GETTING CHINA INTO THE GAME: BILATERAL LABOR AGREEMENTS IN THE SYSTEM OF GLOBAL LABOR RIGHTS

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Bilateral trade agreements are the preferred mode of transnational regulation for the People's Republic of China. China has made promises on labor rights in draft bilateral agreements that it has not previously made in any other venue. The future of transnational labor regulation requires Chinese participation. Bilateral agreements should therefore become a normal part of transnational labor law. Model labor rights provisions for bilateral agreements should be promulgated. Consultative and informal enforcement will be necessary.

Introduction

Bilateral agreements perform two crucial, and intimately related, functions in the system of global labor rights. First, they build the trust necessary for a system of rights without formal sanctions. Second, they are, for this reason, currently China's favored mode of participation in global labor rights, as China is not party to any multilateral trade agreement with labor provisions, discourages global union federations and labor rights organizations, and does not participate meaningfully in the International Labour Organization. It is thus no exaggeration to describe the understanding and gradual expansion of labor provisions, in bilateral trade, investment, and migration treaties, as the most important current development in global labor rights. This is true despite the fact that the bilateral treaties discussed in this Symposium cannot claim any meaningful successes and cannot be enforced in any practical way. China's increasing importance in the global economy calls for an examination of the kinds of labor regulation found in Chinese bilateral trade and investment agreements. This Article proceeds from the assumption that getting China into the global labor regulation game is as important a challenge for 2021 as was the challenge of getting the U.S. into the game in the 1990s, which was resolved when the ILO adopted its 1998 Declaration on Fundamental Principles and Rights at Work.[1]

Part I of this Article reviews the theory of global labor rights. In the absence of meaningful sanctions, global labor rights cannot force any participating state to take action adverse to its economic interests. This can be a strength, not a weakness; a feature, not a bug. It means that no country achieving a comparative advantage from

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1 Int'l Lab. Org. [ILO], *ILO Declaration on Fundamental Principles and Rights at Work*, https://www.ilo.org/declaration/lang--en/index.htm.

a particular labor practice, such as comparatively low wages, need fear coercion to abandon its comparative advantage.

Not long ago, it was frequently alleged by free-traders and developing countries that any effort at transnational labor regulation would inevitably be protectionist and interfere with the economic gains that countries achieve through comparative advantage. Experience has shown that this is not the case. The natural terrain for global labor regulation is instead the vast terrain of abusive labor practices that are not a source of long-term comparative advantage, but survive because countries fear that they will suffer short-term disadvantage if they eliminate them while their trading rivals do not. Literally all the successes of global labor regulation fall into this vast terrain, including success at the elimination of child labor, forced labor, unsafe buildings, and other unsafe or unhealthy work practices. These practices are not a source of comparative advantage. They do not attract foreign direct investment. No one sources to a country because of its collapsing buildings or illiterate children. They are not part of any country's development plan. They survive because of collective action problems in their elimination. Countries do not want to incur short-term expenses, even for long-term gains, if their trading rivals do not. Global labor law, as we know it, is designed to overcome these collective action problems.

Like any collective action problem, this can be modeled as a formal game, in this case (since sanctions are not a practical possibility) an assurance or stag hunt game. Once transnational labor regulation is understood as this process of overcoming collective action problems, the role of bilateral agreements becomes apparent. They build the trust that is necessary for states to commit, and they impede China from defecting from the game, which would destroy any chance of success. The Article will therefore suggest (in Part IV) that the traditional hostility of the International Labour Organization towards bilateral agreements is worth reexamination.

Part II reviews the recent history of Chinese experimentation with new versions of domestic labor law and engagement with international institutions such as the ILO. A period of such experimentation largely ended with the accession of President Xi Jinping in 2013. It is likely that labor law reforms will emerge in the future but impossible to predict what form they will take.

Part III will show, however, that, bilateral treaties with increasingly elaborate labor provisions are the one modality of transnational labor regulation that has been growing in importance for China since 2013. It will examine recent Chinese treaties and analyze their increasingly specific labor provisions. These fall into three groups. The first group governs the work conditions of Chinese in China, as part of a comprehensive investment treaty. Most significant so far is the proposed trade and investment agreement between China and the European Union, which commits China, more clearly than before, to the elimination of forced labor. It is unclear whether this agreement will ever go into effect. However, the EU agreement is worth studying as an example of what is possible. A second group of bilateral agreements governs the work conditions of Chinese workers who work in other countries, typically as part of the Belt and Road Initiative, for example construction workers building a casino in Saipan, part of the U.S. commonwealth of the Northern

Mariana Islands. A third group governs the work conditions of transnational migrants working in China, for example in China's Pilot Free Trade Zones. None of these agreements can be described as a major conceptual advance in labor regulation. It may be factitious even to group them together. But it is also possible that they are data points that point the way toward an emerging Chinese presence in transnational labor regulation through bilateral agreements.

I make no predictions. But Part IV will identify some emerging issues that may clarify the role of Chinese bilateral agreements. One, already mentioned, is the regulation of forced labor, as in the EU agreement. Forced labor is simultaneously among the core practices targeted by the system of transnational labor law; one in which the greatest global successes have been reached; and a historically sore spot for China. A second might be the situation of household domestics from the Philippines now working in China. The Philippines, a major exporter of labor, maintains extensive bilateral agreements with receiving countries, but not yet with China. The power of these Philippine agreements is a major reason why bilateral agreements deserve the attention they are now receiving.

I. The System of Transnational Labor Regulation, or Global Labor Rights Game[2]

Of course every system of transnational regulation aspires to wide coverage and acceptance. Of course it would be nice if China participated actively in a wide range of international law projects. But the need to get China into the global labor rights game has more specific objectives than "wouldn't it be nice." Theoretical understanding of how transnational labor regulation works makes clear the importance of trust among states (in a system without formal sanctions), trust that is fostered when regulation focuses on collective action problems and undermined when defectors earn a comparative advantage.

At a minimum, the theoretical and practical understanding of transnational labor regulation must embed it in these two contexts of the economics of trade: (1) comparative advantage, and (2) game theory. By "comparative advantage" I mean simply the basic Ricardian model, taught in every course in international economics, under which a poor country (we'll use Bangladesh as an example) can benefit from trade if it has a comparative, not necessarily absolute, advantage in producing goods and services. Explaining the precise game in game-theoretic terms is a little more complex, and will lead us to the importance of trust.

Of course transnational labor law can be approached as a legal system, and usually is, by lawyers who write about the International Labour Organization. But then several obvious deficiencies emerge. First, it is a legal system with an extraordinary multiplicity of institutions making and enforcing labor law, including

2 This Part draws on Alan Hyde, *A Game Theory Account and Defence of Transnational Labour Standards—A Preliminary Look at the Problem*, *in* Globalization and the Future of Labour Law 143-66 (John D.R. Craig & S. Michael Lynk eds., 2006).

domestic legislation and labor departments, trade regulators, the International Labour Organization, departments of foreign affairs that enforce treaties, global framework agreements concluded with global union federations, and private law contracts and codes binding apparel brands and retailers and other global corporations. This multiplicity turns out to be functional. More effective labor regulation is achieved when multiple institutions cooperate.[3] This fact is more puzzling to the lawyer than to the game theorist who understands the role of trust and repeated games in finding and maintaining cooperative solutions. Second, it is a system with very limited sanctions. Game theory tells us when agreement can be maintained in the absence of sanctions.

Transnational labor regulation succeeds, even without formal sanctions, when it approximates a stag hunt or confidence game.[4] Of course other games are possible models. But stag hunt seems to me to correspond to the system of transnational labor regulation that we actually observe. So far no one has actually modeled that system with a different game.

In a stag hunt game, there is an optimum solution that requires the cooperation of all players.[5] If any player is confident that the others will cooperate, its winning strategy is to cooperate. But if any player defects, the winning strategy will not be clear. The choice will then be between defecting (eating rabbit), as compared to the best cooperative solution that is possible in a world with some cooperators and some defectors (bringing down a small deer?). That cooperative solution (by definition) will not be as good as the cooperative solution with all. Equally significant, the demonstration that one player can gain by defecting will not be lost on those who remain in the game. The trust necessary to sustain cooperation (in the absence of sanctions) may evaporate and soon no one is cooperating at all. In laboratories, subjects playing stag hunts can achieve and maintain cooperative

3 Matthew Amengual & Laura Chirot, *Reinforcing the State: Transnational and State Labor Regulation in Indonesia*, 69(5) ILR Rev. 1056 (2016); Daniel Berliner et al., *Building Capacity, Building Rights?: State Capacity and Labor Rights in Developing Countries*, 72 World Dev. 127 (2015); Tim Bartley, *Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards*, 12 Theoretical Inquiries L. 517 (2011); Kevin Kolben, *Dialogic Labor Regulation in the Global Supply Chain*, 36(3) Mich. J. Int'l L. 425 (2015); Kevin Kolben, *Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes*, 48 Harv. Int'l L.J. 203 (2007).

4 I always feel somewhat self-aggrandizing when I describe my "model" of transnational labor law. But the works that most influenced my game-theoretic description of global labor law similarly use the stag hunt game as a thought experiment and metaphor, rather than a device for yielding equations. Scott Barrett, Environment and Statecraft: The Strategy of Environmental Treaty-Making (2005) (game-theoretic accounts of environmental treaties, including some stag hunt models); Carlo Carraro, *Modeling International Policy Games: Lessons from European Monetary Coordination*, 24(3) Empirica 163 (1997); Robert A. Green, *Antilegalistic Approaches to Resolving Disputes Between Governments: A Comparison of the International Tax and Trade Regimes*, 23 Yale J. Int'l L. 79 (1998).

5 On stag hunts generally, see Colin F. Camerer, Behavioral Game Theory: Experiments in Strategic Interaction 375-95 (2003); Brian Skyrms, The Stag Hunt and the Evolution of Social Structure (2004). The name comes from an observation in Rousseau that early hunting societies might learn to cooperate in order to bring down a stag, but if each hunted on his own he could catch only a hare. Jean-Jacques Rousseau, *Discours sur l'Origine et les Fondements de l'Inégalité*, Seconde Partie, 3 Ouevres Complètes 166-67 (Jean Starobinski ed., Pléiade edition 1964) [1755].

solutions without sanctions, if their numbers are small and they can communicate and observe each other.[6]

A vivid example of a recent real-world stag hunt scenario was the behavior of the Afghan army in the final months of the Ghani regime. Each soldier had, at one time, calculated that fighting was preferable to Taliban victory. Each such calculation assumed that other soldiers would fight too. Once defections became ubiquitous, there was no stopping them. Fighting alone was not preferable to Taliban victory.

In the real world of transnational labor regulation, the laboratory experiments on stag hunts imply that regulation must be transparent and significantly bottom-up, findings I will not explore here. The stag hunt also explains why transnational labor regulation works to overcome collective action problems, such as ending child labor or collapsing factories, but does not, cannot, and should not attack sources of comparative advantage, such as low labor costs. It explains the near-universal finding that, whatever the institution of labor regulation that is studied, it will achieve its greatest successes eliminating labor practices that are not a source of comparative advantage, such as child labor, forced labor, and unsafe factories. These practices are not part of any country's development plan. They do not attract foreign investment.[7] They persist because countries fear short-term comparative disadvantage if they move to end them while their trading rivals do not.[8] Or governments may be too weak to confront powerful domestic constituencies that benefit from forced or child labor.

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6 Ananish Chaudhuri et al., *Talking Ourselves to Efficiency: Coordination in Inter-Generational Minimum Effort Games with Private, Almost Common, and Common Knowledge of Advice*, 119 Econ. J. 91 (2009).

7 Greg Distelhorst & Richard M. Locke, *Does Compliance Pay? Social Standards and Firm-Level Trade*, 62 Am. J. Pol. Sci. 695 (2018) (noting that developed-world retailers and garment labels are more likely to source to suppliers in compliance with applicable codes); Sebastian Braun, *Core Labour Standards and FDI: Friends or Foes? The Case of Child Labour*, 142 Rev. World Econ. 765 (2006) (noting that child labor deters foreign direct investment); Matthias Busse & Sebastian Braun, *Export Structure, FDI and Child Labour*, HWWA Discussion Paper No. 26174 (2003) (noting that foreign direct investment flows are negatively correlated with child labor, even among developing countries); Mita Aggarwal, *International Trade, Labor Standards, and Labor Market Conditions: An Evaluation of the Linkages* (U.S. Int'l Trade Commission, Office of Econ., Working Paper No. 95-06-C, 1995); OECD, *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade* (1996); OECD, *International Trade and Core Labour Standards* (2001); Niklas Potrafke, *Labor Market Deregulation and Globalization: Empirical Evidence from OECD Countries*, 146 Rev. World Econ. 545 (2010); Dani Rodrik, *Labor Standards in International Trade: Do They Matter and What Do We Do About Them?*, *in* Emerging Agenda for Global Trade: High Stakes for Developing Countries 35, 57 (Robert Z. Lawrence et al. eds., 1996); Peter Morici & Evan Schultz, Labor Standards in the Global Trading System 57 (2001); David Kucera, *The Effects of Core Workers Rights on Labour Costs and Foreign Direct Investment: Evaluating the "Conventional Wisdom* (Int'l Inst. Lab. Stud., Discussion Paper No. 130, 2001); Vivek H. Dehejia & Yiagadeesen Samy, *Trade and Labour Standards–Theory, New Empirical Evidence, and Policy Implications* (CESifo, Working Paper No. 830, 2002); Drusilla K. Brown et al., *The Effects of Multinational Production on Wages and Working Conditions in Developing Countries* (Nat'l Bureau Econ. Res., Working Paper No. 9669, 2003) (relying on the Rodrik and Kucera studies above, plus studies comparing ratifiers with nonratifiers of ILO conventions).

8 Nancy H. Chau & Ravi S.M. Kanbur, *The Adoption of International Labor Standards Conventions: Who, When, and Why?*, Brookings Trade Forum 113, 128-29 (2001) (noting that the most important factor predicting ratification of an ILO convention is whether a country's trading rivals have done so); Leonardo Baccini & Mathias Koenig-Archibugi, *Why Do States Commit to International Labor Standards?: Independent Ratification of Core ILO Conventions, 1948-2009*, 66 World Pol. 446 (2014) (noting that states ratify when peers in international organizations do).

In these cases, progress can be made when governments have the assurance that their trade rivals will not benefit, even short-term, if the government acts against forced or child labor or collapsing factories.

This is why the new International Accord for Health and Safety in the Textile and Garment Industry (September 1, 2021), though drafted to apply to Bangladesh and build on the previous Accord on building safety, contains an express provision (Art. 35-39) that the signatory garment labels and global unions will apply the same terms to at least one other country.[9] This always seemed implicit to me under the former Accord. Leadership companies like H&M would not subject themselves to criticism for practices in Vietnam or Indonesia that they seek to eliminate in Bangladesh. But there is no harm in spelling out this commitment, if it facilitates trust that Bangladesh will not suffer by enforcing building safety.

The transnational labor regulation that we have now, by contrast, is not set up to eliminate the standard comparative advantage found in every textbook on the economics of trade. This is the comparative advantage that Bangladesh gets from low labor costs generally. The only reason that Bangladesh became the world's second largest exporter of garments is its low labor costs. Bangladesh has no natural or absolute advantages as a manufacturer. Bangladesh is not the world's most efficient producer of anything. It has few natural resources, a largely unskilled labor force, and no craft traditions that enter global trade. Yet we have believed since David Ricardo that Bangladesh can benefit from free trade so long as it has a comparative advantage, meaning low opportunity costs, over other producers of low-value-added manufacturing. China is a much more efficient producer of ready-to-wear garments than Bangladesh, but in China such production competes with higher value-added production, while in Bangladesh there is little competition for labor and resources. The past two decades have confirmed the Ricardo observation. In 1978, Bangladesh exported $12,000 worth of garments. By 1984 the figure had risen to around $31 million. Today Bangladesh annually exports around $20 billion in garments. This accounts for 80 percent of Bangladesh's export earnings. Bangladesh is the second-largest manufacturer of garments in the world.[10] And all this comes about for one reason: Bangladesh is a very cheap place to make garments. Its wages are a quarter of China's.[11] Bangladesh has no other natural or historical reason to be a leading garment manufacturer. With the rise of the ready-to-wear garment sector, median income has quintupled, and the poverty rate dropped from 70 to 40 percent.

Transnational labor regulation has no sanctions or bribes to persuade a country like Bangladesh to raise wages generally. It has no reason to expect such a rule to

9 International Accord, *International Accord for Health and Safety in the Textile and Garment Industry* (2021), https://bit.ly/3x0PNZx.

10 Jakir Hossain et al., *Linking Trade and Decent Work in Global Supply Chains in Bangladesh*, Friedrich Ebert Stiftung (2018), http://library.fes.de/pdf-files/bueros/bangladesch/14406-20180614.pdf; Congressional Research Service, *Bangladesh Apparel Factory Collapse: Background in Brief* (2014), https://sgp.fas.org/crs/row/R43085.pdf.

11 Syed Zain Al-Mahmood et al., *The Global Garment Trail: From Bangladesh to a Mall Near You*, Wall St. J. (May 3, 2013), https://on.wsj.com/3z8vFYj.

be acceptable to a country that achieves a comparative advantage from low wages. The most fully worked-out proposal for a global living wage is Shelley Marshall's proposal to create regional alliances that would negotiate regional wage floors.[12] This, if successful, would rest precisely on the stag hunt's demonstrated power to overcome collective action problems, without sanctions, by building trust and assurance among small groups of cooperators.

Stag hunt models are nowhere near as popular in social science as prisoner's dilemmas.[13] It has been suggested to me that this is because of the formal feature of the stag hunt model that the defection of even one player changes the payoffs of all the others. For many real-world applications, this feature may be unrealistic, or make modeling too complex.

But for transnational labor rights, it is spot-on. That player is China. A hypothetical system of global labor regulation in which China was a world leader in good labor practices, enthusiastically monitored labor practices in its companies' overseas operations, and participated actively in transnational lawmaking, would be much more effective than what we have now. A hypothetical system in which China realized a trading advantage by undercutting everyone else's wages would conversely make it very difficult to persuade India, Bangladesh, or any other country that it could raise its wages.

The reality is somewhere between these extremes. To understand this will require examining two aspects of Chinese work practice. First, Part II of this Article reviews the development in Chinese labor relations of many progressive features that could well be suitable for export during the decade or so before the accession of President Xi Jinping in 2013. Since then, many of these experiments have ended. The result, however, is not a stable system. Levels of industrial unrest are high, and the institutions expected to respond to grievances have historically proved inadequate. Second, Part III of this Article makes the case that China engages in transnational labor regulation primarily through bilateral treaties, as it does not participate meaningfully in the International Labour Organization, does not recognize global union federations or independent domestic unions, has tried to abolish the activities of global labor rights NGOs, and strongly opposes conditioning trade on labor policies.

If redesigning transnational labor regulation in order to encourage Chinese participation is a very high priority, it is necessary then to learn more about how China uses bilateral trade, investment, and migration treaties.

12 Shelley Marshall, Living Wage: Regulatory Solutions to Informal and Precarious Work in Global Supply Chains (2019).

13 In the familiar prisoner's dilemma, it is never rational for any player to cooperate, irrespective of what the other player does. In a stag hunt, the optimum strategy depends by definition on each player's estimate of whether the other players will cooperate or defect. *See supra* note 4.

II. China Would be a Valuable Participant in Transnational Labor Regulation

I adopt a standard narrative of recent Chinese labor policy on which there appears to be a consensus. Before the 1980s or so, China maintained a heavily planned "Iron Rice Bowl" regime in which state-owned enterprises operated as monopolists and lifetime compensation was guaranteed, while labor mobility was nonexistent. China's transition to a market economy sparked impressive but uneven economic growth. Large enterprises had to invent new labor relations for a young, often internally migrant, and restive labor force.[14] Labor unions in China do not function as workers' voice. They are directed by the Party and typically staffed by corporate managers.[15]

During the decade or so before 2013, many interesting new forms of workers' voice were tested. None became standard and all are now moribund. But there remains a great deal of practical expertise among Chinese who lived through and administered these reforms. The 2008 National Labor Contract Law encouraged individual labor contracts with rights enforceable in arbitration. Lawyers were made available to workers to help them learn about and pursue their rights.[16] Labor NGOs appeared alongside the traditional party-dominated unions. Some identified themselves as a labor movement.[17] Some functioned as worker centers.[18] In a few rare cases, the traditional unions held elections among their membership for their leadership.[19] Some of these worker institutions began to engage in collective bargaining.[20] The national government did not oppose these activities at first. It was open to experimentation and transnational influence. For example, the national Department of Work Safety and the ILO jointly created a project to improve workplace relations on safety in ten companies in the Yangtze River delta.[21] Teams of Chinese-speaking scholars from inside and outside China reported on these developments.

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14 *See generally* Sarosh Kuruvilla et al., From Iron Rice Bowl to Informalization: Markets, Workers, and the State in a Changing China (2011).

15 Ching Kwan Lee, Against the Law: Labor Protests in China's Rustbelt and Sunbelt 57-61 (2007).

16 Cynthia Estlund, A New Deal for China's Workers? (2017); Mary E. Gallagher, Authoritarian Legality in China: Law, Workers, and the State (2017); Mingwei Liu & Sarosh Kuruvilla, *The State, the Unions, and Collective Bargaining in China: The Good, the Bad, and the Ugly*, 38(2) Comp. Lab. L. & Pol'y J. 187 (2017).

17 Chunyun Li, *From Insurgency to Movement: An Embryonic Labor Movement Undermining Hegemony in South China*, 74(4) ILR Rev. 843 (2021).

18 Chris King-chi Chan, *Community-Based Organizations for Migrant Workers' Rights: The Emergence of Labour NGOs in China*, 48(1) Community Dev. J. 6 (2013).

19 Chunyun Li & Mingwei Liu, *Overcoming Collective Action Problems Facing Chinese Workers: Lessons from Four Protests Against Wal-Mart*, 71(5) ILR Rev. 1078 (2018).

20 Sarosh Kuruvilla & Hao Zhang, *Labor Unrest and Incipient Bargaining in China*, 12(1) Mgt. & Org. Rev. 159 (2016); Chloé Froissart, *Negotiating Authoritarianism and its Limits: Worker-led Collective Bargaining in Guangdong Province*, 32(1) China Info. 23 (2018); Siqi Luo & Tao Ying, *Moderated Mobilization: A New Model of Enterprise-Level Collective Bargaining in South China*, 242 China Q. 418 (2020).

21 Xiaoyu (Sherry) Guan & Steve Frenkel, Managing Labor Standards in China: An Exploratory Analysis, presented at Global Transformation of Work: Market Integration, China's Rise, and Labour Adaptation, Rutgers University (Mar. 16-18, 2016) (unpublished manuscript) (on file with author). Professor Frenkel

Beginning in 2013 or so, however, national policy, soon reflected in the provinces, shifted to party control, repression of activism, and chilling scholarship.[22] Prominent activists were arrested beginning in July 2015 and charged with collusion with "hostile foreign forces."[23] Worker protests were followed by interrogation and detention.[24] Foreign NGOs were prohibited from lending financial support to worker organizations. Scholars were discouraged from studying labor disputes.[25]

Despite these restrictions on information, which make it hard to be sure what is happening, it does not appear that the present system is stable. Worker disputes are refashioned as individual grievances and channeled to the official unions and court procedures, which do not resolve them and instead contribute to insurgency.[26] China, like every other country, is struggling to regulate the work conditions of workers notionally employed by temporary help agencies. A 2012 law, which limits to 10 percent the share of any workforce that may consist of such dispatch workers, has led instead to what Xiaojun Feng calls a "cat-and-mouse game."[27] A 2014 report of the ILO, prepared by a Chinese labor administrator, was critical of government administrative practices toward employment agencies.[28] However, according to Professor Feng, it has not played any part in the extensive subsequent Chinese discussions of dispatch work.[29]

Another source of instability is China's articulated development policy, and experience, to transition from a low-wage, export-driven economy to a higher-wage economy with higher levels of consumption.[30] But the legal mechanisms of wage raises are not solidly in place, as collective bargaining, labor contracts, and strikes are not encouraged; regional variations are stark, while effective alternatives have not been implemented. Chinese employers are struggling to fill available jobs as the

confirmed in personal communication that this paper was never published because the ILO project was shut down.

22 Sarosh Kuruvilla, *From Cautious Optimism to Renewed Pessimism: Labor Voice and Labor Scholarship in China*, 71(5) ILR Rev. 1013 (2018).

23 Anita Chan, *The Relationship between Labour NGOs and Chinese Workers in an Authoritarian Regime*, 9(1) Glob. Lab. J. 1 (2018); Ivan Franceschini & Elisa Nesossi, *State Repression of Chinese Labor NGOs: A Chilling Effect?*, 80 China J. 111 (2018); Froissart, *supra* note 20, at 32-4.

24 It appears that protests over social security are more readily tolerated than protests over wages. *See* Yujeon Wang & Wei Chen, *Different Demands, Varying Responses: Local Government Responses to Workers' Collective Actions in South China*, 243 China Q. 839 (2020).

25 Kuruvilla, *supra* note 22.

26 Patricia Chen & Mary Gallagher, *Mobilization Without Movement: How the Chinese State "Fixed" Labor Insurgency*, 71(5) ILR Rev. 1029 (2018).

27 Xiaojun Feng, *Regulating Labour Dispatch in China: A Cat-and-Mouse Game*, 33(1) China Info. 88 (2019).

28 Genghua Liu, *Private Employment Agencies and Labour Dispatch in China* (ILO, Working Paper No. 293, 2014).

29 Personal communication (Aug. 31, 2021). Professor Xiaojun Feng is the expert on Chinese regulation of employment agencies, *see* Feng, *supra* note 27.

30 Shaojie Zhou & Angang Hu, *Looking Ahead: China Becoming a High-Income Economy*, *in* China: Surpassing the "Middle Income Trap" 179 (Shaojie Zhou & Angang Hu eds., 2021).

number of young people entering the labor market plummets, the after-effect of the one-child policy, and their willingness to migrate and accept low pay diminishes.[31]

China thus faces many of the same problems as any industrialized country: low wages, wage inequality, overstressed representation systems, misclassification of workers, and, as we shall see further, transnational migrant labor. It has developed some creative responses and abandoned others. There is ample scope for meaningful transnational collaboration on these issues. Whatever the future may hold, any such cooperation today will have to take place in the form preferred by the Chinese government, namely bilateral treaties, to which we now turn.

III. Chinese Labor Relations in the Larger World

In many contexts, to say "globalization" is to imply "China." Chinese firms do business around the world, often, but not always, as part of China's Belt and Road Initiative, an enormous network of construction of roads, ports, and energy pipelines.[32] China exports goods and services. So far, however, China has preferred not to take a leadership role in shaping international law norms of all types, though I will restrict my remarks here to transnational labor regulation.[33] Chinese mining companies are prominent in Africa, and are good employers on the whole, but do not participate in any transnational labor initiatives.[34] Some Chinese low-end garment retailers import readymade garments from Bangladesh, but none ever signed the Accord for Building and Fire Safety in Bangladesh, and none has yet joined the successor International Accord. The ILO and China have a Decent Work Project that seems to exist mainly "on paper."[35] In their stead we have a rather diffuse set of bilateral treaties, to the description of which we now turn.

A. Bilateral Trade and Investment Treaties with Labor Provisions

The proposed China-EU Comprehensive Agreement on Investment (CAI, December 2020) is thus a major step for China in accepting global labor norms. The agreement has not yet been ratified by either China or the EU and may never be. Sanctions against certain Chinese officials over human rights abuses in the Xinjiang Uyghur

31 Stella Yifan Xie & Liyan Qi, *Chinese Factories are Having Labor Pains*, Wall St. J. (Aug 25, 2021), https://on.wsj.com/3M2m9bV.

32 Andrew Chatzky & James McBride, *China's Massive Belt and Road Initiative*, Council on Foreign Relations (Jan. 28, 2020), https://on.cfr.org/3M5AkNo.

33 Robert D. Williams, *International Law with Chinese Characteristics: Beijing and the "Rules-Based" Global Order,* Brookings (Oct. 2020), https://brook.gs/3LZPYd5.; Simon Chesterman, *Asia's Ambivalence about International Laws and Institutions: Past, Present, and Futures*, 27 Eur. J. Int'l L. 945 (2016).

34 Ching Kwan Lee, The Spectre of Global China: Politics, Labor, and Foreign Investment in Africa (2017).

35 The term "on paper" is an obsolete expression referring to verbal expression lacking a behavioral correlate. I suppose we should be saying "on website." ILO, *China Decent Work Country Programme 2016-2020*, https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-beijing/documents/genericdocument/wcms_141713.pdf .

Autonomous Region, in which the EU joined the U.S. and UK in March 2021, put the treaty in doubt.[36] This is ironic, as the precise step forward, represented by the CAI, is China's commitment in the CAI to "make continued and sustained efforts on its own initiative to pursue ratification of . . ." the two fundamental ILO Conventions concerning forced labor. China has made similar commitments before, for example in the ILO Decent Work Program. But this is the first time China has made such a commitment in an economic treaty tied to trade and investment.

The CAI follows a line of five or so bilateral trade and investment treaties with either aspirational labor provisions (Iceland, Peru, Chile) or separate labor rights provisions less comprehensive than the EU treaty (Switzerland, New Zealand). [37] As analyzed by Professor Hailong (Henry) Jia and coauthors, an analysis I follow here, the CAI includes a number of provisions on labor rights that are standard procedure for EU agreements, but new for China, and that show signs of careful negotiation.[38]

The most significant is the commitment, already mentioned, to work toward ratification of the ILO Convention 29 on forced labor. The CAI also contains the customary commitments to enforce effectively the labor obligations in domestic labor law and in the conventions that have been ratified. The two concessions to China here are, first, that failures to enforce violate the CAI only "through a sustained or recurring course of action or inaction," and second, only if they have an investment effect. Jia thinks that the meaning of neither of these concessions is particularly clear.[39] The CAI contains the standard provision that labor obligations are not to be used for protectionist purposes or disguised trade restrictions or discrimination. Enforcement does not include the judicial-style enforcement typical of U.S. free trade agreements, but rests on the monitoring and consultation typical in EU trade and investment agreements. Economic sanctions are not authorized.

The biggest concession to China is that the CAI makes no commitment to working on freedom of association, meaning independent trade unions. Shi Yindong, Professor of International Relations at Renmin University and an advisor to the State Council, referring to the CAI, has described independent labor unions as "impossible" for China.[40] Transnational labor cooperation with China must, for the foreseeable future, accept this, though, as mentioned, alternative workers' organizations existed in the recent past and may emerge in the future.

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36 Mimi Lau, *Why Labour Rights Issues May Sink the EU-China Investment Deal*, South China Morning Post (Feb. 13, 2021, 12:00 PM), https://www.scmp.com/news/china/diplomacy/article/3121576/why-labour-rights-issues-may-sink-eu-china-investment-deal.

37 Ronald C. Brown, *China-EU BIT and FTA: Building a Bridge on the Silk Road Not Detoured by Labor Standard Provisions*, 29 Wash. Int'l L.J. 61 (2019); United Nations Economic and Social Commission for Asia and the Pacific, *Labour Provisions in Asia-Pacific Free Trade Agreements* (UNESCAP Background Paper 01/2017) [hereinafter *UNESCAP*].

38 Henry Hailong Jia et al., Convergence in the Shadow of Divergence: China's acceptance of Labour Obligations in the Sino-EU CAI (unpublished manuscript) (on file with author).

39 *Id*.

40 Tom Mitchell & Katrina Manson, *China Sees EU Investment Deal as Diplomatic Coup After U.S. Battles*, Financial Times (Dec. 31, 2020), https://www.ft.com/content/64ef5592-25b4-48c4-a70b-b42071951941.

These labor rights commitments in the Sino-EU Comprehensive Agreement on Investment may not seem like a big deal. By EU standards they are not. Of course the CAI may turn out to be just another failed set of labor rights in a trade agreement.[41] But I agree with Professor Jia that, in the Chinese context, they are a very big deal. Forced labor is not a source of comparative advantage for China. Thus, under the stag hunt model of transnational labor law, monitoring and consultation, demonstrating that China is not being singled out, that ending forced labor is not a pretext for protectionism, and that trading rivals have effectively eliminated forced labor, should suffice. Professor Jia offers two other reasons for cautious optimism about the potential impact of the CAI. First, its objectives are already Chinese policy. Second, these policies often face domestic opposition within China, so the treaty may strengthen the ability of the forces on behalf of higher labor standards to resist domestic opposition.[42]

The absence of formal enforcement may not be so important. No enforcement mechanism for any labor provision in any Asian or Pacific free trade agreement has ever been invoked.[43] U.S.-style legalistic dispute resolution on labor rights has historically proven impossible to enforce in any meaningful way or time period. I am thinking of the failed U.S. case against Guatemala under the DR-CAFTA.[44] It remains to be seen whether the more rapid provisions of the new free trade agreement linking Canada, the U.S., and Mexico work any better. Much more valuable, I think, are what the EU CAI provides: consultations about (1) Chinese labor law, much of which is excellent, (2) the ILO conventions that China has already ratified, and (3) forced labor, in the context of ongoing discussions about investment. It is also likely that these labor provisions will find their way into corporate social responsibility and other private law instruments, and other trade and investment agreements.

Labor rights provisions in trade agreements have a way of developing in linear fashion: they get stronger, not weaker. It is difficult to imagine future trade and investment agreements with China that have weaker labor provisions. More likely, if the EU formula proves viable, future treaties will expand. But even if they do not, the appeal of bilateral agreements to China is obvious. China is proceeding slowly and maintaining control of the process.

B. Agreements Governing Chinese Workers Outside China

Free-movement zones on the European or African model have not appealed to any Asian government. Consequently, bilateral agreements are the only international law instruments governing migration within Asia. China signs these when the host

41 *See, e.g.*, Adrian Smith et al., *Labor Regimes, Global Production Networks, and European Union Trade Policy: Labor Standards and Export Production in the Moldovan Clothing Industry*, 94 Econ. Geography 550 (2018).

42 Jia et al., *supra* note 38.

43 UNESCAP, *supra* note 37, at 45.

44 Phillip Paiement, *Leveraging Trade Agreements for Labor Law Enforcement: Drawing Lessons from the US-Guatemala CAFTA Dispute*, 49 Geo. Int'l L.J. 675 (2018).

country demands it.[45] For example, the Republic of Korea requires a memorandum of understanding (MOU) with each country whose nationals work in Korea, including China.[46] There does not appear to be a comprehensive list of all these bilateral treaties or MOUs. Chinese companies are a major global presence, particularly in construction, extraction, and manufacturing. Today many such projects are identified with the Belt and Road Initiative. It has been common for these companies to post workforces from China.[47] There are usually formal agreements, but these say little about labor conditions.[48] There are some signs that the practice of posting workers from China is becoming less common, due to increasingly more attractive jobs in China and criticism by host countries that would prefer more jobs to be created for their locals. An overall picture is not easy to assemble.

Such projects necessarily involve a variety of formal agreements with lending institutions and host countries. But it does not seem that any such agreement has either become standard, or provides effective protection for the many Chinese workers, working outside China, who have legitimate workplace grievances.[49] At least, that is the conclusion of Aaron Halegua's study of Chinese construction firms building a casino in Saipan, in the U.S. Commonwealth of the Northern Mariana Islands.[50] Work conditions were abusive; workers died on the job; their passports had been confiscated; they had no union to speak for them. Chinese law required that they be given enforceable labor contracts, but this did not happen. Chinese lending institutions purport to respect recognized global labor rights, but this too does not happen in practice. In the Saipan situation, the host country was the U.S., which enforced its own labor laws through the Federal Bureau of Investigation (FBI). Halegua rightly questions how many host countries will similarly enforce their own labor laws against foreign employers. In Equatorial Guinea, local union activity was suppressed rather than stimulated by Chinese development projects, where a strike by Chinese workers was suppressed.[51]

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45 For example, the 2017 agreement between Israel and China, discussed in Yuval Livnat & Hila Shamir, *Gaining Control? Bilateral Agreements and the Shared Interest of Sending and Receiving Countries to Control Migrant Workers and the Illicit Migration Industry*, 23 Theoretical Inquiries L. 65, 83-6 (2022).

46 Graziano Battistella, *Labour Migration in Asia and the Role of Bilateral Migration Agreements*, *in* The Palgrave Handbook of International Labour Migration: Law and Policy Perspectives 299, 309 (Marion Panizzon et al. eds., 2015).

47 *See generally* Piotr Plewa & Marko Stermšek, Labour Migration from China to Europe: Scope and Potential (ILO 2017).

48 Lizhen Zheng, New Developments in International Labour Migration Under China's Free Trade Zone Policy: Opportunities and Challenges on the Road to Fair Migration, paper given to Labor Law Research Network (June 29, 2021) (on file with author).

49 Dong Yan & Yixuan Wu, *The Labour Disputes of Chinese Posted Workers in the B&R Countries*, 43(1) Emp. Rels. 209 (2020).

50 Aaron Halegua, *Where is the Belt and Road Initiative Taking International Labour Rights?: An Examination of Worker Abuse by Chinese Firms in Saipan*, *in* B&R: The Belt and Road Initiative and Global Governance 225 (Maria Adel Carrel et al. eds., 2020).

51 Ann-Sofie Isakkson & Andreas Kotsadam, *Racing to the Bottom?: Chinese Development Projects and Trade Union Involvement in Africa*, 106 World Dev. 284 (2018); Yifeng Chen & Ulla Liukkunen, *Enclave Governance and Transnational Labour Law: A Case Study of Chinese Workers on Strike in Africa*, 88 Nordic J. Int'l L. 558 (2019).

C. Lack of Agreements Governing Migrants to China

China appears to maintain few formal agreements governing foreign nationals working in China. China's Pilot Free Trade Zones employ transnational migrant labor, but the relevant instruments are the visa and work permit.[52] Filipina domestic workers in China contrast their unregulated status with the more heavily regulated migration of domestic workers to other Asian receiving countries. They report that their bargaining power against their employers is enhanced by the absence of formal regulation.[53]

IV. Two Current Tests for Labor Regulation through Bilateral Treaties with China

This Symposium addresses the question of the scope and use of bilateral agreements on labor migration and rights. In that context, Chinese practice is highly ambiguous. China prefers bilateral trade and investment treaties and does not participate in multilateral trade agreements. The most recent such bilateral treaties contain some very cautious promises on labor rights, such as the enforcement of domestic law and the eventual ratification of ILO instruments against forced labor. Yet far more common are Chinese agreements, on Chinese workers abroad, that contain no labor rights provisions. And migration to China is governed through immigration law rather than labor law. So it is entirely possible that China will remain aloof from transnational labor regulation, and its bilateral agreements unimportant. Let me suggest, however, two very important issues facing China that should clarify the role of bilateral treaties.

A. Forced Labor

China has incentives to make the forced labor provisions of the new EU investment treaty, that is, monitoring and consultation, as effective as possible, because it may well face more dramatic trade restrictions in the future. International concern about forced labor in detention camps for the Uyghur minority in Xinjiang province is of course just a component of larger concern about the treatment of the Uyghurs: the detention camps themselves, forced reeducation and assimilation. The U.S. State Department in both the Trump and Biden administrations described this as genocide, over the objections of the Office of the Legal Adviser of the U.S. Department of State.[54] As of this writing, U.S. sanctions have been limited to four named officials. But a formal finding of either genocide or forced labor would, under U.S. law, trigger

52 Zheng, *supra* note 48.

53 Yiran Zhang, *Rethinking the Global Governance of Migrant Domestic Workers: The Heterodox Case of Informal Domestic Workers in China*, 36 Geo. Immigration L.J. (forthcoming 2022).

54 Colum Lynch, *State Department Lawyers Concluded Insufficient Evidence to Prove Genocide in China*, Foreign Policy (Feb. 19, 2021, 11:36 AM), https://foreignpolicy.com/2021/02/19/china-uighurs-genocide-us-pompeo-blinken/.

sanctions that could include blocking imports.[55] This creates incentives for China to work out meaningful, transparent consultative measures with its EU partners, to whom it has already committed efforts to end forced labor generally.

Of course it is possible that China has no intention of ending forced labor, and intends to use endless consultation with the EU merely as a way of forestalling trade sanctions. But I do not think that countries that import from China are so easily fooled. I predict that, if the EU-China CAI (or something like it) goes into effect. China will be pressured to make meaningful, not cosmetic, concessions in at least the transparency of work regulation in Xinjiang. Forces within the Chinese leadership that favor eliminating forced labor will be strengthened. And, if initiatives are made on transparency, China will prefer to make them in bilateral consultation with the EU rather than through the ILO Convention process or a different trade agreement.

B. Philippine Migrants Working in China

The absence of formal governance of Filipina domestic workers in China, which has been reported by Yiran Zhang, is surprising.[56] The Philippines is a major exporter of labor.[57] It makes heavy use of powerful bilateral migration treaties negotiated by the Philippines Overseas Employment Administration, an agency within its Ministry of Labor and Employment. These treaties have been found to override local labor law. One U.S. case found that Filipino seamen working in Louisiana were required to submit their wage claims to arbitration in the Philippines, under the terms of the relevant treaty, and despite Louisiana state law that specifically forbids arbitration, or any employer choice of forum or law, in employment contracts.[58] The Philippines has a dense network of regulation of its nationals working as domestic workers and has suspended migration on occasion.[59]

As mentioned above, Zhang reports that Filipinas in China claim they have more bargaining power with their Chinese employers because of the absence of the usual bilateral migration treaty with the Philippines. While this is nice for the domestics, one suspects that their Chinese employers will have more influence than Filipina domestics on future Chinese policy on labor migration.

It will be very interesting to see whether the Philippines and China ever conclude their own agreement regulating the employment of Philippine nationals in China. Given China's importance, such an agreement might well become a model. One wonders, for example, whether China would agree to have these workers' wage

55 Brenda Brockman Smith, *China's Use of Forced Labour in Xinjiang: A Wake-Up Call Heard Round the World?*, Council on Foreign Relations (Aug. 26, 2021, 11:24 AM), https://www.cfr.org/blog/chinas-use-forced-labor-xinjiang-wake-call-heard-round-world.

56 Zhang, *supra* note 53.

57 Robyn Magalit Rodriguez, Migrants for Export: How the Philippine State Brokers Labor to the World (2010).

58 Lim v. Offshore Specialty Fabricators, Inc., 404 F.3d 898 (5th Cir. 2005), cert, denied 546 US 826 (2005).

59 Nicole J. Sayres, An Analysis of the Situation of Filipino Domestic Workers (2007), https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-manila/documents/publication/wcms_124895.pdf.

claims arbitrated in the Philippines. If China successfully persuades the Philippines to let local law govern, other countries receiving Philippine migrant labor will be emboldened to follow.

Of course, formal regularization of migrant labor in China does not automatically or typically translate into improved conditions for those workers.[60] Extending labor law protections to migrant workers is a problem in many national systems of labor law.

Conclusion

There is, in short, no currently consistently effective mechanism for protecting workers from labor abuses either inside China, or when Chinese migrate. They are protected by whatever mix of state regulation and union representation they find to hand. While their employment is facilitated by a web of formal private and public agreements, and while recognized global labor rights are seeping slowly into a subset of these agreements, none, as of this writing, is a particularly effective regulatory device against real abuse.

Nevertheless, the International Labour Organization, unions, and worker rights NGOs around the world would be well-advised to pay attention to bilateral trade, investment, and migration treaties which have historically been peripheral to their practice.[61] Of course these treaties include all the countries of the world. But they have recently been the vehicle for Chinese promises on labor rights, particularly ending forced labor, that China has not previously made in contexts where there is any enforcement at all.

The ILO, International Organization on Migration, and global financial institutions such as the World Bank or Asian Development Bank, should propagate model treaty provisions to enforce the basic labor rights in the 1998 Declaration,[62] with particular attention to effective enforcement procedures. At this stage of the game, however, enforcement solely through monitoring and consultation may be necessary to build the trust that will facilitate stronger cooperative solutions in the future.

To my mind, the 1998 Declaration is the most significant development in international labor law in a half-century. It is no secret that the Declaration was designed to get the U.S. into the global labor game, from which it had excluded itself by not ratifying relevant ILO Conventions. The Declaration is significant because it has been carried into corporate codes, global framework agreements, trade law, and the commitments of financial institutions, among other modalities of private enforcement. It has made little difference in ILO daily practice. It certainly has not

60 Xiaojun Feng, *Trapped in Precariousness: Migrant Agency Workers in China's State-owned Enterprises*, 238 China Q. 396 (2019).

61 ILO Recommendation No. 86, Migration for Employment (1949), includes an Annex: Model Agreement on Temporary and Permanent Migration for Employment, including Migration of Refugees and Displaced Persons.

62 *Supra* note 1.

marked any retreat or retrenchment in ILO practice, contrary to predictions made at the time.

Today, the analogous challenge to transnational labor law is to get China into the game. China will increasingly find it to be in its own interest to cooperate with trading partners and rivals on basic labor rights. Diplomats, labor rights advocates, and scholars should be alert to such possibilities; in the near future they will typically take the form of bilateral agreements in which China determines how far it wants to go, rather than readymade conventions or agreements; and enforcement through monitoring and consultation builds, rather than detracts from, the transparency and trust necessary to reach cooperative solutions in a repeated game.