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Trouble Behind the Great Wall: A Critical Look at Workers' Rights in China.

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ARTICLES

TROUBLE BEHIND THE GREAT WALL? A CRITICAL LOOK AT WORKERS' RIGHTS IN CHINA

SCOTT WALTHER*

China is basically controlled by the capitalists. . . . It seems that the government chooses not to see certain things, so we must keep shouting complaints into their ears non-stop. Only after they hear us will they start seeing. Our parents' generation would keep their heads down and endure. But our generation is different. We need to feel at ease. The most important thing in life for us is to realize our values. No matter if it's life, love, work—we are not going to be humiliated like our parents were.¹

Qing Tong

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* St. Mary's University School of Law, J.D., May 2015; Texas State University, B.A., Political Science, May 2011. I would like to thank my friends and family for their constant love and support. I would also like to thank the editorial board of *The Scholar* for their bravery in editing this article. Finally, I would like to thank all of my friends from China who inspired me to write this article.

1. Kathrin Hille et al., *Young Chinese workers on strike*, FINANCIAL TIMES, (July 16, 2010, 5:19 PM), <http://on.ft.com/1Qw7e83>.

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INTRODUCTION

“In an era of globalization where multinationals draw on labor and capital resources across national borders, labor relations and employment practices are still fundamentally bounded by domestic legal regimes.”² Indeed, the fundamental argument is that globalization has allowed large multinational corporations to shop for low cost labor markets with little intervention by governments.³ These markets are attractive to multinational corporations because their labor standards and laws tend to be poorly regulated and enforced.⁴ Specifically, China's labor class has been abused and exploited by multinational corporations because of the country's failure to adequately enforce its labor laws.⁵

2. Virginia E. Harper Ho, *From Contracts to Compliance? An Early Look at Implementation Under China's New Labor Legislation*, 23 COLUM. J. ASIAN L. 35, 38 (2009).

3. See Aaron J. Lodge, *Globalization: A Panacea for the World, Or Conquistador of International Law and Statehood?*, 7 OR. REV. INT'L. L. 224, 264 (2005) (discussing nebulous legal jurisdiction of free trade zones where factories and production plants known as *maquiladoras* operate with few laws or regulations).

4. See Ho, *supra* note 2, at 38 (stating the argument that labor, environmental, and social regulations are sacrificed in the intense competition for investment and jobs).

5. See *id.* (discussing the argument that “inadequate or poorly enforced labor standards in developing countries are to blame for spurring a ‘race to the bottom,’ as intense competition for investment and jobs pushes labor, environmental, and social regulation toward the lowest common denominator”).

Recently, in response to widespread discontent with previous labor laws that favored big businesses, China passed the Labor Contract Law (LCL) in 2008.⁶ The law purports to grant employees additional rights that had been lacking, including compelling employers to complete and enforce contracts with their employees.⁷ Furthermore, the law is widely recognized by the government and multinational corporations affected by the law, as an effective means to protect Chinese workers.⁸ The current enforcement mechanism in place, however, is ineffective and does not adequately represent workers' interests.⁹

The All-China Federation of Trade Unions (ACFTU)—the only trade union legally recognized by the country—does not effectively protect the class of workers the union is mandated to protect.¹⁰ Further, its mission embodies an inherent contradiction:¹¹ The union's mandate is supposed to represent workers' rights while also protecting state interests.¹² As an organ of the government, it is seemingly impossible for the union to represent both parties in an effective manner.¹³ In addition, the enforcement of the LCL is delegated to local branches of the ACFTU.¹⁴ These

6. Li Jian & Chen Peiyong, 中华人民共和国劳动合同法实施条例 [Brief Introduction of Regulations on Enforcement of Labor Contract Law], 6 CHINA L. 72, 72 (2008).

7. 中华人民共和国劳动合同法 (2012 修正) [Labor Contract Law of the People's Republic of China (2012 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 2012, effective Dec. 28, 2012) art. 1 <http://en.pkulaw.cn.skell.idm.oclc.org/display.aspx?id=13222&lib=law&SearchKeyword=Labor%20Contract%20Law%20of%20the%20People%27s%20Republic%20of%20China&SearchCKeyword=> (“The [l]aw is formulated for the purposes of improving the labor contractual system, clarifying the rights and obligations of both parties of labor contracts.”).

8. See Jian & Peiyong, *supra* note 6, at 72 (implying employers have become more aware of the ramifications of lawful employment and the signing of labor contracts).

9. See generally CHINA LABOUR BULLETIN, PROTECTING WORKERS' RIGHTS OR SERVING THE PARTY: THE WAY FORWARD FOR CHINA'S TRADE UNIONS (2009), http://www.clb.org.hk/en/files/share/File/research_reports/acftu_report.pdf (suggesting that, as a government arm in the Communist system, the ACFTU will favor State interests when balancing workers' rights and state interests).

10. See *id.* at 3 (proposing that delegating enforcement duties to local, provincial trade unions leaves the labor enforcement system open to varying interpretations of how enforcement must occur).

11. See *id.* (reporting on the “complex identity of the ACFTU and show[ing] how it has become increasingly politicized, passive and subservient to the Party and government”).

12. See *id.* (stating the ACFTU purports to both defend workers' right and serve the CCP).

13. *Id.* Because it is an arm of the Communist government, it instinctively puts state interests above those of the Chinese workers. *Id.*

14. *Id.*

local branches, which are often operated by local business enterprises, are also ineffective at enforcing workers' rights.¹⁵

Studies and investigations have been conducted by labor watchdog organizations, such as China Labor Watch and China Labour Bulletin. It is evident that even under the newly formed LCL, multinational corporate influence still plays a significant role in the widespread violations of Chinese workers' rights.¹⁶

Part II of this article provides relevant background information of the development of China and the process/effect of globalization. Part III introduces and discusses the development of Chinese labor law. Part IV analyzes China's labor system and the violations of labor laws that exist within its borders. Part V analyzes the effectiveness of the labor enforcement mechanism in place in the ACFTU. Part VI outlines solutions that should be implemented in order to effectively secure workers' rights in China. Part VII and VIII analyze the ACFTU while examining the effect of globalization on labor workers' rights.

I. BACKGROUND

China's economic development has helped to propel the nation to share the global stage with other world superpowers.¹⁷ Chinese labor and economic law, as it is known today, began to develop around the time the People's Republic of China (PRC) was established.¹⁸ The PRC, the country's current political regime, was founded in 1949 by the Chinese Communist Party (CCP).¹⁹ Led by Mao Tsedong, the CCP was a political faction that implemented several economic, social, and political campaigns that yielded disastrous results.²⁰ These campaigns included the Great Leap Forward (1958–1959), the Hundred Flowers Campaign (1957), and the Great Proletariat Cultural Revolution (1966–1976).²¹ The Great Leap Forward was a failed economic experiment because it

15. *See id.* at 23 (stating political duties have undermined the union's goals of defending workers' rights at the enterprise level).

16. *Id.* The influences are made possible through globalization and through the ineffectiveness of the ACFTU. *Id.*

17. *See generally Country Profile: China*, LIBR. OF CONG.–FED. RES. DIV. (Aug. 2006), <http://www.loc.gov/rr/frd/cs/profiles/China.pdf> (narrating China's development from a new nation in 1949 to a world power, economically and politically, because of the developments the government underwent).

18. *See id.* at 5 (implying contemporary Chinese law began in 1949 with the rise of the CCP).

19. *See id.* (describing the turmoil existing in the region at the time that lead to establishment of the new government).

20. *See id.* (inferring the early CCP was extreme in their attempts at imposing reform and change).

21. *Id.*

focused on communal farming and reduced economic flexibility.²² Similarly, the Hundred Flowers Campaign actively repressed intellectual activities within China because intellectuals posed a threat to the Chinese government.²³ The Great Proletariat Cultural Revolution was a movement that actively sought to remove alternative political groups to the one-party Communist government.²⁴ These experimental movements severely hampered China's economic, social, and political progress, the consequences of which would be felt for many years to follow.²⁵

A. *Post-Détente*

Following the death of Mao in 1976, China began to undergo a period of economic reform that allowed for greater interaction with the outside world under the new successor Deng Xiaoping.²⁶ Economic reforms were necessary due to the setback from the failed experiments of the Mao regime.²⁷ President Richard Nixon's visit to the country in 1973 was regarded as one of the first important steps towards reform and improving relations with the outside world.²⁸ This began to thaw the icy relations between the communist PRC and the capitalist United States.²⁹ Nixon's visit marked the beginning of the period of détente—or lessening of tensions—this, along with the significant reforms conducted by the Chinese government, paved the way for China to enter the world economy and feel the effects of more open-market-based economies.³⁰

22. See generally John Gittings, *Understanding Revolutionary China*, 133 CHINA Q. 152, 153–55 (1993) (examining the activities of the Great Leap Forward and its detrimental consequences of the implementation of its extreme agricultural practices).

23. See generally Erin E. Douglas, *The Struggle for Human Rights Versus Stability: The Chinese Communist Party and Western Values Clash*, 29 DENV. J. INT'L L. & POL'Y 151, 162 (2001) (examining Mao's Hundred Flowers Campaign, which focused on removing political dissidents and intellectuals that could pose a threat to the Communist regime).

24. See generally Gittings, *supra* note 22, at 155 (concluding the Cultural Revolution, which acted to suppress alternative political ideals, was not beneficial and ultimately led to China becoming a single-party state).

25. See generally *Country Profile: China*, *supra* note 17, at 6 (generalizing China did not begin to implement beneficial reforms until approximately twenty years after the failed Maoist experiments).

26. See *id.* at 5 (referring to Deng Xiaoping's rise to power and his initiatives to end "a generation of extreme animosity toward Washington").

27. See generally *id.* at 5–6 (stating the dramatic reforms that took place in China beginning in 1978 that "eventually made China one of the largest world economies and trading partners" were a result of the government realizing that the actions of the past were mistakes).

28. *Id.* at 35.

29. *Id.*

30. See generally *id.* at 6 (theorizing that through détente, the relationship between China and the United States became a lucrative one for both countries and the economic

Despite the significant improvement during this time period, several issues still remained.³¹ The PRC continued to be very autocratic by actively suppressing any perceived threat to the economic, political, or social welfare of China.³² These “threats” typically came in the form of illegal labor strikes.³³ Authorities would respond to these strikes with “heavy-handedness [by] rounding up activists and crushing independent labour groups” and their movements.³⁴ Historically, a major criticism of the Chinese government’s response to perceived instability is “its failure to protect and enforce constitutionally guaranteed individual [citizens’] rights *against* the state.”³⁵ Unlike the judicial system in the United States, the National People’s Congress (NPC), and not the Chinese judiciary,³⁶ is the ultimate authoritative power responsible for creating and enforcing constitutional rights.³⁷

The government of the PRC endured many growing pains from 1949 to 1982, adopting five different constitutions over only a thirty year period.³⁸ The inconsistencies created an unsound governmental infrastructure that gave rise to political corruption within the CCP’s high ranks.³⁹ Additionally, throughout the PRC’s existence, there have been substantial

ambitions of China). The Four Modernizations (agriculture, industry, science, and national defense) became the preeminent agenda within the party, state, and society. *Id.* The well-being of China’s people increased substantially, especially along the coastal areas and in urban areas involved in manufacturing for the world market. *Id.*

31. *See generally id.* (stating for all of China’s improvements during this time, many people believed that certain areas of China’s society, particularly politics, were lagging behind). Yet, politics, the so-called “fifth modernization,” occurred at too slow a pace for the emerging generation. *Id.*

32. *See id.* (stating the Communist regime has, since its inception, suppressed perceived threats to the State, regardless of form). “The democracy movement, however, was violently suppressed by the military in the 1989 Tiananmen incident.” *Id.* “Citizens cannot express opposition to the CCP—led political system and do not have the right to change their national leaders or form of government.” *Id.* at 41. “In 2003 . . . journalists, authors, academics, and researchers were reportedly harassed, detained, and arrested by the authorities.” *Id.* at 42.

33. *See generally Labour unrest: Out brothers, out!*, THE ECONOMIST (Jan. 31, 2015), <http://www.economist.com/news/china/21641275-guangdong-province-pioneers-new-approach-keeping-workers-happy-out-brothers-out> (implying that because independent trade unions are banned, many of the disruptions within contemporary Chinese society are led by “workers, taxi drivers, and teachers” trying to enforce their rights).

34. *Id.*

35. Ernest Caldwell, *Horizontal Rights and Chinese Constitutionalism: Judicialization Through Labor Disputes*, 88 CHI.-KENT L. REV. 63, 73 (2012).

36. *Id.* at 65.

37. *Id.* at 65–66.

38. *Id.* at 64.

39. *See generally id.* at 64–65 (illustrating the numerous constitutional changes China has faced since the establishment of the PRC to accommodate shifts in political power and the socio-economic environment, and Western criticism for “absence of individual rights”).

problems with Chinese labor laws.⁴⁰ For example, the only legal labor union through which Chinese workers may organize is the wholly state-controlled ACFTU.⁴¹ Conflicting interests such as this, coupled with the complete authority the NPC has over legislative interpretation, leaves Chinese labor workers with limited means to seek redress against their government.⁴²

B. *Post-Accession to the World Trade Organization and Contemporary China*

On December 11, 2001, China became the 143rd member of the World Trade Organization (WTO).⁴³ Accession to the WTO led to extensive legislation in China, making it more market-oriented, as opposed to the traditional control-based economy in other Communist nations.⁴⁴ This legislation increased China's exposure to foreign direct investment by corporations and national governments.⁴⁵ As a result, this has led to many labor issues within China.⁴⁶ These issues range from excessive

40. See generally Edward Wong, *Global Crisis Adds to Surge of Labor Disputes in Chinese Courts*, N.Y. TIMES, Sept. 16, 2010, http://www.nytimes.com/2010/09/16/world/asia/16china.html?_r=1& (implying the significant increase in labor disputes brought to court are due to improvements sought by the Chinese government, but involve issues that have always existed and still exist in China).

41. See *id.* (asserting Chinese workers have to rely on government-run labor unions to protect their individual rights).

42. See Caldwell, *supra* note 35, at 65–66 (“The constitution does not stipulate the method of enforcement nor what, specifically, *enforcement* actually entails.”). Issues related to constitutional supervision are typically marginalized. *Id.* at 66; see also Christopher Duncan, *Out of Conformity: China's Capacity to Implement World Trade Organization Dispute Settlement Body Decisions After Accession*, 18 AM. U. INT'L L. REV. 399, 404 (2002) (voicing “within the [Communist] framework, civil rights and liberties are of little concern,” and that the government of China places public order above the individual rights of the people).

43. Duncan, *supra* note 42, at 403–04.

44. See *id.* at 405–07 (suggesting in order to accede to the WTO, China had to radically adopt a large amount of legislation in order to appeal to the more market-oriented countries, including the United States).

45. See generally *id.* at 402–05 (indicating the more market-oriented legislation allowed foreign companies to profitably invest in China).

46. See CHINA LABOR WATCH, 2013 ANNUAL REPORT (2014), <http://chinalaborwatch.org/2013%20Annual%20Report%20FINAL.pdf> (highlighting the labor issues that surrounded the Foxconn facility where child labor was being utilized); see also Jianyong Yue, *What does globalization mean for China's Economic Development?*, GLOBAL POL'Y J. (May 24, 2012), <http://www.globalpolicyjournal.com/blog/24/05/2012/what-does-globalization-mean-china%E2%80%99s-economic-development> (“implicating labor issues have “impeded China's industrialization by locking in Chinese enterprises at the low-end of the global value chain, preventing them from upgrading along the technological ladder”). See generally CHINA LABOR WATCH, 2012 ANNUAL REPORT (2013), <http://chinalaborwatch.org/Images/2012.pdf> (concluding China has many labor issues, espe-

overtime and unsafe working conditions, to child labor, and insubstantial pay.⁴⁷ Since the government benefits from this influx of foreign money,⁴⁸ the PRC is driven by monetary interests in protecting foreign businesses rather than strictly enforcing its own labor laws.⁴⁹

II. GLOBALIZATION

Globalization is a complex process that affects nations and governments across the world.⁵⁰ It allows the world's population to interact and become more integrated on political, economic, and social levels.⁵¹ In particular, for the purposes of this piece, globalization makes national economies more susceptible to international influence.⁵²

A. *Globalization Defined*

Globalization is defined as the rise of interconnectivity in the world through increased movement of trade, labor, culture, and technology.⁵³ Essentially, it is the union of the “processes by which the peoples of the world are incorporated into a single world society, global society.”⁵⁴ Globalization allows corporations to “free[ly] move goods and money anywhere in the world that affords an opportunity for profit, without gov-

cially pertaining to loss of bonuses and lack of clarity when factories need to relocate due to globalization).

47. See also 2013 ANNUAL REPORT, *supra* note 46 (underlining the labor strikes at Foxconn and other facilities). See generally 2012 ANNUAL REPORT, *supra* note 46 (outlining the Chinese labor issues pertaining to insufficient bonuses, unsafe working conditions, child labor, etc.).

48. See *Country Profile: China*, *supra* note 17, at 22 (specifying the amount in USD China receives in foreign aid and foreign investment); see also Caldwell, *supra* note 35, at 65–66 (explaining how the government has the power to ultimately determine the constitutionality of governmental action); *Country Profile: China*, *supra* note 17, at 20 (asserting other trade unions have failed to establish a separate trade union from the ACFTU, resulting in the government having ultimate control of the only labor union in China).

49. See generally Yue, *supra* note 46 (inferring because China's enterprises are at the “low-end of global value,” the Chinese government would turn to more valuable business interests). The government has a significant interest in all companies/factories/manufacturing plants in China. *Id.*

50. Lodge, *supra* note 3, at 224.

51. *Id.* at 229–30; see also JAN A. SCHOLTE, GLOBALIZATION: A CRITICAL INTRODUCTION 49 (2d ed. 2005) (claiming globalization creates an interdependence between countries and communities).

52. See generally Lodge, *supra* note 3, at 226–27 (inferring globalization is a global process which intertwines national economies and societies with other international interests); SCHOLTE, *supra* note 51, at 54–55 (discussing four concepts of globalization—internationalization, liberalization, universalization, and westernization—that do not recognize the “novelty and transformative potential of globalization” in modern times).

53. Lodge, *supra* note 3, at 229.

54. *Id.*

ernment interference.”⁵⁵ Countries differ in terms of culture, resources, economies, and ideals, as such, there is a natural gravitation towards the benefits of globalization (as defined).⁵⁶ This process has been an important reason why our world is so interconnected today.⁵⁷ Many countries benefit from the free flow of information between governments, however, benefits are often accompanied by consequences.⁵⁸ These consequences are distinctively seen in many countries around the world, including China.⁵⁹

B. *History/Development of Globalization*

Globalization has existed in many forms throughout history.⁶⁰ Early examples of globalization occurred in the empires of Rome and Britain.⁶¹ Globalization also opened the door to international trade between Europe and China.⁶² The modernized version of globalization takes the form of multinational corporations, mass media, and capitalistic enterprises.⁶³ According to Jan Scholte, Professor of Politics and International Studies at University of Warwick, UK, a significant portion of growth in

55. See *id.* at 229 (quoting David C. Korten, *When Corporations Rule the World* 4 (2d ed. 2001) (concluding when the world economy becomes integrated, it gives multinational corporations a freer market to maximize profitability).

56. See generally *id.* at 237–38 (implying countries, with their diverse strengths and weaknesses, would seek to compensate their weaknesses through interaction with other nations).

57. See generally *id.* at 229 (inferring when “products, services, currency, ideologies, religions, and culture [move] between countries,” it inherently aids in the interconnectivity of the world).

58. See *id.* at 242–45 (emphasizing the different advantages (spurs competition, increases living standards, offers greater access to technology) and disadvantages of globalization, including overspecialization, ostracizing nations that do not engage in globalization as fully, and unreasonably influencing national markets).

59. See generally Yue, *supra* note 46 (asserting the Chinese economy has endured as its enterprises being rendered obsolete when China had no choice but to integrate into the world economy through globalization).

60. Lodge, *supra* note 3, at 232 (“Historically, globalization occurred through international trade, territorial imperialism, and colonization.”).

61. See *id.* (demonstrating even before the term “globalization” was invented, Rome and Britain were already practicing trade of products, religion, and culture past their respective borders).

62. See generally *id.* at 231 (stating, in ancient times, globalization arose from trade ships carrying specialized products of a region to other nations). Globalization, through international trade, brought Chinese silk to Europe and European gold and culture to China. *Id.*

63. See *id.* at 232–33 (explaining the four historical developments—colonization, industrial revolution, technology, and capitalism—led to the creation of modern globalization, with capitalism being most influential). See generally SCHOLTE, *supra* note 51, at 136 (affirming capitalism has played a significant role in globalization as we perceive it today).

international and social connections transcending national borders is the result of improved economic conditions derived from globalization.⁶⁴

These economic conditions stem from capitalist development and international mobility of capital and labor.⁶⁵ In China, there was a growing trend to convert the Chinese economy into a “socialist market economy.”⁶⁶ Because the government began to expose employers to capitalistic tendencies and market forces, employers could no longer count on the subsidies that came hand in hand with the previous socialist “planned economy.”⁶⁷ Without the subsidies, employers cut labor costs to maximize their profits.⁶⁸ When the capitalist method of maximizing wealth accumulation is combined with liberalized employers in dire need of foreign investment, it becomes a recipe for exploitation and abuse.⁶⁹ As stated by Qing Tong, a shop-floor activist turned bestselling author, “China is basically controlled by the capitalists. . . . It seems that the government chooses not to see certain things.”⁷⁰

C. *Benefits of Globalization in China*

Modern globalization has taken on the spirit of liberalization:⁷¹ First, it gives lesser developed nations access to larger markets and foreign direct investment,⁷² second, it allows countries to have easier access to advanced technology and capital,⁷³ and finally, it provides greater possibili-

64. SCHOLTE, *supra* note 51, at 136–37.

65. *See id.* at 136–37 (emphasizing the capitalist method of production, in terms of using surpluses to further production, has effectively fueled globalization).

66. Ronald C. Brown, *China's Employment Discrimination Laws During Economic Transition*, 19 COLUM. J. ASIAN L. 361, 363 (2006).

67. *Id.*

68. *Id.*

69. *See* Sean Cooney, *Making Chinese Labor Law Work: The Prospects for Regulatory Innovation in the People's Republic of China*, 30 FORDHAM INT'L L.J. 1050, 1050 (2006) (“China’s extraordinary economic success is marred by widespread labor abuses, epitomized by the manufacturing sweatshop[s] staffed by ill-treated workers migrating from China’s hinterland.”). *See generally* Lodge, *supra* note 3, at 248–49 (emphasizing in order to profit from globalization, an industry often disregards labor laws which may result in “extreme physical dangers to workers and the use of children as expendable cheap labor.”); Yue, *supra* note 46 (implying because many Chinese enterprises are behind the curve technologically, foreign enterprises can be viewed as a means of improving China’s economy).

70. Kathrin Hille, et al., *Striking Out; Reportage*, FINANCIAL TIMES, July 17, 2010, at 22.

71. Lodge, *supra* note 3, at 235.

72. *See generally id.* at 235–36 (giving an example of how Portugal has seen greater participation from private entities though the liberalization of its economy).

73. *Id.* at 236.

ties for people to ascertain information through the internet.⁷⁴ This gain can be offset, however, when a country censors substantial information from its citizens.⁷⁵ Globalization also allows different regions to specialize in certain areas of the world economy—a concept known as “comparative advantage.”⁷⁶ China is inhabited by 1.3 billion people,⁷⁷ encompassing “about one quarter of the world’s workers and about 1.5 times the combined workforce of all developed states.”⁷⁸ Because China has such a large labor force, it is no surprise that approximately one-third of its economy is dedicated to manufacturing cheap goods and exporting them to countries across the world.⁷⁹

D. *Deficiencies of Globalization in China*

Globalization creates a benefit by creating comparative advantage, however, this is also a deficiency of the system because it can lead to overspecialization.⁸⁰ This problem is particularly prevalent in China.⁸¹ While globalization has enabled China to become a manufacturing superpower, it has also made China overly reliant on its manufacturing expertise to sustain its economic growth.⁸² This is due, in part, to multinational corporations’ ability to appeal to corrupt politicians within the Chinese government.⁸³ The CCP, often described as “omnipresent,”⁸⁴ has a universal presence, especially when it comes to economic growth and imple-

74. *See id.* (stressing how globalization has advanced technology and how the modern idea of sharing information on the internet has improved the life of many around the world).

75. *See generally* Madison Park, *China’s Internet firewall censors Hong Kong protest news*, CNN (Sept. 30, 2014), <http://www.cnn.com/2014/09/29/world/asia/china-censorship-hong-kong/> (affirming China, during the democratic movement in Hong Kong, censored several social media sites in order to insulate its general populace).

76. Lodge, *supra* note 3, at 237.

77. *The World Factbook: China*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html> (last updated Sept. 4, 2015).

78. SUSAN A. AARONSON, *How China’s Employment Problems Became Trade Problems: China, Labour Law and the Rule of Law* (Inst. for Int’l Econ. Pol’y, George Washington U., Working Paper No. 3, 2010).

79. *See generally The World Factbook: China*, *supra* note 77 (stating 30.3% of the labor force is classified under an industry occupation which includes manufacturing and distribution; implying it is inevitable for a country with such a large labor force to base its economy on utilizing its most valuable asset: its people).

80. *See* Lodge, *supra* note 3, at 243 (stressing overspecialization may cause an economy to become dependent on trade as the only means of survival).

81. *See generally id.* (applying the concept of overspecialization to China’s singular reliance on its labor force to manufacture goods cheaply for export).

82. *See id.* at 243–44 (asserting once a country has become successful at something, it can be nearly impossible to retreat from it or diversify its economy).

83. *See generally* K.R. Sudhaman, *Impact of Globalization and its impact on China*, MEDIA MIMANSA, Jan.–Mar. 2009, at 83–84, <http://www.mediamimansa.com/7th%20issue/>

mentation of labor policies.⁸⁵ In fact, wherever there are companies or joint ventures, there is a standing mandate to establish a “branch” of the Party so that the government may be involved.⁸⁶ This indicates that even with the establishment of foreign influences on the country, through its “omnipresence,” the Chinese government is always involved to some degree.⁸⁷ Modern globalization is fueled by maximizing the bottom dollar.⁸⁸ Labor laws often times inhibit maximization, and as a result, corporations actively seek to either avoid or incentivize local governments from enforcing these laws.⁸⁹

III. CHINA’S LABOR LAW

A. 1994 Chinese Labor Law

In the wake of Chairman Mao’s failed economic policies, China was left without an effective structure to govern their evolving labor population.⁹⁰ Evidenced by economic and social factors, as well as an overall sense of dissatisfaction with existing law, it became clear that the government needed to adopt the reforms proposed by the 1994 Labor Law.⁹¹ As a result of the increased influence of globalization, “[i]n 1994, China passed its first labor law regulating employer and employee relation-

7eng_83-85.pdf (illustrating how multinational corporations have had an influence on China’s corruption).

84. Xiao Li, *Legal and Economic Development with Sui Generis Chinese Characteristics: A Systems Theorist’s Perspective*, 39 BROOK. J. INT’L L. 159, 185–87 (2014).

85. *See generally id.* at 185–89 (“The CCP represents (1) society’s most advanced productive forces; (2) advanced culture; and (3) the needs and interests of the greatest majority of the Chinese population.”).

86. *Id.* at 187–88.

87. *See generally id.* at 185–89 (implying the CCP’s “omnipresence” derives from its involvement in social and economic affairs occurring in China).

88. Lodge, *supra* note 3, at 248–49.

89. *See id.* (suggesting corporations must break the law to make a profit because “carefully follow[ing] local laws or customs” is not always profitable).

90. *See Country Profile: China*, *supra* note 17, at 5.

91. *See* TU LAN & JOHN PICKLES, *China’s New Labour Contract Law: State Regulation and Worker Rights in Global Production Networks* (Capturing the Gains, U.N., Working Paper No. 5, 2011), <http://www.capturingthegains.org/pdf/ctg-wp-2011-5.pdf> (detailing the reasons why the Chinese government needed to adopt new reforms to remain economically and socially viable: the central government needed to make reforms to deal with large deficits derived from the previous labor system and the increased number of workers in the private sector that were not legally protected).

ships.”⁹² The law was a significant departure from China’s traditional Communist policies.⁹³

The 1994 Labor Law granted significant rights to employees that had not existed under previous regimes in the PRC.⁹⁴ The law set general policies that sought to streamline existing policies.⁹⁵ Any modification to these policies by employers, such as the extension of working hours, had to first be approved by the labor union.⁹⁶ The law included employee rights to rest, take vacations, and to “work in an environment that is safe and does not endanger their health”—all newly founded rights that had not previously existed in the workforce.⁹⁷ Further, another important feature of the 1994 Labor Law was that an individual employment contract could not “contain clauses that [were] less protective than the ones contained in a collective contract.”⁹⁸

Even though the 1994 Labor Law established many new rights that purported to aid Chinese laborers, this law was met with greater and greater dissatisfaction and scrutiny:

Increasing dissatisfaction with the old law centered [sic] on three aspects of the law. First, the law focused solely on the termination of the labor contract without paying enough attention to when and how a contract comes into being. In many cases, employers would simply refuse to sign a contract, which effectively invalidated obligations required in the law. Second, the law was widely regarded as vague and overly simplified, and many potential abuses were not covered by the law. Third, the old law had nothing to say about informal employment and precarious work, which officially did not exist in the early 1990s. During the years between the old Labour Law and the new Labour Contract Law, thousands of administrative regulations had to be promulgated by local governments to deal with these omis-

92. Sharon Hang, Comment, *Investing in Human Rights: Using Bilateral Treaties to Hold Multinational Corporations Liable for Labor Rights Violations*, 37 *FORDHAM INT’L L.J.* 1215, 1224 (2014).

93. See LAN & PICKLES, *supra* note 91 (noting this law was the first time laborers in China could enter into contracts with their employers). “Before the reforms, there were no labour contracts because all workers were supposedly the ‘masters of the nation’ with permanent positions . . . in state-owned enterprises.” *Id.*

94. Hang, *supra* note 92, at 1224–25 (discussing the additional rights provided by the 1994 Labor Law).

95. See *id.* at 1224–25 (outlining several general policies that were incorporated into the 1994 Labor Law, including guaranteed minimum wages to be set locally, a limited working day of eight hours per day and forty-four hours per week, and requiring private employment contracts to specify the duration of the employment).

96. *Id.* at 1225.

97. *Id.*

98. *Id.* at 1226.

sions. Although some of these regulations were progressive and effective, many of them contradicted each other and caused further problems for labour control.⁹⁹

This dissatisfaction, stemming from the widespread lack of implementing changes in the labor conditions of Chinese workplaces, eventually led to the Chinese government passing the 2008 LCL.¹⁰⁰

B. 2008 Labor Contract Law

In the early 2000s, the Chinese government began to formulate new reforms for the labor system in place because it determined that the 1994 Labor Law was inadequate to protect the workers of China.¹⁰¹ In response to the protests, dissatisfaction, and reports of child labor,¹⁰² the Standing Committee of the NPC convened on June 29, 2007 to reform the law.¹⁰³ The meeting ultimately resulted in the enactment of the 2008 LCL—a law that has continued to increase the number of long-term labor contracts (ideally equating to more stability for workers).¹⁰⁴ The 2008 law echoes some of the 1994 Labor Law concepts, but further details the negotiating power rights of the employee.¹⁰⁵

99. LAN & PICKLES, *supra* note 91.

100. See Hang, *supra* note 92, at 1227–28 (discussing the legislative changes to China's Employment Law in 2008: Labor Dispute Mediation and Arbitration Law, Employment Promotion Law, and Labor Contract Law).

101. See Monique Garcia, *China's Labor Law Evolution: Towards a New Frontier*, 16 ILSA J. INT'L & COMP. L. 235, 237 (2009) (listing reasons why the 1994 Labor Law was ineffective at reducing employee exploitation). The laws and rules under the 1994 system were implemented by each local government, which led to confusion and inadequate execution. *Id.* The 1994 law was seen as voluntary by the very groups it was supposed to be enforced against. *Id.*; see also LAN & PICKLES, *supra* note 91 (explaining the reasons behind the dissatisfaction with the old law and support for reforming it). The 1994 law failed to address all aspects of contract formation (focusing solely on termination), was overly vague and open to exploitative interpretation, and did not address all forms of employment. *Id.*

102. See Garcia, *supra* note 101, at 238 (discussing labor protests which led to the passage of the 2008 LCL. One incident in particular caused the Standing Committee to quickly and resolutely pass the 2008 LCL: "In the Shanxi and Henan provinces, police freed nearly 600 workers held as slave laborers, many of them being children." *Id.*

103. Jian & Peiyong, *supra* note 6, at 72.

104. See *id.* (describing the growing trend, beginning in 2008, of increasing labor contracts for a duration for more than one year).

105. See Hang, *supra* note 92, at 1232 (highlighting the 2008 LCL took general concepts from the 1994 Labor Law, but made implementation of the law more specific and clear). The LCL defined certain terms ("fixed-term" and "open-ended") and enforced more specific restrictions on employers, including the requirement that employment contracts "contain terms pertaining to work hours, rest breaks, vacation hours, wages, and occupational health and safety standards." *Id.*

The LCL has made strong advances in several highly contentious areas from the original 1994 Labor laws.¹⁰⁶ Specifically, the law requires labor enforcement provisions to be handled by the labor administrative department of the State Council.¹⁰⁷ Additionally, another important section of the new law requires employers to stipulate a probation period with a sliding scale depending on the length of the contract.¹⁰⁸ This is intended to favor employees because it reduces the period of time during which conflicts over the labor contract arise (which favored the employer).¹⁰⁹ By adding specific provisions preventing employers from paying less than minimum wage or firing employees without cause, the Standing Committee sought to prevent employers within China from exploiting “upwardly mobile and aspiring young, skilled workers.”¹¹⁰

Stated as being an attempt to “institute and further a harmonious relationship between employers and employee,” President Hu Jintao likened the 2008 law to the “Long March” of Mao Tse-dong during the civil war.¹¹¹ This law was touted as a success against both internal and external opposition, however, it also effectively weakened China’s position with Foreign Investment Enterprises (FIEs).¹¹²

IV. ANALYSIS OF CHINESE LABOR LAW

A. *The Effectiveness of the 2008 Labor Contract Law*

The LCL is heralded as a “clear retreat from the broad deference given to employers under the 1994 Labor Law.”¹¹³ It prescribes minimum conditions for workers: a forty-four hour work week, overtime pay, acknowl-

106. See generally LAN & PICKLES, *supra* note 91 (concluding the LCL, generally, was a trend away from employer-centric section under the 1994 Labor Law).

107. 中华人民共和国劳动合同法 [Labor Contract Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., June 29, 2007, effective July 1, 2013) art. 73, <http://en.pkulaw.cn/display.aspx?id=6133&lib=law&SearchKeyword=labor%20Contract%20Law%20of%20the%20People%27s%20Republic%20of%20China&SearchCKeyword=>.

108. *Id.* at art. 19. “If the term of a labor contract is not less than 3 months but less than 1 year, the probation period shall not exceed one month.” *Id.* If the term is between 1 and 3 years, the “probation period shall not exceed two months.” *Id.* If the labor contract is greater than 3 years, the probation period shall not exceed 6 months. *Id.*

109. See LAN & PICKLES, *supra* note 91 (explaining under the vague provisions of the 1994 Labor Law, employers could exploit employees during the probation period without sufficient protections in place for those employees).

110. See *id.* (stating reforms in higher education in the 1990s led to more young skilled workers getting jobs and subsequently being exploited).

111. Garcia, *supra* note 101, at 238.

112. See generally *id.* at 239–40 (discussing the LCL was a success at advancing employee rights, but adversely affected the profitability and viability of foreign interests).

113. Ho, *supra* note 2, at 69.

edgement of leave and holidays, and the requirement for employers to regularly and fully pay the minimum wage set by local authorities.¹¹⁴ The terms in the LCL focus less on “mobility within the workforce” and more on job security based on clearer contracts between employers and employees.¹¹⁵

The LCL specifically addresses contract terms between employers and employees, and¹¹⁶ also enables employees to collectively bargain for these contracts.¹¹⁷ The law is enforced at the local level by the Communist governments within each province.¹¹⁸ As such, local governments are required to solicit opinions from labor unions regarding the state of the labor contract system,¹¹⁹ however, there is only one *legally* recognized labor union in China, the ACFTU.¹²⁰

The language in Article 10 of the LCL explicitly states that a written labor contract shall be established between the employer and employee at the outset of the relationship or within one month of work commencing.¹²¹ The language also stipulates that employers are granted a one month probationary period at the beginning of the relationship when employers can refrain from entering into written contracts with their employees.¹²² Contracts under the law are classified as either fix-term contracts, non-fixed term contracts, or contracts set up for the duration of specific tasks.¹²³ In the event that compensation or any other provisions are omitted, the employer and employee will defer to the relevant provisions in the collective contract with the company.¹²⁴ If there is no collec-

114. Louise W. Floyd, *When Old Meets New: Some Perspectives on Recent Chinese Legal Developments and Their Relevance to the United States (The Importance of Labor Law)*, 64 SMU L. REV. 1209, 1215 (2011).

115. Ho, *supra* note 2, at 69.

116. *See generally* 中华人民共和国劳动合同法 [Labor Contract Law of the People's Republic of China] art. 1–2.

117. *See id.* at art. 4 (describing the general provisions of the employer/employee contracts).

118. *See id.* at art. 30, 54, 55, 73, 74 (describing the responsibilities of local and county level labor departments to supervise and inspect the implementation of labor contracts).

119. *Id.* at art. 41, 43, 73, 78.

120. *See* Stanley Lubman, *China's Continuing Labor Problems*, WALL ST. J. (Sept. 27, 2010, 5:42 PM HKT), <http://blogs.wsj.com/chinarealtime/2010/09/27/china%E2%80%99s-continuing-labor-problems/> (describing the sectors and tensions at play in Chinese society).

121. 中华人民共和国劳动合同法 (2012 修正) [Labor Contract Law of the People's Republic of China (2012 Amendment)] at art. 10.

122. Jian & Peiyong, *supra* note 6, at 73.

123. 中华人民共和国劳动合同法 (2012 修正) [Labor Contract Law of the People's Republic of China (2012 Amendment)] art. 12–15.

124. *Id.* at art. 18.

tive contract, then the “principle of equal pay for equal work shall be observed.”¹²⁵

Under the LCL, fixed-term contracts stipulate the duration of the employer-employee relationship.¹²⁶ A non-fixed term contract is the default form that will bind the employee and employer.¹²⁷ Non-fixed term contracts are contracts where employer and employee do not stipulate an end time for the contract, and can occur when: (1) employees have worked for the employer for ten years; (2) when employees have worked for the employer for ten years consecutively prior to the employer’s adoption of the labor contract system; or (3) when a year has lapsed since the employee began to work for the employer.¹²⁸

Under the LCL, the Chinese government specifically designates the labor administrative department of the State Council as the entity responsible for implementing the labor contract system.¹²⁹ Beyond that, it falls to local governments to supervise and inspect the enforcement of the labor contract system within their respective jurisdictions.¹³⁰ In order to accomplish this, Article 73 of the LCL states that these local governments “shall solicit the opinions of the labor unions, enterprise representatives, and relevant industrial administrative departments.”¹³¹ Since the only labor union legally recognized in China is the ACFTU, which is a legal arm of the central government of China,¹³² the only representatives that could potentially proffer the opinions mandated by Article 73 to local governments are either government labor representatives or representatives of the very companies that could potentially be violating workers’ rights.

The LCL imposes harsh penalties against employers who violate employees’ rights. Employers are obligated to pay employees no less than the local minimum wage.¹³³ If an employer fails to conclude written contracts with employees “after the lapse of more than one month but less than one year as of the day when it started using him,” the employer may be liable to the employee for double the monthly wages owed.¹³⁴ If an employer compels employees to work excessive overtime, threatens em-

125. *Id.* at art. 11.

126. *Id.* at art. 13.

127. *Id.* at art. 14.

128. *Id.*

129. *Id.* at art. 73.

130. *Id.*

131. *Id.*

132. Jedidiah J. Kroncke, *Property Rights, Labor Rights and Democratization: Lessons from China and Experimental Authoritarians*, 46 N.Y.U. J. INT’L L. & POL. 115, 162 (2013).

133. 中华人民共和国劳动合同法 (2012 修正) [Labor Contract Law of the People’s Republic of China (2012 Amendment)] art. 72.

134. *Id.* at art. 82.

ployees with violence, commands employees to perform dangerous tasks, implements corporal punishment, or damages the physical or mental health of any employee, the employer may be subject to administrative punishment and or criminal liability.¹³⁵

According to the International Labour Organization, the Chinese workforce consists of a maximum 48 hour work week.¹³⁶ There is extensive proof, however, that many manufacturing companies not only force workers to exceed the maximum, but also fail to pay these workers adequately for additional time.¹³⁷ Unfortunately, the effectiveness of imposing the penalties set forth in the LCL is contingent upon the enforcement of local governments.¹³⁸ The localized approach problem is evidenced by the exploitation of workers at corporate factories such as Foxconn and Pegatron.¹³⁹

135. *Id.* at art. 88.

136. INT'L LAB. ORG., WORKING CONDITIONS LAWS REPORT 2012: A GLOBAL REVIEW, at 5, 12 (2013), http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_235155.pdf.

137. *See generally* CHINA LABOR WATCH, ANALYZING LABOR CONDITIONS OF PEGATRON AND FOXCONN: APPLE'S LOW-COST REALITY, at 14 (2015) [hereinafter APPLE'S LOW-COST REALITY], http://www.chinalaborwatch.org/upfile/2015_02_11/Analyzing%20Labor%20Conditions%20of%20Pegatron%20and%20Foxconn_vF.pdf ("Research of Pegatron's workers' pay stubs reveals average of 60+ working hours per week, 52% of workers completed more than 90 hours of overtime per month, even working as many as 132 hours of overtime."); CHINA LABOR WATCH, APPLE'S UNKEPT PROMISES: CHEAP IPHONES COME AT HIGH COSTS TO CHINESE WORKERS, at 1 (2013) [hereinafter CHEAP IPHONES COME AT HIGH COSTS TO CHINESE WORKERS], http://www.chinalaborwatch.org/upfile/2013_7_29/apple_s_unkept_promises.pdf (concluding workers at Pegatron get paid less than half of the local monthly income of Shanghai, which forces employees to work excessive overtime to make ends meet); CHINA LABOR WATCH, TWO YEARS OF BROKEN PROMISES: INVESTIGATIVE REPORT OF CATCHER TECHNOLOGY CO. LTD (SUQIAN), AN APPLE PARTS MANUFACTURER, at 6, 7, 13 (2014) [hereinafter TWO YEARS OF BROKEN PROMISES], http://www.chinalaborwatch.org/upfile/2014_09_04/2014.09.02_Suqian_Catcher_FINAL_PDF_UPDATE.pdf ("Workers [at Catcher Technology Co., Ltd] are not allowed to choose if they want to work overtime or not."); CHINA LABOUR BULLETIN, SWIMMING AGAINST THE TIDE: A SHORT HISTORY OF LABOUR CONFLICTS IN CHINA AND THE GOVERNMENT'S ATTEMPTS TO CONTROL IT, at 16 (2010) [hereinafter SWIMMING AGAINST THE TIDE], http://www.clb.org.hk/en/files/File/research_reports/Labour%20Conflict%20Report%20final.pdf (recounting results from surveys taken in the 2000s revealing the amount of migrant workers who were without contracts and forced to work overtime without pay).

138. 中华人民共和国劳动合同法 (2012 修正 [Labor Contract Law of the People's Republic of China (2012 Amendment)] art. 74.

139. *See generally* APPLE'S LOW-COST REALITY, *supra* note 137, at 6, 16, 18 (reporting on Apple affiliate's excessive overtime with no compensation); CHEAP IPHONES COME AT HIGH COSTS TO CHINESE WORKERS, *supra* note 137, at 1 (reporting on Pegatron's competitive practices for supplying Apple's new iPhone at the cost of working conditions).

One of the most significant violators of the Chinese LCL is the tech giant, Apple.¹⁴⁰ The largest violations have occurred at the Apple affiliated plants of Foxconn, Pegatron, and Catcher.¹⁴¹ Workers at the Pegatron plant in Shanghai have been documented working extremely long work weeks while averaging monthly earnings below the local average monthly wage of Shanghai.¹⁴² Apple drove labor costs down between Foxconn and Pegatron by shifting orders between the two locations.¹⁴³ Specifically, in an effort to resolve the rising labor costs at Foxconn, Apple contracted with Pegatron,¹⁴⁴ a move that resulted in a competitive race to drive down the cost of labor. Similarly, employees at the Catcher production plant typically work up to 100 hours of overtime a month, which is “nearly three times the limit of 36 hours mandated by Chinese Labor Law.”¹⁴⁵

At a glance, the LCL seems to be an effective means of addressing the shortcomings of the Chinese labor system, but that is simply a facade. Policymakers wanted to increase the benefits of labor workers, but realized that in order to do so, labor costs and unemployment would likely increase.¹⁴⁶ Also, despite the rise in collective contract agreements, there is clear evidence that many employees still slip through the cracks.¹⁴⁷ When collective contracts are negotiated, employees are nearly always excluded from the negotiating process.¹⁴⁸ As such, these contracts rarely reflect the true interests of the employee.¹⁴⁹

140. See APPLE'S LOW-COST REALITY, *supra* note 137, at 1, 2 (discussing Apple's labor practices in China).

141. See *generally id.* at 1, 17 (“Research of Pegatron's workers' pay stubs reveals average of 60+ working hours per week, 52% of workers completed more than 90 hours of overtime per month, even working as many as 132 hours of overtime.”); TWO YEARS OF BROKEN PROMISES, *supra* note 137, at 14 (“Workers [at Catcher Technology Co., Ltd] are not allowed to choose if they want to work overtime or not.”); CHEAP IPHONES COME AT HIGH COSTS TO CHINESE WORKERS, *supra* note 137, at 1 (concluding workers at Pegatron get paid less than half of the local monthly income of Shanghai, which forces employees to work excessive overtime to make ends meet).

142. CHEAP IPHONES COME AT HIGH COSTS TO CHINESE WORKERS, *supra* note 137, at 1.

143. See APPLE'S LOW-COST REALITY, *supra* note 137, at 4 (describing how Apple used Pegatron and Foxconn to reduce labor costs).

144. *Id.*

145. TWO YEARS OF BROKEN PROMISES, *supra* note 137, at 6.

146. AARONSON, *supra* note 78.

147. See SWIMMING AGAINST THE TIDE *supra* note 137, at 11, 21 (reporting on the flaws inherent in China's labor laws versus employer practices).

148. See *id.* at 11 (reporting on the flaws inherent in China's labor laws versus employer practices).

149. See *id.* (reporting on the flaws inherent in China's labor laws versus employer practices).

Labor unions are supposed to safeguard the interests and rights of workers while also protecting the overall interests of the country.¹⁵⁰ When a country's GDP—China's was approximately 17.62 trillion dollars in 2014 (surpassing the United States as the world's largest economy)—is derived heavily from its manufacturing sector, the interests of labor workers tend to become secondary to that of the state.¹⁵¹ As such, labor rights are outweighed by monetary needs, as such, factories in China continue to use abusive practices that violate the existing labor law as well as International Labor Organization (ILO) standards.¹⁵²

V. STATE OF THE CONTEMPORARY LABOR SYSTEM IN CHINA

Since the passage of the 2008 LCL, there is evidence that certain working conditions have improved.¹⁵³ As mentioned, the LCL requires a written contract that must be agreed upon and enforced between the employer and employee,¹⁵⁴ and employers must consult with labor unions and employees before modifying work rules.¹⁵⁵ The increase of bargaining power for employees, however, has led to a rise in labor disputes.¹⁵⁶

A. *Decline of the Chinese Labor Industry*

In 1993, there were between 12,358 and 34,794 labor disputes heard by arbitration committees, but in 2011, there were over 589,244 hearings.¹⁵⁷ A major factor for this drastic increase is due to the down-turn of the Chinese economy.¹⁵⁸ Throughout the early 2000s, China enjoyed double digit GDP growth. In recent years, however, China's growth has dropped

150. Hang, *supra* note 92, at 1237.

151. See generally *The World Factbook: China*, *supra* note 77 (reporting China's "per capita income is below the world average" despite its ranking as the world's largest economy, indicating the interest of a single individual comes after that of the State's).

152. Hang, *supra* note 92, at 1247.

153. 2013 ANNUAL REPORT, *supra* note 46, at 7.

154. 中华人民共和国劳动合同法 [Labor Contract Law of the People's Republic of China] art 10.

155. See LAN & PICKLES, *supra* note 91 (analyzing China's contract law amidst global production demands).

156. 2013 ANNUAL REPORT, *supra* note 46, at 7. These labor disputes are generally brought before the labor dispute arbitration committees and have been extremely prevalent since the passage of the Chinese Labor Contract Law. *Id.*

157. *Id.*

158. See generally CHINA LABOUR BULLETIN, SEARCHING FOR THE UNION: THE WORKERS' MOVEMENT IN CHINA 2011-13, at 8 (2013), http://www.clb.org.hk/en/sites/default/files/File/research_reports/searching%20for%20the%20union%201.pdf (generalizing when the economy began to slow down, manufacturers began to cut labor costs by cutting pay and benefits).

significantly,¹⁵⁹ causing the manufacturing sector to take a large hit.¹⁶⁰ During this time, the demand for cheap exports from China was on the decline,¹⁶¹ while employee wages (up to 50% from 2010–2013)¹⁶² and land cost was steadily increasing.¹⁶³

As a result of the unstable economy, labor intensive industries such as toy, shoe and garment manufacturers fled China to find cheaper resources in countries like Bangladesh and Cambodia.¹⁶⁴ Electronics companies were hit equally as hard when companies like Sony, Sharp, and Panasonic reported losing \$5.6 billion, \$4.7 billion, and \$9.64 billion in 2011, respectively.¹⁶⁵ Some industries rebounded slightly in 2013, but much of that progress was dissolved in the June 2013 credit crunch.¹⁶⁶ In response to the economic hardships, several manufacturers in China turned to an easier way to “offset their reduced profits by cheating workers out of overtime and cutting back” on certain benefits.¹⁶⁷

In contemporary China, factories still abuse Chinese labor laws.¹⁶⁸ These violations include overtime violations, unsafe work environments, and the persistent usage of child labor and intermediaries to avoid compliance.¹⁶⁹ The most prevalent labor issues involve the demand for higher wages and severance compensation.¹⁷⁰

B. *Enforcement of Wages and Compensation*

In the event of termination or relocation of the company, the LCL stipulates that employees must receive one month's salary for every year of service.¹⁷¹ Evidenced by a report published by the labor watchdog group,

159. *Id.* at 7.

160. *Id.*

161. *See id.* (explaining large buyers in Europe, the United States, and Japan slowed spending).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 7–8.

166. *Id.* at 8. The credit crunch was a period of time where many banks nearly ran out of money in China. *Id.*

167. *Id.*

168. Hang, *supra* note 92, at 1248–53.

169. *Id.*

170. *See* SEARCHING FOR THE UNION: THE WORKERS' MOVEMENT IN CHINA 2011-13, *supra* note 158, at 14–15, 30, 33, 38 (discussing protests involving low wages and lack of severance compensation led by sanitation workers, workers on strike at the Ohms Electronics factory, and workers for state-owned enterprises whose complaints were continually ignored).

171. *Id.* at 19.

China Labour Bulletin,¹⁷² many employees demand the “market rate” for severance compensation—a rate that is typically twice the amount of the mandated rate required by the LCL.¹⁷³ On September 17, 2012, around 6,000 employees in Shanghai went on strike against their employer, Flextronics, in protest against the mandated LCL’s offer of severance compensation.¹⁷⁴ The LCL’s severance package became effective because Flextronics was moving its factory from Shanghai to Suzhou, Jiangsu.¹⁷⁵ Employees demanded a similar compensation offer that was given to management (eight months’ salary for every year worked), but negotiations proved to be ineffective.¹⁷⁶ The demands seemed reasonable, largely because their average salary paled in comparison to manufacturing employees in the United States.¹⁷⁷

Since mid-2010, wages for factory workers in China have increased by approximately 50%.¹⁷⁸ Even with this significant increase, however, the wages of these workers still equal approximately one fiftieth of the equivalent wage in the United States.¹⁷⁹ Under China’s current Five Year Plan (2011–2015), the minimum wage (set by each locality) “is set to increase at an average rate of 13% a year and eventually reach 40% of the average wage in each region.”¹⁸⁰ Unfortunately, these optimistic numbers are not realistic because pay increases for the manufacturing sector are falling behind many other higher paying sectors of the Chinese economy.¹⁸¹ In fact, in some electronic factories, the minimum wage is so low that employees have to work extra hours to meet basic monetary needs.¹⁸²

172. *See generally* SEARCHING FOR THE UNION: THE WORKERS’ MOVEMENT IN CHINA 2011-13, *supra* note 158, at 8–9 (reporting instances where workers have demanded more than the mandated amount for compensation).

173. *Id.* at 19.

174. *Id.*

175. *Id.*

176. *Id.*

177. Baogang Guo, *China’s Labor Standards: Myths and Realities*, ACADEMIA, at 5 (Feb. 7, 2003), http://www.academia.edu/165449/China_s_Labor_Standards_Myths_and_Realities.

178. SEARCHING FOR THE UNION: THE WORKERS’ MOVEMENT IN CHINA 2011-13, *supra* note 158, at 20.

179. Guo, *supra* note 177, at 5.

180. SEARCHING FOR THE UNION: THE WORKERS’ MOVEMENT IN CHINA 2011-13, *supra* note 158, at 20.

181. *See id.* (alluding to manufacturing pay gains being inferior to those in the financial and technology sectors).

182. CHINA LABOR WATCH, TRAGEDIES OF GLOBALIZATION: THE TRUTH BEHIND ELECTRONICS SWEATSHOPS, at 5 (2012), http://www.chinalaborwatch.org/upfile/2011_7_11/20110712.pdf.

The Chinese government relies heavily on the effectiveness of the LCL's localized enforcement provision that empowers local bureaucrats to execute the law fairly for all Chinese workers.¹⁸³ Unfortunately, the efficacy of the local governments depends heavily on the relationship that exists "between the workers and the [local] government, the level of disruption caused by the workers' protest[s], and the overall social and economic goals of the local government"¹⁸⁴ Local governments vary in degree regarding the amount of experience in dealing with labor disputes.¹⁸⁵ Traditionally poorer provincial governments, lacking the resources of most of their counterparts, tend to be more "business-friendly" to attract lucrative business to their provinces.¹⁸⁶ This can expose workers in those poor provinces at risk for abuse.

The governments of Mudanjiang and Xian, are two examples of poor governments ignoring complaints of workers in favor of "business-friendly" policies.¹⁸⁷ In Mudanjiang, the government repeatedly ignored demands and pleas from thousands of employees at the Hualin Giti Tire Co.¹⁸⁸ "The workers had made 12 written complaints and signed 11 collective petitions to the provincial and municipal government"; and the government never resolved the issue.¹⁸⁹ The government's failure to acknowledge the issue prompted a public protest on March 26, 2012.¹⁹⁰ Since it is a crime to stage protests in China, several workers went to prison.¹⁹¹ In Xian, several hundred workers from Double Crane Pharmaceutical Co. complained to the provincial government that current wages were unsuitable to live on, and similarly, the government consistently

183. See 中华人民共和国劳动合同法 [Labor Contract Law of the People's Republic of China] art. 30, 54, 55, 73, 74 (describing the responsibilities of local and county level labor departments to supervise and inspect the implementation of labor contracts).

184. SEARCHING FOR THE UNION: THE WORKERS' MOVEMENT IN CHINA 2011-13, *supra* note 158, at 32.

185. See generally *id.* at 32-37 (concluding provinces that have more manufacturing centers, like Guangzhou, have more experience in dealing with labor disputes than other provinces).

186. See *id.* at 36-37 (inferring that because provincial governments in poorer provinces tend to "be more overtly business-friendly": governments do what they can to cater to and attract businesses by ignoring the demands of workers).

187. *Id.*

188. See *id.* (relating to the sale of the state-owned Hualin Rubber Factory).

189. *Id.* at 37.

190. *Id.*

191. See generally Dana C. Nicholas, *China's Labor Enforcement Crisis: International Intervention and Corporate Social Responsibility*, 11 SCHOLAR 155, 167-68 (2009) (stating the repercussions for organizing include imprisonment, giving workers little ability to organize and demand better working conditions).

turned their complaints away.¹⁹² Similar to the situation in Mudanjiang, these workers took to the streets to protest the lack of response to their complaints.¹⁹³ It is alarming that the only way for factory workers to garner public support for their rights in China, is to break the law and perpetuate the cycle of repressive disregard for the plight of Chinese workers.

Some local governments tend to favor a neutral approach towards labor disputes.¹⁹⁴ For example, the local government in Guangdong, understanding that most labor disputes stem from relations between factory workers and management, leaves labor disputes to the employees and factory owners.¹⁹⁵ Aside from maintaining a neutral position between factory workers and owners, local governments also take a stance that attempts to negotiate concessions from both groups.¹⁹⁶ However, these governments are also known for cracking down on groups who promote labor rights as well as non-governmental organizations (NGOs) that purport to do the same.¹⁹⁷ The government of the Shenzhen province was a notorious example of this.¹⁹⁸ As part of an intimidation campaign, in 2012, government officials in Shenzhen conducted inspections of several local NGO offices and subsequently terminated lease agreements and contracts with the Spring Wind Labour Dispute Service Centre, the Yuandian Workers' Centre, and the Dagongzhe Migrant Worker Centre.¹⁹⁹ These government officials have also incessantly questioned labor activists like Zhang Zhiru and compelled several others to move.²⁰⁰

VI. ANALYZING THE ACFTU AND ITS LOCAL LABOR UNIONS

A. *Effectiveness of the All-China Federation of Trade Unions*

In political theory, it is widely believed that trade unions provide a counterbalance between government power and business interests that

192. SEARCHING FOR THE UNION: THE WORKERS' MOVEMENT IN CHINA 2011-13, *supra* note 158, at 37.

193. *Id.*

194. *Id.* at 32. This is typically for privately-owned and foreign-owned factories. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 35.

198. *See id.* at 35-36 (reporting the Shenzhen government has repeatedly harassed and intimidated the labor rights groups and other NGOs supporting workers).

199. *Id.*

200. *See* Alexandra Harney, *China labor activists say facing unprecedented intimidation*, REUTERS (Jan. 21, 2015, 12:47 PM), <http://www.reuters.com/article/2015/01/21/us-china-labour-idUSKBN0KU13V20150121>. The police of Shenzhen were able to inhibit Zhang's labor advocacy activities by telling his landlords that he was a "politically problematic tenant." *Id.*

exist in our contemporary globalized society.²⁰¹ Through the spread of globalization and the business-centric policies that come with it, trade unions in China have been unable to provide this aforementioned balance.²⁰² To run effectively, trade unions require certain political liberties.²⁰³ These liberties include free speech, the right to assemble, and the right to have grievances addressed.²⁰⁴ These political liberties also run hand-in-hand with specific labor standards,²⁰⁵ including the right to join a union of one's own choice, to organize, to bargain, and, to strike, if necessary.²⁰⁶ However, as discussed above, the presence of an effective trade union structure is sorely lacking in countries like China.²⁰⁷

In recent years, China's economic policy has been to assimilate with the world economy while maintaining tight control of its workforce.²⁰⁸ Specifically, its policy towards trade unionism has been a crucial element of this inherent struggle.²⁰⁹ In contemporary China, there is only one legally recognized union: the ACFTU.²¹⁰ Originating in the 1920s, the ACFTU predated the PPC.²¹¹ Due to the rise of the CCP, in 1949, the ACFTU fell under state control.²¹² As such, the ACFTU is "simply a creature of the Chinese state and the Communist Party."²¹³ The communist government adopted a "corporatist approach" to the management of the ACFTU and labor.²¹⁴ This strategy assumed that the interests of the state and workers were inherently aligned.²¹⁵ This notion did not sit well with the leaders of the ACFTU, which ultimately led to their eventual purge shortly after the rise of the CCP.²¹⁶

Since the ACFTU's reorganization in 1978, the union now represents over 250 million workers,²¹⁷ and exists at every level of Chinese govern-

201. Stephen F. Diamond, *The "Race to the Bottom" Returns: China's Challenge to the International Labor Movement*, 10 U.C. DAVIS J. INT'L POL'Y 39, 55 (2003).

202. *Id.* at 55.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 55–56.

209. *See id.* at 55 (stating China's approach to economic policy in the midst of globalization undermines trade unions' ability to counter the government's power).

210. Kroncke, *supra* note 132, at 162.

211. *Id.*

212. *Id.*

213. Diamond, *supra* note 201, at 55.

214. Kroncke, *supra* note 132, at 162.

215. *Id.*

216. *Id.*

217. *Id.*

ance.²¹⁸ Current law prohibits workers from independently organizing,²¹⁹ and any attempt to do so can lead to incarceration.²²⁰ This leaves the ACFTU as the only option for workers' rights to be heard.²²¹ The only organization (which is government-controlled) that represents workers cannot effectively demand better working conditions because of political constraints.²²² Coupled with a firewall preventing the free exchange of information online,²²³ there has been relatively little national outcry from workers:

[s]ince an average Chinese worker faces imprisonment for organizing trade groups, there is very little upheaval from workers in rural Chinese factories at this point in time. These workers are poor and in need of the little income they make from working in Chinese factories. Working class children are particularly vulnerable because often they are needed to assist in providing for their families. Thus, without incentive or opportunity for workers to organize, factory owners are able to exploit child labor to increase output of goods.²²⁴

The need for income seems to be a larger incentive for the average worker in China than risking everything in trying to improve their environment.²²⁵ This is especially true for migrant workers.²²⁶ These workers leave their lives in rural China to seek better pay in manufacturing centers in urban areas.²²⁷ Their migratory nature, however, has made it

218. See *id.* (outlining the governing structure of the ACFTU). There are thirty-one regional federations of the ACFTU. *Id.* These exist at the "provincial, prefectural, county and township levels." *Id.* Furthermore, there are over one million grassroots local unions. *Id.*

219. Nicholas, *supra* note 191, at 167; Diamond, *supra* note 201, at 55; Toby D. Merchant, *Recognizing ILO Rights to Organize and Bargain Collectively; Grease in China's Transition to a Socialist Market Economy*, 36 CASE W. RES. J. INT'L L. 223, 224 (2004).

220. Nicholas, *supra* note 191, at 168; Merchant, *supra* note 220, at 224; Diamond, *supra* note 201, at 55.

221. Nicholas, *supra* note 191, at 167-68.

222. *Id.*

223. Park, *supra* note 75.

224. Nicholas, *supra* note 191, at 168.

225. *Id.* at 174. See generally PROTECTING WORKERS' RIGHTS OR SERVING THE PARTY: THE WAY FORWARD FOR CHINA'S TRADE UNIONS, *supra* note 9 at 30 (explaining "joint rights protection initiatives" led by local union is not within the means of moth living in underdeveloped regions).

226. See PROTECTING WORKERS' RIGHTS OR SERVING THE PARTY: THE WAY FORWARD FOR CHINA'S TRADE UNIONS, *supra* note 9, at 27-28 (asserting migrant workers are an exceptionally disadvantaged and exploited group of workers that do not assert their rights out of fear of losing their jobs).

227. Nicholas, *supra* note 191, at 174 n.89 (quoting David Barboza, *Reform Stalls in Chinese Factories*, N.Y. TIMES, Jan. 5. 2008, at C1).

incredibly difficult for the ACFTU to address even their most basic demand—"decent pay for decent work."²²⁸

In the contemporary ACFTU, virtually all of the leadership at the national and regional levels is made up of CCP members.²²⁹ The ACFTU Chairman is a member of the Political Bureau, and most of the grassroots union leaders are themselves "enterprise managers with strong ties to the interests of the local business community."²³⁰ These local union leaders are typically appointed or run unopposed in union elections.²³¹ The leadership of this organization, at all levels, seems to have a significant conflict of interests between the communist government, local businesses, and the workers that these leaders purport to protect.²³² The labor leaders in local enterprises "are dependent on management, and very often union leaders have close ties with management, compromising their ability to effectively represent workers."²³³

With the ACFTU's incorporation into the CCP, its apparent role is to broadcast labor policy instead of representing workers.²³⁴ As a result, much of that responsibility has fallen to the discretion of the local union leaders.²³⁵ These local ACFTU leaders, with local business ties, have virtually full discretion as to how workers are represented.²³⁶ In fact, the ACFTU seems to occasionally condemn the "rank-and-file" attempts to secure jobs, benefits, and pensions in favor of business interests.²³⁷

In 1997, the ACFTU proudly stated that trade unions were re-vamping efforts by "mounting vigorous campaigns to educate workers on the international labour standards and actively participating in the legislation work of the government."²³⁸ In more recent years, however, the positivism of the campaign in the 1990's has reached a stalemate.²³⁹ In addition,

228. PROTECTING WORKERS' RIGHTS OR SERVING THE PARTY: THE WAY FORWARD FOR CHINA'S TRADE UNIONS, *supra* note 9, at 28–29.

229. Kroncke, *supra* note 132, at 163.

230. *Id.*

231. *Id.*

232. *See id.* ("As a result of [the] embedded relationship within the CCP, the corporatist role of the ACFTU has been to transmit labor policy rather than represent workers' interests.").

233. *Conflicts of interests and the ineffectiveness of China's labour laws*, CHINA LABOUR BULLETIN (Oct. 10, 2007), <http://www.clb.org.hk/en/?q=node/50375>.

234. Kroncke, *supra* note 132, at 163.

235. *Id.*

236. *Id.*

237. Diamond, *supra* note 201, at 55–56.

238. *Chinese Trade Unions Actively Push Forward the Application of International Labour Standards*, ACFTU (Dec. 10, 1997), <http://english.acftu.org/template/10002/file.jsp?cid=69&aid=34>.

239. *See generally* SEARCHING FOR THE UNION THE WORKERS' MOVEMENT IN CHINA 2011–13, *supra* note 158, at 37 ("[The ACFTU] has spent much of the last three years mired

the ACFTU has also been described as a “lost cause . . . out of touch with the realities of labour relations in China today.”²⁴⁰ A government-controlled entity that is

[f]ar from supporting democratic and free trade unionism, [and its] [] [] central purpose is to carry out State and Party directives and to do everything it can to insure that all workers fall into line as well.²⁴¹

The ACFTU has not been able to provide a reasonable and effective framework for local trade unions to enforce.²⁴² Traditionally, the ACFTU does not have a collective bargaining role.²⁴³ Coupled with the fact that all other forms of independent labor organization are banned, it is clear that the ACFTU does not fully represent the interests of the workers.²⁴⁴ Further, restrictions have been placed on independent trade unions by law to “prevent any workers’ collective action from growing into ‘anything long-term, programmatic, or institutional.’”²⁴⁵

Historically, labor unrest in China has been underreported,²⁴⁶ and any effort to galvanize widespread labor action has been stamped out by the government firewall.²⁴⁷ Internet usage has steadily risen in China.²⁴⁸ It has been recognized that communication, especially through the Internet,

in inactivity . . . incapable of breaking free of its traditional bureaucratic mind-set and actually do something to help the workers.”). This is evidenced by the ACFTU’s work plan for the years 2011 to 2013, which focused on two key tasks that had been outlined in a 2010 speech by the then chairman Wang Zhaoguo: namely to “encourage all enterprises to establish trade unions according to the law,” and to “encourage all enterprises to hold collective wage negotiations according to the law.” *Id.*

240. *Id.* at 38.

241. Diamond, *supra* note 201, at 58.

242. SEARCHING FOR THE UNION THE WORKERS’ MOVEMENT IN CHINA 2011-13, *supra* note 158, at 38.

243. Kroncke, *supra* note 132, at 165.

244. *Id.* “Instead, the CCP has used the ACFTU to negotiate broad contractual minimums in certain geographic areas and industries to attempt to further its vision of industrial relations.” *Id.*

245. Stanley Lubman, *A Shot at Solving China’s Angry Worker Problem*, WALL ST. J. (Feb. 26, 2015, 2:26 PM HKT), <http://blogs.wsj.com/chinarealtime/2015/02/26/a-shot-at-solving-chinas-angry-worker-problem> (quoting expert, Mary Gallagher, from the University of Michigan).

246. Kroncke, *supra* note 132, at 166.

247. *See generally* Park, *supra* note 75 (emphasizing China actively suppresses mass media that it deems to have a substantial negative impact on the government or the country as a whole).

248. *See* Euan McKirdy, *China’s online users more than double entire U.S. population*, CNN (Feb. 4, 2015, 12:24 AM), <http://www.cnn.com/2015/02/03/world/china-internet-growth-2014/> (stating China has the world’s largest and fastest growing number of internet users).

will be key to any substantial labor reform in China.²⁴⁹ The argument could be made that this increased usage has increased the exposure of labor disputes to the Chinese public, but the sophisticated “Great Firewall” of China prevents any widespread access of potentially “destabilizing” elements to society.²⁵⁰

B. *Specific Instances Where the ACFTU was Inadequate*

There have been several labor disputes at some of China’s largest manufacturing plants, including the incident at Foxconn, the world’s largest producer of contract electronics.²⁵¹

In January and February of 2012, hundreds of workers dramatically threatened collective suicide at Foxconn. Foxconn, China’s largest private sector employer, produces a staggering 40% of the world’s electronic[] goods but is best known for its close relationship with Apple and as a key supplier for Microsoft.²⁵²

It was reported that Foxconn forced employees to work an extreme number of overtime hours.²⁵³ This resulted in many deaths directly related to overwork and work-related exhaustion.²⁵⁴ According to the secretary of the ACFTU’s secretariat, Guo Jun, private companies like Foxconn had employees working over 10 hours a day without days off.²⁵⁵ These work conditions were caused, in part, by the high-pressure working environment imposed on these employees as a result of large orders from foreign companies like Apple.²⁵⁶ As noted by Professor Chang Kai, Fox-

249. See *World Report 2014: China*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2014/country-chapters/china-and-tibet> (last visited Sept. 14, 2015) (stating internet users are aggressively calling for political reform despite restrictions on internet usage).

250. See generally Park, *supra* note 75 (discussing with Professor Xiao Qiang, that Chinese authorities, though unable to completely keep the public in the dark about protests, can shut down forums where public discussion can take place).

251. See Kroncke, *supra* note 132, at 166 (“[S]ince the mid-1990s [labor unrest] has generally increased at a rate of 25% a year.”).

252. *Id.*

253. Zhang Xiang, *Foxconn’s long hours causing workers’ deaths: Union*, CHINA DAILY, http://www.chinadaily.com.cn/china/2015-02/03/content_19477082.htm (last updated Feb. 4, 2015, 10:20 PM).

254. *Id.*

255. *Id.*

256. *Id.*; see Keira Lu Huang & Lawrence Chung, *Chinese trade union slams Taiwan tech giant Foxconn for ‘overworking’ staff*, SOUTH CHINA MORNING POST (Feb. 4, 2015, 10:20 AM), <http://www.scmp.com/print/news/china/article/1700269/chinas-official-trade-union-criticises-electronics-maker-foxconn> (reporting 74.5 million iPhones were sold after the newest model was released in 2010, a “[t]all order even for big suppliers like Foxconn”).

conn does not have a union chosen by the workers.²⁵⁷ One would assume that Foxconn's presence on the world's manufacturing stage would be enough to take extra precautionary measures to ensure that its workers are adequately protected. Difficulty in enforcing labor union laws likely occurs because many trade unions that exist within private enterprises are considered "fake unions," "existing in name only but without any real power."²⁵⁸

As predicted, the events at Foxconn directly caused several other major strikes across China.²⁵⁹ According to Paul Tang, chief economist of Bank of East Asia in Hong Kong, "[a]ll it takes now is a single spark and news will spread all over China, which could lead to similar industrial action in other factories."²⁶⁰ There is a growing trend of public labor strikes against major manufacturers,²⁶¹ but these represent only a small fraction of the labor unrest in China.²⁶²

Stemming from the ACFTU's inability to establish effective policies, local trade unions are left with little guidance.²⁶³ Some of these smaller trade unions have found success, but these successful interventions in labor disputes are few and far between.²⁶⁴ Specifically, trade unions in the provinces of Shenzhen and Guangzhou have at least made attempts to protect workers' rights.²⁶⁵ The Shenzhen Federation of Trade Unions organized elections for union representatives in Shenzhen to push for higher wages and better benefits,²⁶⁶ however, it was later reported that not only did the elections not take place, but violations of workers' rights

257. Huang & Chung, *supra* note 256; *see also* Kroncke, *supra* note 132, at 166 (discussing FoxConn's size and market share).

258. *Conflicts of interests and the ineffectiveness of China's labour laws*, *supra* note 233.

259. Peter Foster, *China Faces Waves of Strikes After Foxconn Pay Rise*, TELEGRAPH (June 10, 2010, 4:56 PM), <http://www.telegraph.co.uk/finance/china-business/7818406/China-faces-wave-of-strikes-after-Foxconn-pay-rise.html>. Workers went on strike at a complex operated by Brother, a Japanese sewing machine manufacturer, Honda, and a Taiwanese-owned machinery company. *Id.*

260. *Id.*

261. Kroncke, *supra* note 132, at 167.

262. *Id.*

263. *See generally* SEARCHING FOR THE UNION: THE WORKERS' MOVEMENT IN CHINA 2011-13, *supra* note 158, at 44 (emphasizing that since there was no central enforcement mechanism in place when the strike at the Citizen Watch factory failed, the trade union had to hire the Guangdong Laowei Law Firm to resolve the issue).

264. *See generally id.* at 38-39 (asserting attempts to intervene in labor disputes usually only staves off the issue for a few months or does not conclude anything at all).

265. *See generally id.* (discussing high-profile trade union interventions in Shenzhen and Guangzhou for the purpose of initiating solutions for long standing labor issues).

266. *Id.* at 38.

still existed;²⁶⁷ therefore, the *attempt* to intervene was illusory. A similar attempt was made in Guangzhou by the Guangzhou Federation of Trade Unions Chairman, Chen Weiguang.²⁶⁸ Weiguang publicly pushed for companies to pay their obligations (wages and social insurance) to employees as well as to ensure that the basic rights of workers were protected.²⁶⁹ Beyond these provinces, there has been little reported action of other provincial trade unions acting on behalf of workers' rights.²⁷⁰

VII. GLOBALIZATION'S NEGATIVE EFFECT ON CHINESE WORKERS' RIGHTS

As stated by the labor watchdog organization, China Labor Watch, the abuse that exists in the labor system are "firmly entrenched in the global supply chain."²⁷¹ The system of globalization has allowed multi-national corporations, like Apple, to benefit greatly with large profit margins.²⁷² They accomplish these profit margins by placing their production facilities in countries that have cheap sources of labor.²⁷³ This globalization benefit is in danger because of the provisions in the LCL that increase labor costs in China by compelling companies to conclude contracts with full-time employees, increased severance pay, and "tighter" regulations concerning the dispatch of labor.²⁷⁴

267. *Id.* at 38–39. In 2013, students went undercover at several factories in Shenzhen and discovered widespread violations of labor laws in addition to the workers not fully understanding what a union was and who the representatives were. *Id.*

268. *Id.* at 39.

269. *Id.* In 2012, the Guangzhou Federation of Trade Unions also pushed for the protection of basic rights for the sanitation workers in Guangzhou, who had protested five times over low pay and insubstantial benefits. *Id.* In 2013, it responded to the firing of five employees at an American company, International Paper, by launching an investigation. *Id.*

270. *See id.* at 40 (reporting there was only one other instance of successful intervention, during the Yanlian SOE dispute in Shaanxi). The provincial union in Shaanxi set up a working group to investigate state-owned enterprise companies. *Id.* The vice-chairman of the Shaanxi Federation, Gu Dongwu, stated that "As state-owned enterprises, they should also shoulder their social responsibilities, set an example, strictly comply with national labour laws and regulations, and actively safeguard workers' legitimate rights and interests." *Id.*

271. TRAGEDIES OF GLOBALIZATION: THE TRUTH BEHIND ELECTRONICS SWEATSHOPS, *supra* note 182, at 12.

272. *See id.* at 12–13 (describing the retail price of electronics, like an iPhone (\$600), as being far greater than the cost to manufacturer the components (\$187.51) and assemble the final product (\$6.45) by outsourcing to foreign manufacturers).

273. *Id.* at 107.

274. *See generally* Garcia, *supra* note 101, at 241, 249 (highlighting the effects that the LCL's requirements for improved working conditions will have on the global market, especially China's rising labor costs).

Some scholars have claimed that Western companies have begun to initiate positive change to the labor issues that exist in countries like China.²⁷⁵ This does not excuse, nor should it negate the fact that multinational corporations, like Apple, have been at the center of the labor issues for years.²⁷⁶ Many of the FIEs fear the provisions that pertain to non-fixed term employment contracts.²⁷⁷ Unlike at-will employees in the United States, which can be terminated for any or no cause, Chinese non-fixed term employees may be terminated only for good cause and must be given severance pay.²⁷⁸ Although the LCL authorizes fixed-term contracts²⁷⁹—contracts that terminate after a certain period of time—provisions provided in the LCL entitle workers to severance pay.²⁸⁰ Theoretically, this creates issues for foreign companies wanting a flexible workforce.²⁸¹

Foreign companies are both negatively and positively affected by the LCL's provisions.²⁸² Even though the LCL requires employers to close contracts with employees, there has not been a harmonious national interpretation or execution of the law in China.²⁸³ In many respects, the LCL is vague and leads to animosity and distrust between employees, labor unions, and employers.²⁸⁴ Within the civil law system of the PRC, the central government must issue guiding interpretations for the laws since their courts do not adhere to the common law principle of *stare decisis*.²⁸⁵ Because the central government has been late on issuing guiding opinions, local provincial governments have had to implement their

275. See Nicholas, *supra* note 191, at 178 (discussing China and its foreign manufacturers' efforts to improve labor conditions by entering into international agreements and adopting codes of conduct in factories).

276. *Id.* See generally TRAGEDIES OF GLOBALIZATION: THE TRUTH BEHIND ELECTRONICS SWEATSHOPS, *supra* note 182, at 12–13 (asserting large corporations like Apple and Microsoft's pre-negotiating of materials, which lock in their profits, have left the Chinese workers vulnerable because factories can only reduce costs by cutting wages, not negotiation for cheaper materials); Foster, *supra* note 259 (asserting the events which occurred at Foxconn were directly caused by extreme production quotas imposed upon Foxconn by large corporations).

277. Garcia, *supra* note 101, at 243.

278. *Id.* at 243–44.

279. *Id.* at 243.

280. *Id.* at 243–44.

281. See *id.* at 244 (explaining employees can execute fixed-term contracts but can only conclude two contracts consecutively).

282. See generally *id.* at 247–49 (arguing the LCL provides loopholes for foreign corporations, but it also raises labor costs for foreign corporations).

283. *Id.* at 247–48.

284. See *id.* at 247 (concluding the lack of interpretation in new LCL has resulted in confusion between employers, local governments, attorneys, and trade unions).

285. *Id.*

own makeshift guiding opinions.²⁸⁶ This furthers the lack of uniformity and widens the loopholes within the LCL system.²⁸⁷

There are over 570,000 FIEs in China.²⁸⁸ They employ around 28 million workers and are mainly located along the coastal regions of China.²⁸⁹ With the implementation of the LCL, labor laws are more consistent and the overall workforce is better paid.²⁹⁰ As a result, several FIEs relocated to countries with a cheaper labor force,²⁹¹ including Olympus Corp. and Yue Yuen Industrial Ltd.²⁹² The remaining FIEs in China, especially those requiring larger workforces, labor costs continue to rise under the LCL's regime.²⁹³

One scholar believes the rising labor costs in China will “balance” the equitable treatment of Chinese workers by narrowing the trade imbalance that exists between China and the rest of the world.²⁹⁴ With the rising costs of labor stemming from the enforcement of the LCL, Chinese-made products will no longer have a significant advantage over goods made in other countries.²⁹⁵ Since much of the manufacturing capability in the world rests in China, this could have an indirect effect on instilling labor law reform in neighboring countries.²⁹⁶ However, this scholar relies heavily on the premise that all of the LCL is equally enforced throughout the PRC.²⁹⁷ With the local provinces taking it upon themselves to issue guiding opinions, there is no harmonious execution of the law,²⁹⁸ therefore, the optimism portrayed by the scholar is misplaced.

286. *Id.* at 248.

287. *Id.* at 247–48 (concluding the new LCL has not been thoroughly interpreted by the PRC government legal body, therefore confusing FIEs operating in the PRC).

288. *Id.* at 248.

289. *Id.*

290. *Id.* at 249.

291. *Id.*

292. *Id.* These companies shifted some of their production to Vietnam. *Id.*

293. *Id.*

294. *Id.*

295. *Cf. id.* (arguing China's dominance in the manufacturing market will inevitably have an impact on other countries, leading to greater wealth amongst workers; therefore, creating a larger consumer base for American companies “looking for new markets in which to sell their products”).

296. *Id.*

297. *See id.* at 247 (2009) (relying on “most observers[’]” belief that “employees’ rights are extensively increased” under the LCL).

298. *See Id.* at 248 (stating the lack of a central enforcement mechanism has compelled local governments to implement their own with varying degrees of effectiveness).

Electronics manufacturers have been major violators of the LCL.²⁹⁹ This has been documented by China Labor Watch since the unfortunate May 2010 incident at Foxconn.³⁰⁰ China Labor Watch determined that these manufacturers engaged in a de facto “race-to-the-bottom” because they found that Foxconn was actually one of the better workplaces present among other electronics manufacturers.³⁰¹ This “race-to-the-bottom” strategy stems from increased production orders from companies like Apple and Samsung.³⁰² In addition to the vast number of orders needed to be filled, the velocity of these production orders adds strain on these manufacturers and the people that work at these facilities.³⁰³ In an age where technology is consistently improving and changing, the constant pressure to fill orders compels manufacturers to put production before employees’ rights.³⁰⁴

Foreign companies have implemented codes of conduct at their facilities in China.³⁰⁵ One could reason that these codes of conduct indicate that workers are looked after by these companies, but this practice is “contradictory.”³⁰⁶ Hand in hand with these codes of conduct is the intense pressure that these foreign companies place on the local manufacturing plants to meet their orders.³⁰⁷ In order to maximize their own profit margins, these manufacturing plants exploit their workers and cut their pay.³⁰⁸ For countries such as China, whose economy relies heavily on the manufacture and export of cheap goods, there is an inherent disincentive to enforce its own labor laws.³⁰⁹ If they effectively enforce the

299. See TRAGEDIES OF GLOBALIZATION: THE TRUTH BEHIND ELECTRONICS SWEATSHOPS, *supra* note 182, at 12 (reporting on the labor and human rights violations inside Chinese electronics manufacturing plants).

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.* at 13.

304. See *id.* (implying the quick turnaround for technology corporations’ upgrades equates to more pressure put on the local manufacturers and the workers that put the products together).

305. Nicholas, *supra* note 191, at 178.

306. *Id.*

307. *Id.*

308. See TRAGEDIES OF GLOBALIZATION: THE TRUTH BEHIND ELECTRONICS SWEATSHOPS, *supra* note 182, at 13 (reporting on multi-national corporations’ ability to circumvent strict labor laws in their own countries by outsourcing labor to developing countries where labor is cheap and laws are not regulated uniformly).

309. See Nicholas, *supra* note 191, at 179 (explaining that despite international treaties and obligations, some nations fear enforcing labor laws to protect their citizens will lead to a loss of large and “lucrative” orders).

labor laws that exist, they might suffer “a competitive disadvantage with other developing nations” with cheaper sources of labor.³¹⁰

To fully understand the culpability of foreign multi-national corporations, China Labor Watch analyzed the “gradual solidification of profit stratification.”³¹¹ Up to 75% of electronic products created in China are produced in a contract manufacturing system.³¹² This gives companies like Apple leverage over the material that manufacturers use in the production of products like the iPhone.³¹³ In 2010, the iPhone 4 sold for approximately \$600.³¹⁴ Of the \$600, approximately \$187.51 was used to purchase manufacturing components.³¹⁵ Miscellaneous costs involved in manufacturing totaled \$45.95, and only \$6.54 went to assembly and labor costs,³¹⁶ leaving a profit margin of \$360.³¹⁷ Because the purchased materials for production are pre-negotiated with the multi-national corporation, Chinese-based manufacturers can only profit from reducing miscellaneous costs and the costs of labor.³¹⁸ This greatly incentivizes manufacturers to ignore laws in order to maximize their own profit.³¹⁹

VIII. CONCLUSION

A. *External Solution: Corporate Social Responsibility*

Since the issues pertaining to China’s labor system are problematic in a number of ways—conflict of interests within the ACFTU; systemic effects of globalization; and the lack of a universally enforced labor law mechanism—the solutions must be broad enough to encompass a large majority of these problems. Multi-national corporations, particularly electronics giants like Apple and Samsung, must engage in corporate social responsibility.³²⁰ They cannot continue to distance themselves from the issue,

310. *Id.* at 178–79.

311. TRAGEDIES OF GLOBALIZATION: THE TRUTH BEHIND ELECTRONICS SWEATSHOPS, *supra* note 182, at 12.

312. *Id.*

313. *See id.* at 12–13 (suggesting utilizing a contract manufacturing system allows sophisticated corporations like Apple to negotiate extremely favorable conditions for themselves).

314. *Id.* at 12.

315. *Id.*

316. *Id.* at 13.

317. *Id.*

318. *Id.* at 12–13.

319. *Id.* at 13.

320. *See generally* Nicholas, *supra* note 191, at 181 (discussing the growing importance of corporate social responsibility in global business practices throughout the world).

blame local manufacturers, and seek countries with cheap and bountiful labor whenever local labor laws increase the cost of doing business.³²¹

In addition, national governments where these corporations have their principle place of business, should pass laws that make it more difficult for corporations to be mobile enough to freely move from country to country to take advantage of the workforce and the tax benefits.³²² Some large foreign businesses may openly support efforts to “make the world a better place.”³²³ However, what they do behind the scenes is more telling.³²⁴ They adopt codes of conduct to show consumers that they care about working conditions,³²⁵ but put incredible amounts of pressure on local manufacturers to meet production quotas.³²⁶ The superficial efforts that corporations have made seem to only support the status quo of non-enforcement of labor laws in China because the alternative would raise labor costs and cut into their profit margins.³²⁷

In theory, large foreign companies should use their influence to implement the labor standards that already exist, but often times, are ignored by local governments.³²⁸ Turning a blind eye to the violations of workers’ rights in China makes these corporations just as culpable by demanding more from the local manufacturers than evading responsibility for the resulting working conditions.³²⁹ China Labor Watch conducted an investigation in 2010 pertaining to labor conditions at local manufacturing plants in China.³³⁰ In particular, China Labor Watch found that these

321. *See id.* at 185 (stating Western companies need to give consideration to the reality of the conditions in industrial China).

322. *See generally* Jeanne Sahadi, *Crazy Corporate Tax Loopholes? ‘Inversions’ are Small Potatoes*, CNN MONEY (Sept. 23, 2014, 4:46 PM), <http://money.cnn.com/2014/09/23/news/economy/corporate-taxes-inversions-and-other-loopholes/> (suggesting corporations utilize tax loopholes to gain a profit advantage, even if it is at the cost of workers’ rights).

323. Nicholas, *supra* note 191, at 183.

324. *See generally id.* (implying corporations support efforts to “make the world a better place” in order to pay lip service to regulators and to garner positive public attention).

325. *Id.* at 185.

326. *See* TRAGEDIES OF GLOBALIZATION: THE TRUTH BEHIND ELECTRONICS SWEATSHOPS, *supra* note 182, at 13 (stating that as a result of price negotiations with suppliers, the pressure to make profit falls on the workers).

327. *See* Nicholas, *supra* note 191, at 183 (stating that despite having the desire to “make the world a better place,” big businesses refuse to support Chinese measures to have more open policies).

328. *See id.* at 185–87 (indicating Western companies can influence foreign factory compliance with labor standards that are being ignored).

329. *See generally* TRAGEDIES OF GLOBALIZATION: THE TRUTH BEHIND ELECTRONICS SWEATSHOPS, *supra* note 182, at 12–14 (suggesting that like a domino effect, large corporations that are concerned with profits will pressure local manufacturers, which will negatively affect workers).

330. *Id.* at 1.

manufacturing plants violated Article 7(d) of the International Covenant on Economic, Social, and Cultural Rights.³³¹ This particular article stipulates that all workers are to be offered “[r]est, leisure and reasonable limitation of working hours.”³³² The investigation found that local manufacturers routinely do not adhere to this principle.³³³ Because multi-national corporations do business with these habitual violators of labor laws, they share in the responsibility to make sure business is being run in accordance to all laws.

Multi-national corporations should proactively take steps to alleviate these plain errors made by local Chinese governments (and the corporations themselves) that exploit cheap labor and the lack of enforcement of China’s labor laws. One such effort these corporations should engage in is educating Chinese workers about the Chinese Labor Law.³³⁴ Educating workers on their rights under the LCL would empower them with the needed knowledge to fight for the benefits and wages they are entitled to receive.³³⁵ Engaging the workforce directly would encourage Chinese employees to negotiate with their employers as required under the LCL.³³⁶ Otherwise, as documented proof shows, employers do not sign written contracts with their employees in good faith,³³⁷ nor do they inform employees of the legal implications of signing their contracts without carefully examining them.³³⁸ By educating the workforce, foreign corporations could engage in the corporate social responsibility championed by the scholar, Dana Nicholas, and help stop the bad faith dealings of local Chinese manufacturers.³³⁹ This bad faith is due, in no small part, to the localized handling of labor contract enforcement.³⁴⁰

331. *Id.* at 92.

332. *Id.*

333. *See id.* (concluding some factories prevent workers from enjoying sick, maternal, and marriage leave and have workers working seven days a week).

334. Nicholas, *supra* note 191, at 184.

335. *See id.* at 189–90 (“Labor conditions can improve if Chinese workers can couple increased awareness of the standards for labor conditions along with the availability of sanctions to enforce.”).

336. *See generally* TRAGEDIES OF GLOBALIZATION: THE TRUTH BEHIND ELECTRONICS SWEATSHOPS, *supra* note 182, at 92–93 (discussing how workers do not enforce their contractual rights because they are unaware of them).

337. *Id.*

338. *See id.* at 93 (stating employees are not informed about the specific details of the contract before signing them).

339. Nicholas, *supra* note 191, at 184.

340. *See* TRAGEDIES OF GLOBALIZATION: THE TRUTH BEHIND ELECTRONICS SWEATSHOPS, *supra* note 182, at 92 (stating no law directly regulates contracts; regulation is left to local labor laws).

Additionally, large foreign companies should use their influence to pressure local businesses to abide by the LCL.³⁴¹ In doing so, they would help facilitate local change and adherence to the law. Moreover, because of China's accession to the WTO, compelling local adherence to the LCL would help improve the perceived integrity of foreign corporations abroad.³⁴² If the international business community can unite by holding itself accountable, educating its workforce, and agreeing to do business with companies in compliance with the 2008 LCL, then real labor standard improvements can occur in China.³⁴³

B. *Internal Reform within China and the ACFTU*

In addition to the steps that need to be taken outside of China, there are several that China itself must take to achieve prolonged, substantial success. China must establish genuine, independent trade unions that actually advocate for the workers.³⁴⁴ As concluded by the International Confederation of Free Trade Unions, "the ACFTU is not an independent trade union organization, and therefore, cannot be regarded as an authentic voice of Chinese workers."³⁴⁵ Attempts to form independent alternatives to the ACFTU have consistently been faced by repression from the Chinese central government.³⁴⁶ As already stated, educating the Chinese workforce on the benefits of the LCL would put significant pressure on the ACFTU to step into the forefront to address the labor issue that exists in China.³⁴⁷

Even though Chinese government officials realize that their current approach to addressing labor issues (putting them out one "fire" at a time), is not a long term solution, their only response has been an ineffective effort at rousing the ACFTU.³⁴⁸ Moving forward, there are two potential

341. See Nicholas, *supra* note 191, at 185 (stating labor standards will be improved if Western companies initiate changes).

342. Nicholas, *supra* note 191, at 185.

343. *Id.* at 184–86.

344. See Diamond, *supra* note 201, at 68 (discussing the international labor movement to support unions in China).

345. *Id.*

346. *Id.* at 71.

347. Harney, *supra* note 200. See generally SEARCHING FOR THE UNION: THE WORKERS' MOVEMENT IN CHINA 2011-13, *supra* note 158 (suggesting if all employees knew about their rights, they would actively demand that the ACFTU properly represent them).

348. See SEARCHING FOR THE UNION: THE WORKERS' MOVEMENT IN CHINA 2011-13, *supra* note 158, at 47 (discussing the Chinese government's failure to protect workers' rights). "[W]hen Xi Jinping summoned the new leaders of the ACFTU to Party headquarters in Zhongnanhai and told them face-to-face that China's workers deserved better, the ACFTU responded with its usual jargon, platitudes and archaic rhetoric while basically ignoring the issue at hand." *Id.*

paths for reforming the LCL system that exists in China: (1) allowing independent trade unions to form; and (2) compelling the ACFTU to actually represent the interests of the workers as is legally mandated.³⁴⁹ As long as the ACFTU remains “firmly stuck in its old ways” and parroting its mechanical recitation of being in line with the Central Party, it will not be a viable option for labor reform in China.³⁵⁰

The ACFTU, according to China Labor Bulletin, must be restructured in order to better serve as a trade union that actually supports workers' rights under the LCL.³⁵¹ A solid first step to achieve this would be to consolidate the ACFTU within the national and provincial federations instead of delegating all policymaking and implementing to all of the various local trade federations.³⁵² The national federation could create labor policy and the provincial federations could act to coordinate and implement those policies.³⁵³ This would allow more flexibility in dealing with provinces that are in greater need of labor policy.³⁵⁴ The provincial federations could be able to set up centers and programs in cities and other areas to provide training, facilitate collective bargaining, and provide other necessary services to workers.³⁵⁵ Ultimately, however, a comprehensive effort to educate the workforce of their rights under the LCL is necessary.

Additionally, the Chinese government should allow the NGOs (e.g., China Labor Watch and China Labour Bulletin) to do their work without fear of intimidation from the government.³⁵⁶ Labor activists routinely get questioned and detained by police without formal charges.³⁵⁷ This intimidation is due to the “politically unstable” and “disruptive” nature of labor unrest.³⁵⁸ The government also intimidates activists because the NGOs

349. *See generally* Kroncke, *supra* note 132, at 169 (suggesting if independent trade unions had solely economic functions in mediating employment conditions, there would be worker advocacy).

350. SEARCHING FOR THE UNION: THE WORKERS' MOVEMENT IN CHINA 2011-13, *supra* note 158, at 47.

351. *See generally id.* (stating the ACFTU is presently ineffective and out of touch with workers).

352. *Id.* at 48.

353. *Id.*

354. *Id.*

355. *Id.*

356. *See id.* at 36–45 (discussing the success of NGOs with collective bargaining and organizing workers, despite government intimidation). *See generally* Harney, *supra* note 200 (stating with China's economy slowing and industrial unrest growing, the Chinese government has stepped up efforts to control labor advocacy).

357. Harney *supra* note 200.

358. *See generally id.* (alluding to growing industrial unrest as subversive to governmental interests).

receive funding from foreign sources.³⁵⁹ Simultaneously, the government encourages workers to turn away from these NGOs and instead turn towards the ACFTU.³⁶⁰ This is distressing because the ACFTU, which is the only legal union in China and controlled by the government, is believed by many activists and workers to be terribly ineffective in its involvement with labor relations.³⁶¹

C. *Abstract Conclusion*

Without the changes discussed above, any “change” would simply be inadequate to protect the one party that is not benefitting from China’s labor laws: the very workers that make up the Chinese economy. If multi-national corporations continue to ignore the consequences that their actions cause, workers will continue to be exploited. These corporations must engage in corporate social responsibility by educating the Chinese workforce of the rights they are entitled to under the LCL. If the Chinese government continues to delegate the enforcement of its LCL, then it must ensure that local labor representatives actually represent the interests of the workers, which they are legally mandated to do. Finally, if the ACFTU continues to be an inefficient trade union, then the Chinese government must engage in either reforming the ACFTU, or allow workers to create independent labor trade unions to adequately represent the workers in negotiations with their employers.

359. *Id.*

360. *Id.*

361. *See id.* (implying that efforts by labor advocates are due to the general belief that “a Communist Party organ” will often side with management or government interests).