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Investing in Human Rights: Using Bilateral Investment Treaties To Hold Multinational Corporations Liable for Labor Rights Violations

Sharon Hang*

*Fordham Law School

COMMENT

INVESTING IN HUMAN RIGHTS: USING BILATERAL INVESTMENT TREATIES TO HOLD MULTINATIONAL CORPORATIONS LIABLE FOR LABOR RIGHTS VIOLATIONS

Sharon Hang[*]

[*] J.D. Candidate, 2015, Fordham University School of Law; B.A. 2012, University of California, San Diego. The author would like to thank Professor Martin Flaherty for his invaluable knowledge and advice throughout the writing process and the *Fordham International Law Journal* Volume XXXVII Editorial Board, especially the incomparable Joanna Pagones, for their direction and insight. The author would also like to thank Sherrie Hang, Linh Sinh, Karl Bakeman, Elizabeth Huh, Danielle Sawaya, and Joanna Mahfood for their constant love and support.

INTRODUCTION

In August 2010, Foxconn, one of the world's largest electronics producing companies located in China, threw a seemingly inconspicuous parade for its employees as part of an effort to 'boost' their morale.[1] Prior to the parade, at least nine

1. *See* Tom Randall, *Inside Apple's Foxconn Factories*, BLOOMBERG slide 3 (Mar. 30, 2012, 3:36 PM), http://www.bloomberg.com/slideshow/2012-03-30/inside-apple-s-foxconn-factory.html (depicting the employee parade at Foxconn's Longhua campus);

Foxconn employees had committed suicide within a span of three months.[2] In fact, since 2007, some sources have reported that at least seventeen Foxconn employees have committed or attempted to commit suicide.[3]

Since reports of these suicides went public, Foxconn became the subject of multiple exposés and investigations looking at the inner workings of their factories.[4] A majority of the reports have found that the combination of excessive overtime hours, unsafe working conditions, and inadequately training employees on how to handle toxic chemicals transformed Foxconn factories into exceedingly dangerous, and possibly deadly, environments for their employees.[5]

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see also Frederik Balfour & Tim Culpan, *The Man Who Makes Your iPhone*, BUSINESSWEEK MAG., Sept. 9, 2010, http://www.businessweek.com/magazine/content/10_38/b4195058423479.htm (discussing how the parade was a "joint production of employee unions and management . . . as part of an effort to mend the collective psyche of a Chinese workforce").

2. *See* Joel Johnson, *1 Million Workers. 90 Million iPhones. 17 Suicides. Who's to Blame?*, WIRED MAG. (Feb. 28, 2011, 12:00 PM), http://www.wired.com/magazine/2011/02/ff_joelinchina/all (discussing the suicides that occurred at the Foxconn factory in Shenzhen and other parts of China); *see also* Randall, *supra* note 1, slide 9 (discussing how at least ten workers committed suicide in 2010).

3. *See* Charles Duhigg & David Barboza, *In China, Human Costs Are Built into an iPad*, N.Y. TIMES, Jan. 25, 2012, http://www.nytimes.com/2012/01/26/business/ieconomy-apples-ipad-and-the-human-costs-for-workers-in-china.html?pagewanted=all (discussing that at least eighteen Foxconn workers have attempted suicide or "fell from buildings in manners that suggested suicide attempts"); *see also* Johnson, *supra* note 2 (noting that some sources indicate that seventeen Foxconn workers have killed themselves since 2006, although Foxconn has disputed a few of the cases).

4. *See, e.g.*, Liu Zhiyi, *The Fate of a Generation of Workers: Foxconn Undercover*, ENGADGET (Richard Lai trans., May 19, 2010, 7:03 PM), http://www.engadget.com/2010/05/19/the-fate-of-a-generation-of-workers-foxconn-undercover-fully-tr/ (describing the experience of an undercover reporter at a Foxconn factory); Johnson, *supra* note 2 (describing the author's tour of a Foxconn plant in Shenzhen after the suicides); Duhigg & Barboza, *supra* note 3 (describing workers' experiences in a Foxconn factory as part of a series on challenges posed by "globalized high-tech industries"); FAIR LAB. ASS'N, FINAL FOXCONN VERIFICATION STATUS REPORT (Dec. 2013), http://www.fairlabor.org/sites/default/files/documents/reports/final_foxconn_verification_report_0.pdf (detailing the Fair Labor Association's extensive investigation of Apple's supply-chain factories in China).

5. *See* STUDENTS & SCHOLARS AGAINST CORP. MISBEHAVIOUR, FOXCONN AND APPLE FAIL TO FULFILL PROMISES: PREDICAMENTS OF WORKERS AFTER THE SUICIDES 3 (May 6, 2011), http://sacom.hk/wp-content/uploads/2011/05/2011-05-06_foxconn-and-apple-fail-to-fulfill-promises.pdf (examining and summarizing their findings of working conditions at Foxconn factories); *see also* Duhigg & Barboza, *supra* note 3 (discussing how Foxconn employees work excessive overtime, often in "onerous work environments and serious—sometimes deadly—safety problems").

Foxconn is one of Apple's most important manufacturers because of the company's ability to produce massive quantities of consumer electronic products like iPhones and iPads.[6] Due to Apple's close affiliation with Foxconn, the US tech giant was subjected to harsh criticism for failing to realize that one of their leading supply-chain factories engaged in labor rights violations egregious enough to cause workers to commit suicide.[7] In response to the suicides and growing media attention, Foxconn added around three million meters of netting to the sides of their buildings to discourage future suicide attempts and set up employee counseling centers.[8]

Although it is unclear to what extent Apple was aware of these labor violations occurring within their supply chains, the Foxconn-Apple scandal brought to the forefront interesting questions about accountability. Is Apple liable for the labor practices used by factories located in China? Further, *should* Apple be held liable? In more generalized terms, should a corporation be held responsible for possible human rights violations occurring in one of their supply-chains located in another jurisdiction?

The Supreme Court of the United States in *Kiobel v. Royal Dutch Petroleum Company* addressed the question of whether a company should be liable for human rights violations when such violations (1) occur extraterritorially and (2) another party

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6. *See* Duhigg & Barboza, *supra* note 3 (stating that Foxconn is one of Apple's "most important manufacturing partners" because of its ability to manufacture "sufficient numbers of iPhones and iPads"); *see also* Johnson, *supra* note 2 (discussing how Foxconn, a partner of Apple, manufactures most of the world's consumer-electronics products).

7. *See* Scott Sterling, *How Apple's Foxconn Problem Is Like Nike's Sweatshop Problem, and Why the Outcome Is the Same*, DIGITAL TRENDS (Oct. 10, 2012), http://www.digitaltrends.com/apple/how-apples-foxconn-problem-is-like-nikes-sweatshop-problem-and-why-the-outcome-is-the-same (comparing Apple's Foxconn situation to the 1990s Nike sweatshop scandal); *see also* Susan Adams, *Apple's New Foxconn Embarrassment*, FORBES (Sep. 12, 2012, 2:38 PM), http://www.forbes.com/sites/susanadams/2012/09/12/apples-new-foxconn-embarrassment (reporting how Apple is facing criticism amidst the launch of its new iPhone 5 because "of the labor practices that go into making Apple's popular products").

8. *See* Randall, *supra* note 1, slide 9 (depicting Foxconn's anti-suicide nets and discussing how Foxconn hired mental health professionals after the 2010 suicides); *see also* Johnson, *supra* note 2 (discussing Foxconn's anti-suicide nets and its online counseling facilities).

commits these violations.[9] In *Kiobel*, the plaintiffs were residents of Ogoniland, a region located in Nigeria, and the defendants named in the case were the Royal Dutch Petroleum Company and the Shell Transport and Trading Company.[10] Throughout the early 1990s, the Nigerian Army purportedly beat, raped, murdered, and arrested Ogoniland residents as well as destroyed and looted their property.[11] The plaintiffs alleged that the defendants violated the Alien Tort Statute ("ATS") by aiding and abetting the Nigerian Army by providing them with food, transportation, and compensation.[12]

The Supreme Court ultimately found for the defendants and held that the ATS does not apply extraterritorially, in part because, "there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms".[13] Prior to *Kiobel*, lower courts used the ATS as a way to hold corporations liable for violating customary international human rights law.[14] The *Kiobel* decision now makes it more difficult for plaintiffs to hold corporations liable for human rights violations occurring outside the United States unless the claims "touch and concern" the United States with "sufficient force."[15]

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9. *See* 569 U.S. ___, 133 S. Ct. 1659 (2013).

10. *Id.* at 1662.

11. *Id.*

12. *Id.* at 1662–63; 28 U.S.C. § 1350 (2012) (providing that courts "shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States").

13. *See Kiobel*, 133 S. Ct. at 1668–69.

14. *See* Joel Slawotsky, *ATS Liability for Rogue Banking in a Post-*Kiobel *World*, 37 HASTINGS INT'L & COMP. L. REV. 121, 130 (2014) (reviewing how previous Alien Tort Statute ("ATS") cases alleged that corporations engaged or were complicit in acts of extrajudicial execution, torture, war crimes, and crimes against humanity); *see also Alien Tort Statute—Extraterritoriality—*Kiobel v. Royal Dutch Petroleum Co., 127 HARV. L. REV. 308, 308 (2013) [hereinafter *ATS-Extraterritoriality*] (describing how the ATS has been used by "foreign victims of human rights abuses seeking to vindicate their rights under international law in U.S. courts").

15. *See ATS-Extraterritoriality*, *supra* note 14, at 311 (summarizing how, after *Kiobel*, the ATS may only be invoked if "the claims touch and concern the territory of the United States . . . with sufficient force"); *see also* Slawotsky, *supra* note 14, at 132–33 (discussing how the ATS may only be invoked if a claim "touches and concerns" the United States with "sufficient force").

Kiobel is an example of the possible issues that could arise in tandem with the globalization of businesses.[16] When a company is engaged in activities abroad that could give rise to human rights violations, their activities touch on questions of liability, jurisdiction, and regulatory authority. These questions will continue to persist as multinational corporations ("MNCs") become more interested in doing business abroad.[17] Thus, although fifty years ago it may have been odd to discuss the effects MNCs' foreign direct investment ("FDI") have on human rights, globalization has made this an increasingly pressing issue.[18]

Additionally, the advent of bilateral investment treaties ("BITs") has provided immense protections for MNCs' investments into other countries.[19] A BIT is an agreement between two signatory states generally geared towards protecting the rights of investors in order to encourage the flow of FDI

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16. *See, e.g.*, John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 A.J.I.L. 819, 824 (2007) (describing the difficulty of regulating multinational corporations because of the different sets of laws that could apply to these entities). *See generally* Symposium, *The Multinational Enterprise as Global Corporate Citizen*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 1 (2001) (providing an overview of the challenges posed by corporations operating in multiple jurisdictions).

17. *See* Kevin Kolben, *Wal-Mart Is Coming, but It's Not All Bad: Wal-Mart and Labor Rights in its International Subsidiaries*, 12 UCLA J. INT'L L. & FOR. AFF. 275, 278 (2007) ("As countries have liberalized their [foreign direct investment] regulations, foreign [multinational corporations] have been rapidly increasing their investment and operations, particularly in emerging markets, such as China and India."); *see also* Steve R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 459 (2001) (discussing how foreign investment by corporations has "significantly outpaced growth in international trade" because of the protections provided by international investment treaties and agreements).

18. *See* David Shea Bettwy, *The Human Rights and Wrongs of Foreign Direct Investment: Addressing the Need For an Analytical Framework*, 11 RICH. J. GLOBAL L. & BUS. 239, 241–43 (2012) (summarizing the effects that foreign direct investment by multinational corporations have on human rights); *see also* Symposium, *The Multinational Enterprise as Global Corporate Citizen*, *supra* note 16, at 3 (discussing briefly the role multinational companies play in relation to an international civil society).

19. *See Come and Get Me*, ECONOMIST, Feb. 18, 2012, http://www.economist.com/node/21547836 (reporting that Argentina, after facing an economic collapse in 2001, paid US$400 million in arbitration awards to MNC investors that sued Argentina under a BIT); *see also* Megan Wells Sheffer, *Bilateral Investment Treaties: A Friend or Foe to Human Rights?*, 39 DENV. J. INT'L L. & POL'Y 483, 484 (2011) (describing how MNC-investors' bargaining power is strengthened by BITs because these instruments provide them with minimum standards of protection).

between the two nations.[20] Under a BIT, if a government acts and this action affects the value of an investor's FDI, the investor has the right to initiate arbitration proceedings against the state and hold it financially liable for their economic losses.[21] For example, in the early 2000s, multiple investors filed over forty arbitration claims worth hundreds of millions of dollars against the state of Argentina after the country defaulted due to a massive financial collapse.[22] Although the investors do have a right to recover for this depreciation in their investment, Argentina has protested that paying all of the investors would force the country into a second default.[23] BITs have also been invoked to protect the value of an MNC's investment even if doing so could cause massive layoffs and reduce job security for state employees.[24] In both of these examples, although BITs are

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20. *See* Sheffer, *supra* note 19, at 484 (outlining a BIT's structure and purpose of encouraging Foreign Direct Investment ("FDI") between the two signatory-states); *see also* Mary E. Footer, *BITs and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment*, 18 MICH. ST. J. INT'L L. 33, 36–39 (2009) (describing how investment treaties have developed towards promoting and protecting foreign investment).

21. *See, e.g.*, William W. Burke-White, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 407, 408 (Michael Waibel et al. eds., 2010) (reporting how a number of investors filed million dollar arbitration claims against Argentina in 2001 even though the state was in the throes of an economic collapse); *see also* Sheffer, *supra* note 19, at 496 (providing a brief overview of how the threat of arbitration proceedings from an MNC can stifle a state's regulatory power).

22. *See* Footer, *supra* note 20, at 40–41 (discussing how, after Argentina's economic crisis in the early 2000s, Argentina faced liabilities estimated up to US$80 billion); *see also* Ken Parks, *Argentina Reaches $677M Investment Dispute Settlement—Government*, WALL ST. J. (Oct. 18, 2013, 9:54 AM), http://online.wsj.com/article/BT-CO-20131018-705467.html (reporting that Argentina agreed to a US$677 million settlement with investors who brought arbitration proceedings against the state as a result of Argentina's default).

23. *See* Parks, *supra* note 22 (reporting that Argentina's president is negotiating with investors to settle their claims or risk defaulting the state a second time); *see also Argentina Tries to Delay $1.3bn Repayment to Creditors*, BBC (Feb. 19, 2014, 2:28 PM), http://www.bbc.com/news/business-26225135 (stating that if Argentina's petition to stall its creditor repayments fails, another default could occur).

24. Petition to Arbitral Tribunal by the Canadian Union of Postal Workers & of the Council of Canadians, In the Matter of a Claim under Chapter 11, Section B of the North American Free Trade Agreement, *United Parcel Service of America, Inc. v. Canada, Petition to the Tribunal* 7–8 (Nov. 8, 2000), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/ups-04.pdf (arguing that, in an arbitration proceeding between Canada and an MNC, a decision in favor of the MNC would force Canada to restructure their national postal service, which could seriously impact workers by causing major layoffs and affecting job security).

purely commercial instruments, they have been invoked in a way that challenges a state's authority to regulate in areas that affect the wider public.[25]

In July 2013, the United States and China announced that they were in "substantive negotiations" to finalize a US-China BIT.[26] If a US-China BIT is finalized, it is likely that FDI will increase between the two nations.[27] Whether or not a US-China BIT would negatively affect China's regulatory authority remains unclear. China, however, already has such a notorious reputation for insufficiently protecting workers that it is widely known as the "world's sweatshop."[28] The recent Foxconn scandal helped to again highlight this history of permitting abusive labor practices, particularly in factories that produce products for MNCs.[29] This history of poor worker protection,

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25. *See* Footer, *supra* note 20, at 41 (summarizing investor-state arbitration cases that affected non-commercial areas, such as access to water, environmental, and public health concerns); *see also* Sheffer, *supra* note 19, at 492 (discussing how developing states enter into BITs without fully understanding how the treaty could constrain the state's regulatory power).

26. *See* Chen Weihua, *Key Investment Talks to Restart*, CHINADAILY USA (July 13, 2013, 12:57 AM), http://usa.chinadaily.com.cn/world/2013-07/13/content_16770015.htm (discussing how the United States and China agreed to restart negotiations for a BIT); *see also* Betsy Bourassa, *U.S. and China Breakthrough Announcement on the Bilateral Investment Treaty Negotiations*, TREASURY NOTES BLOG (July 15, 2013), http://www.treasury.gov/connect/blog/Pages/U.S.-and-China-Breakthrough-Announcement-.aspx (reporting that the United States and China have restarted BIT negotiations).

27. *See* US-CHINA ECON. & SEC. REVIEW COMM'N, EVALUATING A POTENTIAL US-CHINA BILATERAL INVESTMENT TREATY: BACKGROUND, CONTEXT, AND IMPLICATIONS 11 (Mar. 30, 2010), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1738&context=key_workplace (explaining how the creation of a BIT generally leads to an increase in FDI between the two signatory nations); *see also* Sheffer, *supra* note 19, at 485 (describing how foreign investment and BITs have grown in tandem).

28. *See* Joseph Kay, *China: Trouble in the World's Sweatshop*, LIBCOM (Aug. 23, 2010, 2:45 PM), http://libcom.org/news/china-trouble-worlds-sweatshop-23082010 ("For nearly three decades, corporations have increasingly relocated manufacturing to China to take advantage of a vast supply of cheap labour and lax regulation."); *see also* CHINA LABOR WATCH, TRAGEDIES OF GLOBALIZATION: THE TRUTH BEHIND ELECTRONICS SWEATSHOPS 107 (2012) [hereinafter TRAGEDIES OF GLOBALIZATION], *available at* http://chinalaborwatch.org/pdf/20110712.pdf (comparing factories in China to "sweatshops previously found in 19th century industrial England").

29. *See* TRAGEDIES OF GLOBALIZATION, *supra* note 28, at 1 (explaining how explosions in Chinese factories have been common for the past decade); *see also* David Barboza, *In Chinese Factories, Lost Fingers and Low Pay*, N.Y. TIMES, Jan. 5, 2008, http://www.nytimes.com/2008/01/05/business/worldbusiness/05sweatshop.html?pagewanted=all (stating that despite nearly a decade's worth of efforts "to eliminate

combined with MNCs' use of BITs to fiercely protect their economic interests, could indicate that a US-China BIT may prove catastrophic for any labor rights movement in China.[30] If a US-China BIT is signed and finalized, this Comment argues that it should contain strong provisions that place affirmative duties on signatory-nations and MNC investors to staunchly protect workers' rights, as well as provide the state and investors with an avenue through which to enforce these obligations.

Part I describes China's labor and employment laws, relevant international labor standards promulgated by the International Labour Organization ("ILO"), and the international investment regime. Part II first discusses how factories in China, particularly those in contract with MNCs, regularly violate labor and employment laws, and then discusses how BITs have primarily been used to protect the interests of MNC investors. Lastly, Part III argues that BITs should incorporate stronger provisions safeguarding and upholding workers' rights that could be used to hold MNCs liable for causing labor rights violations, directly or indirectly.

I. *BACKGROUND ON CHINA'S LABOR AND EMPLOYMENT LAWS, ILO "SOFT LAW" STANDARDS, AND THE INTERNATIONAL INVESTMENT REGIME*

This Part lays out the background of relevant labor and employment laws in force in China, as well as the basic structure of investment treaties. Part I.A provides background information on the 1994 Labor Law. Part I.B then discusses China's changes to their employment laws in 2008. Parts I.C and I.D detail the Trade Union Law and China's regulations of collective contracts, respectively. Part I.E next describes relevant labor standards promulgated by the ILO. Lastly, Part I.F provides a

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sweatshop labor conditions in Asia, worker abuse is still commonplace in many of the Chinese factories that supply Western companies").

30 . *See* CHINA LABOR WATCH, BEYOND FOXCONN: DEPLORABLE WORKING CONDITIONS CHARACTERIZE APPLE'S ENTIRE SUPPLY CHAIN 3 (2012) [hereinafter CHINA LABOR WATCH, BEYOND FOXCONN], *available at* http://www.chinalaborwatch.org/pdf/2012627-5.pdf (concluding that "serious work-related injuries and worker suicides" are pervasive throughout Apple's factories in China); *see also* Sheffer, *supra* note 19, at 484 (discussing how BITs empower MNCs because MNCs could use the "threat of a multi-million dollar adverse arbitration decision" to pressure states into placating MNCs and their economic interests).

brief history of the development of international investment agreements.

A. *China's 1994 Labor Law*

In 1994, China passed its first law regulating employer and employee relationships.[31] The 1994 Labor Law requires an individual employment contract to be signed whenever an employer and employee relationship is created.[32] These employment contracts are required to contain generalized provisions pertaining to a job's duration, its responsibilities, wages, and workplace safety guarantees.[33] Employment contracts must also have provisions detailing disciplinary proceedings, conditions for termination, and consequences for violating the contract.[34]

The 1994 Labor Law also outlines the substantive requirements of employment contracts.[35] For instance, the law generally provides that the "State shall implement a system of guaranteed minimum wages" and that a worker's wages "shall not be lower than the local standards of minimum wages."[36] The law also states that workers are not permitted to work more than

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31. *See* Virginia Harper Ho, *From Contracts to Compliance? An Early Look at Implementation Under China's New Labor Legislation*, 23 COLUM. J. ASIAN L. 35, 45–46 (2009) ("The foundation of modern Chinese labor and employment law is the national Labor Law, which took effect on January 1, 1995."); *see also* Baogang Guo, *China's Labor Standards: Myths and Realities*, CHINA RESEARCH CENTER 2 (Feb. 7, 2003), *available at* http://www.academia.edu/165449/Chinas_Labor_Standards_Myths_and_Realities ("*The Labor Act of 1994* is the first comprehensive labor standards law in China.").

32. 1994 Laodong Fa (勞動法) [1994 Labor Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995) P.R.C. LAWS & REGS art. 16, *translated in* http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383754.htm ("A labour contract shall be concluded where a labour relationship is to be established.").

33. 1994 Labor Law, *supra* note 32, art. 19 (listing clauses that must be included in an employment contract, including clauses on the job's duration, the job's responsibilities, and working conditions).

34. *Id.* (requiring employment contracts to include clauses relating to disciplinary proceedings, conditions for terminating the contract, and the sanctions for violating the contract).

35. *Id.* arts. 36–65 (outlining the substantive requirements for employment contract provisions, such as provisions on wages, working hours, and workplace safety standards).

36. *Id.* art. 48 (stating that employees shall not be paid a wage lower than the state's minimum wage).

eight hours per day or more than forty-four hours per week.[37] In cases where an employer needs to extend working hours, the employer may do so after consulting with the labor union and the workers.[38] Overtime must not exceed thirty-six hours per month but exceptions are allowed for unexpected circumstances like a natural disaster.[39] The 1994 Labor Law also states that the employment contract should specify the job's duration as either a fixed term, non-fixed term, or based on the completion of a specific project.[40]

The 1994 Labor Law provides workers with additional rights. Under the 1994 Law, for example, workers have a right to rest, to take vacations, and a right to work in an environment that is safe and does not endanger their health.[41] Workers also have the right to participate in and organize labor unions that must "represent and safeguard the legitimate rights and interests of all labourers."[42] Through unionization, workers have the right to negotiate with employers on "equal footing."[43] Further, workers have the right to request assistance and support from a labor union in arbitration or court proceedings over wrongful termination claims.[44] Workers also have the right to engage in collective negotiations with the employer to create a collective contract.[45] These collective contracts set out minimum standards pertaining to wages, working hours, rest hours, vacations, and workplace safety requirements that each

37. *Id.* art. 36 ("The State shall practise a working hour system wherein labourers shall work for no more than eight hours a day and no more than 44 hours a week on the average.").

38. *Id.* art. 41 (allowing employers to extend working hours after consulting with the labor union and the workers).

39. *Id.* arts. 41–42 (permitting employees to work only one overtime hour per day and a maximum of thirty-six overtime hours per month, with exceptions for certain extenuating circumstances, such as a natural disaster or a slow-down in production that would affect the public interest).

40. *Id.* art. 20 ("The term of a labour contract is classified into fixed term, non-fixed term and the completion of a specific assignment as a term.").

41. *Id.* art. 3 (stating that workers shall have the right to rest, to take vacations, and to a safe and healthy workplace environment).

42. *Id.* arts. 7–8 (giving workers the right to participate in and organize labor unions and requiring unions to represent workers' rights and interests).

43. *Id.* (requiring employers to negotiate on "equal footing" with employees).

44. *Id.* art. 30 (giving workers the right to receive assistance and support from labor unions in arbitrations or lawsuits over wrongful termination claims).

45. *Id.* art. 33 (stating that workers have the right to negotiate for a collective contract with employers).

individual employment contract must meet.[46] In other words, an individual employment contract cannot contain clauses that are less protective than the ones contained in a collective contract.[47] Lastly, the new law provides that workers have the right to initiate proceedings in a mediation committee, an arbitration committee, or a court, should any dispute arise between the worker and employer.[48]

To ensure compliance, the 1994 Labor Law imposes obligations on both employers and the Ministry of Labor and Social Security ("MLSS"), China's administrative department of labor. The MLSS is charged with regulating and managing workers and their relationships with employers.[49] Employers are expected to establish new workplace rules that comply with the 1994 Labor Law.[50] The MLSS must also take steps to help enforce compliance with the law in order to adequately protect workers against employers.[51] Specifically, the MLSS must ensure that employers are complying with the new law and it is required to address and rectify situations in which a violation does occur.[52] For example, the MLSS can issue a warning and order the employer to provide compensation to any worker harmed by an employment law violation.[53] Further, employers who use

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46. *Id.* (listing out the terms that may be included in a collective contract, such as provisions on wages, work hours, workplace safety requirements, rest, and vacation).

47. *Id.* art. 35 ("The standards of working conditions and labour remuneration agreed upon in labour contracts concluded between individual labourers and the enterprise shall not be lower than those stipulated in the collective contract.").

48. *Id.* art. 79 (giving workers the right to resolve disputes with their employers in a mediation or arbitration tribunal and, as a last resort, to bring the dispute to a court if any party is unsatisfied with the mediation or arbitration decision).

49. *Ministry of Labor and Social Security*, GOV.CN, http://english.gov.cn/2005-10/02/content_74185.htm ("The [MLSS] . . . is in charge of labor force management, labor relationship readjustment, various items of social insurance management and legal construction of labor and social security.").

50. 1994 Labor Law, *supra* note 32, art. 4 ("The employing units shall establish and perfect rules and regulations in accordance with the law . . . .").

51. *Id.* art. 5 (requiring the state to take "various measures to promote employment . . . lay down labour standards . . . and gradually raise the living standard of labourers").

52. *Id.* art. 85 (requiring the MLSS to "supervise and inspect the implementation of laws, rules and regulations on labour by the employing unit, and have the power to stop any acts that run counter to laws, rules and regulations on labour and order the rectification thereof").

53. *Id.* art. 89 ("Where the rules and regulations on labour formulated by the employing unit run counter to the provisions of laws, rules and regulations, the

violence or intimidation against employees can be criminally sanctioned and subjected to a warning, a fine, or a fifteen-day detention.[54] Employers who force their employees to work in an unsafe workplace environment may also be similarly sanctioned.[55]

B. *Changes to China's Employment Law in 2008*

After the passage of the 1994 Labor Law, widespread changes in labor conditions were not immediately realized.[56] With employers attempting to bypass the law through the extensive use of dispatched workers (workers hired through an intermediary employment agency), arrangements for which individual employment contracts were not explicitly required, many employer-employee relationships failed to culminate in a contract.[57] In other cases, employers disregarded the law altogether.[58]

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administrative department of labour shall give a warning to the unit, and order it to make corrections; where any harms have been caused to labourers, the unit shall be liable for compensation.").

54. *Id.* art. 96 (providing that if an employer uses intimidation or violence against employees, the employer could be punished with a fifteen day detention, a fine, or a warning).

55. *Id.* art. 93 (stating that employers who compel their workers to work in an unsafe workplace environment "shall be investigated for criminal responsibility").

56. *See* Sara Biddulph, *Responding to the Industrial Unrest in China: Prospects for Strengthening the Role of Collective Bargaining*, 34 SYDNEY L. REV. 35, 41 (2012) (explaining how, despite the passage of the 1994 Labor Law, many workers still did not have an employment contract); *see also* Dr. Louise Willans 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) (discussing briefly how the 2008 reforms were enacted in order to address the myriad problems still faced by workers in China despite the 1994 Labor Law).

57. *See* Harper Ho, *supra* note 31, at 66 ("In keeping with global trends toward more flexible and less stable employment relationships, employers in China also now rely extensively on informal, part-time, temporary, or subcontracted workers, arrangements which are not fully addressed under the 1994 Labor Law."); *see also Beijing Tightens Loophole on Hiring Temporary Workers*, REUTERS (Dec. 28, 2012, 6:59 AM), http://www.reuters.com/article/2012/12/28/us-china-labor-idUSBRE8BR041201 21228 (discussing how employers in China are more frequently using workers hired via intermediary agencies in order to avoid complying with the new employment laws).

58. *See* Biddulph, *supra* note 56, at 40 (explaining how the 1994 Labor Law "failed to provide adequate protection from abusive practices especially to the ever growing number of workers leaving rural areas to find work in construction, small and medium-sized private enterprises, labour-intensive and export-oriented industries"); *see also* Li Jing, *China's New Labor Contract Law and Protection of Workers*, 32 FORDHAM INT'L L.J.

China enacted new employment legislation in 2008 that helped to address some of the shortcomings from the 1994 Labor Law.[59] First, China passed the Labor Dispute Mediation and Arbitration Law ("LMAL") that provides workers and employers with clearer guidelines about how to resolve labor disputes.[60] Second, the Employment Promotion Law ("EPL") recognizes a worker's right to work and to receive assistance from the government when looking for a job.[61] Third, the Labor Contract Law ("LCL") forms the core of the new legislation by improving on the 1994 Labor Law.[62]

1. Labor Dispute Mediation and Arbitration Law

The LMAL was enacted to help resolve disputes between employers and employees in a way that would protect the interests and rights of both parties.[63] The law is applicable to disputes over wages, work hours, rest and vacation terms, the safety of the workplace environment, expenses for job-related injuries, and other work-related damages. [64] The LMAL

1083, 1110–12 (2009) (discussing how employers did not sign individual employment contracts with workers so as to avoid the 1994 Labor Law's substantive requirements).

59. *See* Harper Ho, *supra* note 31, at 38 ("In 2008, however, three new primary labor laws took effect that together represent the first major retooling of China's labor legislation since its national Labor Law was enacted in 1994 . . . ."); *see also* Jing, *supra* note 58, at 1106 ("The Labor Contract Law purports to draw upon China's twenty-year-plus experience with labor contract practices and sets out to respond to some of the manifest deficiencies of the Labor Law.").

60. Dui Laodong Zhengyi Tiaojie Zhongcai Fa (對勞動爭議調解仲裁法) [Labor Dispute Mediation and Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2007, effective May 1, 2008) P.R.C. LAWS & REGS art. 1, *translated at* http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471614.htm (stating that this law was "enacted in order to resolve labor disputes in an impartial and timely manner").

61. Jiuye Cujin Fa (就業促進法) [Employment Promotion Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Jan. 1, 2008) P.R.C. LAWS & REGS arts. 3, 52, *translated at* http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471590.htm (recognizing a worker's right to work and requiring the state to assist workers in finding jobs).

62. Laodong Hetong Fa (勞動合同法) [Labour Contract Law] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2007, effective Jan. 1, 2008) P.R.C. LAWS & REGS art. 1, *translated at* http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471106.htm (announcing that the law was enacted to improve on the employment contract system).

63. Labor Dispute Mediation and Arbitration Law, *supra* note 60, art. 1 (stating that the LMAL was enacted to "protect the lawful rights and interests of the parties").

64. *Id.* art. 2 (describing the disputes which the LMAL regulates).

emphasizes that workers have rights when they are in a dispute consultation with an employer, such as the right to ask a labor union or third party to participate in the consultation.[65] Further, if a dispute involves ten or more workers requesting the same form of relief, the workers can choose one worker to act as the worker representative during any mediation, arbitration, or litigation proceedings.[66] The LMAL also gives workers the right to file a complaint with the MLSS if an employer fails to pay wages or other monetary damages for job-related injuries.[67]

The LMAL sets out specific guidelines on how employees and employers should resolve an employment dispute. First, workers may resolve the dispute by consulting with their employer.[68] If the consultation does not lead to a satisfactory resolution, the parties may file an application with a mediation committee.[69] In mediation, the worker is represented by a worker representative who is either someone from the labor union or a person designated by the workers to serve as the worker representative.[70] The mediator must be either a representative from the labor union or a person chosen by both parties.[71]

If mediation fails to resolve the dispute within fifteen days of when the mediation application was first filed, or if one of the parties fails to comply with a mediation settlement's terms,

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65. *Id.* art. 4 (explaining that, should a dispute arise, workers may ask a union or third-party to join in on a consultation with the employer).

66. *Id.* art. 7 (giving workers the right to choose a worker representative in disputes involving ten or more workers).

67. *Id.* art. 9 (providing that, when an employer "defaults in the payment of labor remuneration or . . . defaults in the payment of medical expenses for job-related injury, economic compensation or damages, the worker concerned may make a complaint to the administrative department of labor").

68. *Id.* art. 4 ("When a labor dispute arises, the worker concerned may have a consultation with the employing unit . . . .").

69. *Id.* art. 5 ("Where a labor dispute arises and the parties are not willing to have a consultation, or the consultation fails, or the settlement agreement reached is not performed, they may apply to a mediation institution for mediation.").

70. *Id.* art. 10 (requiring the worker representative in a mediation proceeding to be a member of the union or someone designated by all the employees).

71. *Id.* ("The director of the labor-dispute mediation commission of the enterprise shall be a trade union member or a person chosen by both parties.").

either party may apply for arbitration.[72] Arbitration differs from mediation in that, in an arbitration proceeding, representatives for the MLSS, the labor union, and the employers comprise the arbitration commission.[73] The number of arbitrators on an arbitration commission must be an odd number.[74] The LMAL does not explain how arbitrators are chosen, but does require arbitrators to have some legal experience or experience with working in a labor union or human resources management position.[75] Although the LMAL is silent as to which party should pay for mediation or litigation, the government is required to pay any fees incurred by either party during an arbitration proceeding.[76] If a party is dissatisfied with an arbitration decision, litigation may be used as a last resort.[77] Workers can initiate litigation challenging an arbitral award within fifteen days from when the arbitral award was issued while employers can only challenge an arbitral award under certain specified circumstances.[78]

2. The Employment Promotion Law

The EPL emphasizes that workers have the right to work and to choose a job.[79] The EPL further provides workers with rights and assistance when it comes to obtaining a job by requiring the government to provide information and resources to workers looking for employment.[80] Local governments must also provide workers with free consultations detailing

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72. *Id.* art. 14 (providing that if the parties do not reach a mediation agreement within fifteen days or the mediation agreement does not provide satisfactory results, either party may apply for arbitration).

73. *Id.* art. 19 (stating that an arbitration proceeding shall be composed of representatives for the MLSS, the labor union, and the employer).

74. *Id.* (requiring an odd number of arbitrators to serve on an arbitration commission).

75. *Id.* art. 20 (listing out the requirements for arbitrators).

76. *Id.* art. 53 ("Arbitration of labor disputes is free of charge.").

77. *Id.* art. 5 (providing that if either party is dissatisfied with an arbitral award, it "may initiate a litigation").

78. *Id.* arts. 48–49 (stating that a worker who is dissatisfied with an arbitral award may challenge it in court, while employers may only challenge arbitral awards under listed circumstances).

79. Employment Promotion Law, *supra* note 61, art. 3 (upholding a worker's right to work and the right to choose a job).

80. *Id.* art. 7 (requiring the state to assist workers in finding a job).

employment policies and regulations.[81] Labor unions, and other public organizations, must also provide workers looking for jobs with support and assistance.[82]

More importantly, the EPL has extensive provisions requiring intermediaries to respect workers' rights and interests.[83] Intermediaries, or labor dispatch companies, contract with individual employees and dispatch these employees as needed to different worksites.[84] Since workers sign contracts directly with the intermediary, employers are not required to sign individual employment contracts with these dispatched workers and thus owe them no contractual obligations.[85]

The EPL further regulates intermediaries by requiring them to register with the administrative department for industry and commerce.[86] Intermediaries are also prohibited from lying to employees or employers, working with employers operating illegally, and withholding a worker's identification materials or other documents.[87] If an intermediary violates any of the provisions laid out in the EPL, the intermediary may be

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81. *Id.* art. 35 (obligating governments at the county level to provide information about employment laws and regulations to workers).

82. *Id.* art. 9 (requiring labor unions and other public organizations, like women's groups or disabled person's groups, to help protect and support workers' right to work).

83. *Id.* art. 39 (stating that intermediaries "are prohibited from infringing on the legitimate rights and interests of the workers" who use their services).

84. *See Labor Dispatch System in Reform: Window on the South (南风窗)*, CHINA LAB. NEWS TRANSLATION 1 (Mar. 17, 2011), http://www.clntranslations.org/file_download/139 (describing how intermediaries contract directly with the employee and subsequently dispatch these employees to employers); *see also* Dexter Roberts, *Why China's Factories Are Turning to Temp Workers*, BUS. WK., Mar. 8, 2012, http://www.businessweek.com/articles/2012-03-08/why-chinas-factories-are-turning-to-temp-workers ("'Labor dispatch' companies recruit workers and send them as temporary staff to factories in need.").

85. *See Labor Dispatch System in Reform*, *supra* note 84, at 2 (explaining how employers have avoided compliance with employment laws through the use of dispatched or temporary contract employees); *see also* Roberts, *supra* note 84 (reporting that employers are more frequently using dispatched workers in order to avoid complying with employment laws).

86. Employment Promotion Law, *supra* note 61, art. 40 (requiring intermediaries to seek permission from and register with the administrative department of industry and commerce).

87. *Id.* art. 41 (prohibiting intermediaries from providing false information, working with employers operating illegally, or withholding a worker's documents).

subjected to a fine.[88] If an intermediary charges a worker for using its services, the MLSS must order the intermediary to reimburse the worker and fine the intermediary at least CNY¥500 (approximately US$81).[89]

3. The Labor Contract Law

The LCL, echoing the 1994 Labor Law, requires employers and employees to sign individual employment contracts.[90] This law applies to fixed-term employment contracts, open-ended employment contracts, and employment contracts that expire upon the completion of a specified task.[91] Unlike the 1994 Labor Law, the LCL defines fixed-term and open-ended contracts and gives workers the right to negotiate with their employers over the length of these terms.[92] An employment contract is required to contain terms pertaining to work hours, rest breaks, vacation hours, wages, and occupational health and safety standards.[93] If an employer and employee fail to conclude a written employment contract within one year of when the worker was first hired, an open-ended contract is automatically created.[94]

The LCL establishes default terms for employment contracts should an employer fail to create one with an individual employee. For instance, if an employee has started working without an individual employment contract, the employee's wage is based on the rate specified in the collective

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88. *Id.* arts. 65–66 (stating that intermediaries may be fined for providing false information, withholding a worker's documents, or operating without permission).

89. *Id.* art. 66 (requiring the MLSS to fine an intermediary CNY¥500 but not more than CNY¥2,000 if the intermediary forces a worker to pay a deposit for using its services).

90. Labour Contract Law, *supra* note 62, art. 10 ("To establish a labor relationship, a written labor contract shall be concluded.").

91. *Id.* art. 12 ("Labor contracts consist of fixed-term labor contracts, open-ended labor contracts and labor contracts that expire upon completion of given jobs.").

92. *Id.* arts. 13–14 (defining fixed-term contracts as contracts with specified end dates agreed upon by the employees and employers, and defining open-ended employment contracts as contracts where the employees and employers agree to not fix an end date).

93. *Id.* art. 17 (listing the terms required in employment contracts).

94. *Id.* art. 14 (providing that an employment contract is automatically created if an employer "fails to conclude a written [employment] contract with a worker within one year").

contract or, if the collective contract does not address wages, local minimum wage standards.[95] Further, if a dispute arises over hours or workplace safety issues and the employer and employee cannot reach an agreement, the provisions in the collective contract shall apply and, if there is no collective contract, local laws on hours and working conditions apply.[96]

The LCL also provides workers with the right to revoke the employment contract in whole or in part if the contract was created through misrepresentation or coercion or contains provisions waiving an employer's obligations under relevant employment laws and regulations.[97] Even if an employment contract or a provision of the contract is revoked, an employer must still pay the worker for any work performed by using the average wage paid to similarly situated employees.[98] A worker is also given the right to revoke their contract if an employer fails to provide safe working conditions, pay wages on time and in full, or otherwise impairs a worker's interest or rights in any way.[99] If an employer uses violence or intimidation to compel a worker to work, the worker has the right to revoke the employment contract without notifying the employer in advance. [100] Lastly, the LCL gives workers the right to immediately petition the court for relief if the employer fails to pay wages on time rather than going through an extensive mediation and arbitration process first.[101]

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95. *Id.* art. 11 (stating that the collective contract or local minimum wage standards shall be used as default terms if an employee is working without an individual employment contract).

96. *Id.* art. 18 (discussing how, if an employer and employees fail to reach a resolution during a dispute about hours or working conditions, relevant collective contract provisions or local laws will apply as default terms).

97. *Id.* art. 26 (invalidating an employment contract or parts of an employment contract obtained through misrepresentation or coercion or if it contains provisions waiving an employer's obligations to comply with employment laws).

98. *Id.* art. 28 (requiring the employer to pay workers for any work performed under an employment contract, even if the employment contract is later invalidated).

99. *Id.* art. 38 (providing employees with the right to revoke an employment contract if the employer fails to provide safe working conditions, pay wages on time and in full, or abide by relevant employment laws and regulations).

100. *Id.* ("If an employing unit forces a person to work by resorting to violence, intimidation or illegal restriction of personal freedom . . . , [the worker] may revoke the labor contract forthwith without notifying the employing unit of the matter in advance.").

101. *Id.* art. 30 (stating that, if an employer defaults in paying wages, the worker may petition a court to order the employer to pay).

The LCL further restricts employers by prohibiting them from immediately terminating an employee who cannot work due to a work-related injury or who is on medical leave.[102] Employers also cannot immediately fire a worker who has worked for the employer continuously for fifteen years and is five years away from reaching retirement age.[103] In other words, Article 42 of the LCL protects groups of employees, like the injured and the elderly, from being immediately fired by an employer unless there is some exceeding justification for the termination. In any other circumstance, an employer may fire the employee after providing notice thirty days in advance or paying the employee an extra month's salary.[104] Employers must inform their employees about any workplace rules, regulations, and decisions that have a direct bearing on the workers' immediate interests.[105] Employers must provide employees with accurate information about the job's occupational hazards and safety issues and remuneration guidelines, as well as any other information the worker requests.[106] Under the LCL, employers cannot violate labor quotas or compel workers to work overtime. [107] The LCL also provides more protections for dispatched workers by requiring intermediaries to sign at least a two-year, fixed-term contract with each dispatched worker, to pay wages on a monthly basis, and to specify the length of time a dispatched worker can work at a specific worksite. [108]

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102. *Id.* art. 42(1)–(2) (prohibiting employers from terminating an employment contract with an employee who cannot work due to a work-related injury or an illness).

103. *Id.* art. 42(5) (stating that employers may not immediately fire a worker who had worked with the employer for fifteen years and is five years away from retirement age).

104. *Id.* arts. 40, 42 (listing the circumstances under which an employer must either provide notice to a worker before terminating an employment contract or pay an extra month's salary).

105. *Id.* art. 4 ("The employing unit shall make public or inform the workers of the rules and regulations, and the decisions on important matters, which have a direct bearing on the immediate interests of the workers.").

106. *Id.* art. 8 ("When an employing unit recruits a worker, it shall truthfully inform him of the job description, the working conditions, the place of work, occupational hazards, conditions for work safety, labor remuneration and other matters which the worker requests to be informed of.").

107. *Id.* art. 31 (barring employers from violating labor quotas or compelling employees to work overtime).

108. *Id.* arts. 58–59 (requiring intermediaries to sign two-year, fixed-term contracts with each worker, pay workers on a monthly basis, and to specify how long each worker will stay at a worksite).

Intermediaries are prohibited from charging workers a fee for using their services and from pocketing any of the workers' wages.[109]

Employers must consult with the union or a chosen workers' representative before making any decision that might affect the immediate interests of workers, such as decisions relating to remuneration, work hours, rest and vacation times, occupational safety and health standards, worker's insurance and welfare, training, disciplinary proceedings, and labor quotas.[110] For example, if an employer needs to cut employment by more than twenty persons or more than ten percent of the total number of employees, the employer may do so only after consulting with the union or all of the employees thirty days prior.[111] An employer, however, is allowed to significantly cut down their workforce only if it is absolutely necessary, such as if the company is facing dire production and management issues or cannot afford to keep the same amount of workers.[112]

The LCL reiterates that workers have the right to negotiate for a collective contract with their employers.[113] A labor union or, if a labor union has not yet been established, a worker representative elected by the workers, must sign off on the collective contract.[114] In contrast to the 1994 Labor Law, the LCL further provides that the MLSS must approve a collective contract before it becomes effectuated.[115]

The LCL gives labor unions a more active role in representing workers' rights by permitting unions to immediately initiate arbitration or litigation proceedings against

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109. *Id.* art. 60 (prohibiting intermediaries from charging workers a fee or from pocketing a worker's wages).

110. *Id.* art. 4 (requiring employers to consult with either the labor union or a workers' representative before making any decision that might affect workers' interests and rights).

111. *Id.* art. 41 (stating that if an employer fires a certain number or percentage of their workforce, the employer must do so after notifying the labor union or all the employees at least thirty days in advance).

112. *Id.* (allowing employers to lay off a significant portion of their workforce only if the company is facing major production, management, or financial issues).

113. *Id.* art. 51 (giving workers the right to negotiate for a collective contract).

114. *Id.* (stating that a collective contract must be approved by either a labor union or by a worker representative elected by the workers).

115. *Id.* art. 54 (requiring the MLSS to approve a collective contract before it becomes valid).

an employer in disputes over collective contract provisions.[116] If a worker individually brings an arbitration or litigation proceeding against an employer, labor unions must provide the worker with support and assistance.[117] Labor unions must also provide assistance and guidance to workers who are in negotiations with an employer to create an individual employment contract.[118] The LCL also requires labor unions to supervise employers to ensure that they are abiding by the terms of an individual employment contract or the collective contract.[119]

The LCL sets out more specific penalties for employers and intermediaries who violate the law. If an employer fails to conclude an individual employment contract with a worker, the employer must pay the worker two times his salary for each month the worker has worked without an employment contract for up to a year, at which point an open-ended contract is automatically created.[120] In cases where an employer withholds wages from an employee or fails to pay adequate overtime wages, the MLSS must order the employer to pay these wages, and if the employer continues to withhold wages the MLSS can order the employer to pay additional compensation. [121] If an intermediary withholds a worker's identification cards or other documents, the MLSS must order the intermediary to return these documents.[122] If an intermediary commits a particular serious violation of the LCL, the MLSS must fine the

116. *Id.* art. 56 (giving labor unions the power to directly initiate arbitration or litigation proceedings against an employer in a dispute over the provisions of a collective contract).

117. *Id.* art. 78 ("Where a worker applies for arbitration or brings a lawsuit, the trade union concerned shall provide him with support and assistance . . . .").

118. *Id.* art. 6 ("The trade union shall give assistance and guidance to the workers in lawfully concluding labor contracts with the employing unit . . . .").

119. *Id.* art. 78 (requiring labor unions to "supervise the performance of labor contracts and collective contracts by the employing units" in order to protect the rights and interests of workers).

120. *Id.* art. 82 (ordering employers to pay a worker twice their salary per month and automatically creating an open-ended contract after a year).

121. *Id.* art. 85 (requiring the MLSS to order employers to pay employees any back-wages and additional compensation if the employer continues to withhold wages).

122. *Id.* art. 84 (requiring the MLSS to order intermediaries to return any documents provided to the intermediary by an employee).

intermediary at least CNY¥1000 (approximately US$162) but not more than CNY¥5000 (approximately US$80).[123]

C. *China's Laws Governing Labor Unions: The Trade Union Law*

The 1992 Trade Union Law ("1992 TUL") first codified China's unions' right to initiate collective contract negotiations with employers.[124] The 1992 TUL was amended in 2001 ("2001 TUL"), and these amendments strengthened workers' rights to join and participate in a labor union.[125] The 2001 TUL generally provides that a labor union must protect the interests and rights of workers while simultaneously protecting China's overall state interests.[126] Under the 2001 TUL, labor unions must listen to workers' complaints, voice workers' demands and opinions, and "help them solve their difficulties and serve them wholeheartedly."[127] Like the LCL, the 2001 TUL gives labor unions the right to initiate consultation, arbitration, and then litigation proceedings directly against the employer if the employer violates a worker's rights or interests.[128] The 2001 TUL provides further protections for workers who join a union by granting the MLSS the power to order the employer to reinstate the employee and pay any back wages in the event of a labor or

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123. *Id.* art. 92 (requiring the MLSS to fine an intermediary at least CNY¥1000 for particularly serious violations but not more than CNY¥5000).

124. *See* Ronald C. Brown, *China's Collective Contract Provisions: Can Collective Negotiations Embody Collective Bargaining?*, 16 DUKE J. COMP. & INT'L L. 35, 37 (2006) ("The 1992 Trade Union Law in fact first authorized unions at the enterprise level to conclude collective contracts with the employer."); *see also* 1992 Gonghui Fa (工會法) [1992 Trade Union Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 3, 1992, effective Apr. 3, 1992) P.R.C. LAWS & REGS art. 6, *translated at* http://english.mofcom.gov.cn/aarticle/lawsdata/chineselaw/200211/20021100053571.html (codifying labor unions' obligation to represent the interests and rights of workers).

125. 2001 Gonghui Fa (工會法) [2001 Trade Union Law] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2001, effective Oct. 27, 2001) P.R.C. LAWS & REGS art. 3, *translated at* http://english.gov.cn/laws/2005-10/11/content_75948.htm (reaffirming workers' rights to join labor unions).

126. 2001 Trade Union Law, *supra* note 125, art. 6 (stating that labor unions must "safeguard the legitimate rights and interests of workers . . . . [w]hile protecting the overall interests of the entire Chinese people").

127. *Id.* (requiring unions to listen to workers' complaints, voice their demands, and overall assist workers with any difficulties).

128. *Id.* art. 20 (providing that labor unions may initiate arbitration or litigation proceedings against an employer if an employer violates a worker's rights or interests).

employment law violation.[129] The 2001 TUL prohibits employers from insulting, slandering, injuring, or taking retaliatory action against a union's staff members.[130] The 2001 TUL, overall, improved on the 1992 TUL by strengthening a labor union's obligation to protect workers' rights and interests.[131]

D. *China's Provisions on Collective Contracts*

The MLSS promulgated the Provisions on Collective Contract ("Provisions") in 2004.[132] The purpose of the Provisions is to strengthen the rights of workers during negotiations for collective contracts.[133] The Provisions cover all commercial institutions in China, both public and private.[134] Under the Provisions, the labor union chooses a worker representative or, if a labor union has not yet been established, the employees may vote for a person to act as the workers' representative during collective negotiations.[135] The worker representative must represent the workers' interests.[136] Before the collective contract becomes valid, first it must be submitted to and approved by the employees.[137] Collective contracts are

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129. *Id.* art. 52 (explaining that an employer is required to rehire an employee and pay any back wages if the employee was fired for participating in a union).

130. *Id.* art. 51 (stating that employers who humiliate, slander, or injure a staff member of a labor union may be subjected to a criminal investigation).

131. *See* Brown, *supra* note 124, at 37 ("The Trade Union Law as amended in 2001 continued to strengthen the union's mandate in collective wage negotiations."); *see also CLB Analysis of the New Trade Union Law*, CHINA LABOUR BULL. (Feb. 28, 2002), http://www.clb.org.hk/en/content/clb-analysis-new-trade-union-law (hesitantly agreeing that the 2001 Trade Union Law comes closer to ILO standards but leaves much to be desired).

132. Guanyu Jiti Hetong De Guiding (關於集體合同的規定) [Provisions on Collective Contract] (promulgated by the Ministry of Labor and Social Security, May 1, 2004, effective May 1, 2004), *translated at* http://www.asianlii.org/cn/legis/cen/laws/pocc373.

133. Provisions on Collective Contract, *supra* note 132, art. 1 (providing that the purpose of the Provisions is to further protect both workers' and employers' interests when they are engaged in negotiations to create a collective contract).

134. *Id.* art. 2 (stating that the Provisions apply to both commercial enterprises and public institutions).

135. *Id.* art. 20 (laying out the procedures in choosing a worker representative both in scenarios in which there is a union and when there is not).

136. *Id.* art. 19 (requiring a worker's representative to "take part in the collective negotiation on behalf of the interests of their own party").

137. *Id.* art. 36 (providing that a collective contract may not be adopted unless the contract is discussed at a meeting where at least two thirds of all the employees or

not permanent and the parties to the negotiation may stipulate to keep the collective contract for at least one year but no more than three years.[138] Further, collective contracts may be modified or cancelled if either party cannot perform its contractual duties.[139] The employer must have a justifiable reason to refuse participating in collective negotiations.[140]

E. *International Labor Standards and Rights*

China joined the ILO in 1919.[141] The ILO's purpose is to promote cooperation between employers, workers, and governments in order to further protect and reinforce the rights of workers.[142] The ILO promulgates conventions that set out basic principles on workers' rights.[143] These conventions, once ratified by a member state, are legally binding instruments in that state.[144] The ILO has identified eight conventions as fundamental because they cover "subjects that are considered as fundamental principles and rights at work."[145] China has ratified twenty-five of the ILO's conventions, twenty-two of which are still in force.[146] China has ratified half of the fundamental conventions, and specifically has not ratified (1) Convention No. 87, the Freedom of Association and Protection of the Right to

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employee representatives are present and half of the employees or the employee representatives approve the contract).

138. *Id.* art. 38 ("In general, the period of validity of a collective contract or a special collective contract shall be 1 to 3 years . . . .").

139. *Id.* art. 40 (listing the circumstances under which a collective contract may be modified or cancelled).

140. *Id.* art. 56 (stating that an employer cannot refuse to engage in collective negotiations without a justifiable reason).

141 . *China*, ILO, http://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110_COUNTRY_ID:103404 (last visited Mar. 1, 2014).

142. *How the ILO Works*, ILO, http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/lang–en/index.htm (last visited Mar. 1, 2014).

143 . *Conventions and Recommendations*, ILO, http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang–en/index.htm (last visited Mar. 1, 2014) (describing the purpose of the ILO conventions).

144. *Id.* (stating that once a member state ratifies a convention, it becomes a legally binding international treaty).

145. *Id.* (listing the conventions considered as fundamental by the ILO).

146. *Ratifications for China*, ILO, http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103404 (last visited Mar. 1, 2014). The three conventions not in force are either outdated conventions or shelved conventions, meaning that they are no longer regularly updated by the ILO.

Organize Convention, (2) Convention No. 98, the Right to Organize and Collective Bargaining Convention, (3) Convention No. 29, the Forced Labour Convention, and (4) Convention No. 105, the Abolition of Forced Labour Convention.[147] Generally, these conventions protect a worker's right to form a union and engage in collective bargaining, and prohibit the use of forced or compulsory labor.[148] Even if a member has not yet ratified a specific fundamental convention, all members of the ILO have an obligation to promote and realize these conventions' espoused principles.[149]

This Part first discusses the ILO Declaration on Social Justice, which is a restatement of the ILO's main principles within the context of a more globalized economy. It next discusses the declaration the ILO adopted addressing the interactions of MNCs, state governments, and the rights of workers.

1. The ILO Declaration on Social Justice

In 2008, the Ninety-Seventh International Labour Conference adopted the ILO Declaration on Social Justice for a Fair Globalization (the "ILO Declaration on Social Justice"), the third major statement of principles and policies adopted by the organization since its first Constitution in 1919.[150] The ILO Declaration on Social Justice specifically addresses the problems

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147. *Id.*

148. International Labour Organisation, Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organise, July 9, 1948, 68 U.N.T.S. 17.; International Labour Organisation, Convention (No. 98) Concerning the Application of the Principles of the Right to Organise and Bargaining Collectively, July 1, 1949, 96 U.N.T.S. 257; International Labour Organisation, Convention (No. 29) Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55; International Labour Organisation, Convention (No. 105) Concerning the Abolition of Forced Labour, June 25, 1957, 320 U.N.T.S. 291.

149. *See* International Labour Organisation, Declaration on Fundamental Principles and Rights at Work and Its Follow-up art. 2, June 18, 1998 (Annex revised June 15, 2010) ("[A]ll Members, even if they have not ratified the Conventions in question, have an obligation . . . to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions . . . .").

150. International Labour Organisation, Declaration on Social Justice for a Fair Globalization preface, Aug. 13, 2008 ("This is the third major statement of principles and policies adopted by the International Labour Conference since the ILO's Constitution of 1919.").

that globalization poses to workers' rights.[151] Specifically, the ILO Declaration on Social Justice recognizes how globalized economic integration fosters economic growth and increases employment rates, but at the same time nonetheless causes some countries to face major challenges relating to income inequality, poverty levels, and job security.[152]

The ILO Declaration on Social Justice lays out four strategic objectives that require member states to develop and enhance labor protections within their borders to help realize fundamental workers' rights more universally.[153] The ILO Declaration on Social Justice further provides that the ILO should provide assistance to member states wishing to incorporate the principles of the four objectives into a bilateral or multilateral agreement.[154] The ILO Declaration on Social Justice encourages both the ILO and member states to cooperate with both MNCs and labor unions in order to further promote these four objectives.[155]

2. The Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.

The ILO Declaration on Social Justice also reaffirms the policies stated in the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (the "Tripartite Declaration").[156] The principles in the Tripartite Declaration are intended to guide governments, employers, workers, and MNCs on how to act in accordance with the

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151. *Id.* (stating that the ILO Declaration on Social Justice was adopted to reaffirm ILO values within "the context of globalization.").

152. *Id.* at 5 (discussing how globalization has boosted some countries' economies while simultaneously causing detrimental effects in other countries' employment sectors).

153. *Id.* art. I(A) (outlining the goals and purposes of the ILO Declaration on Social Justice's strategic objectives).

154. *Id.* art. II(A)(iv) (permitting member states to ask the ILO for assistance in creating a bilateral or multilateral agreement that fosters the achievement of the four objectives).

155. *Id.* art. II(A)(v) (encouraging cooperation between states, MNCs, and labor unions to further realize the four strategic objectives).

156. *Id.* 8 (listing the Tripartite Declaration and its objectives as having "particular relevance").

principles espoused by the ILO.[157] It recognizes that MNCs and their affiliated organizations could contribute to abusive workplace practices, either directly or indirectly.[158] Thus, the Tripartite Declaration encourages MNCs to play a stronger role when it comes to ensuring that workers' rights are respected, promoting economic and social welfare, and improving the living standards in other countries.[159]

The Tripartite Declaration states that MNCs should respect the sovereign rights of each state, abide by national laws and regulations, give adequate consideration to local practices, and heed applicable international standards.[160] Specifically, the Tripartite Declaration encourages governments that have not yet ratified Convention Nos. 87 and 98 to do so.[161] MNCs are encouraged to consult with relevant authorities and workers' organizations in order to ensure that their operations do not violate that country's social development policies.[162] MNCs are expected to take steps to ameliorate their impact on the labor markets of other nations by providing stable employment and notifying the appropriate government authorities or workers' representatives of any changes that would have major effects on employment rates.[163] MNCs should not offer wages, benefits, or conditions that are less favorable than those offered by

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157. *See* International Labour Organisation, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 5, http://www.ilo.org/wcmsp5/groups/public/—ed_emp/—emp_ent/—multi/documents/publication/wcms_094386.pdf..

158. *Id.* para. 1 (discussing how MNCs, through international direct investment, can either benefit a state or lead to unfair "concentrations of economic power" that could conflicts with the interests of workers).

159. *Id.* (explaining that MNCs "can also make an important contribution to the promotion of economic and social welfare; to the improvement of living standards and the satisfaction of basic needs; to the creation of employment opportunities, both directly and indirectly; and to the enjoyment of basic human rights, including freedom of association, throughout the world").

160. *Id.* para. 8 (stating that MNCs should respect a state's sovereignty, a state's laws, the Universal Declaration of Human Rights, and other international frameworks promulgated by the ILO).

161. *Id.* para. 9 (encouraging nations to ratify Convention Nos. 87 and 98).

162. *Id.* para. 17 (stating that MNCs should try to ensure that their plans do not affect a nation's social development policies).

163 . *Id.* paras. 25–26 (stating that MNCs should try to maintain steady employment rates and notify relevant authorities if their actions affect employment rates).

comparable employers.[164] If the MNC is operating in a country with no comparable employer, the MNC should provide wages, benefits, and conditions in accordance with relevant laws.[165]

The Tripartite Declaration also states that workers in MNCs have the right to establish and join unions.[166] The state must protect these unions against interferences from employers or other third parties.[167] Further, governments are prohibited from offering special incentives to attract more FDI that would limit the workers' freedom of association, right to organize, or right to collectively bargain.[168]

F. *Investments in the International Sphere.*

The international investment sphere has grown exponentially in the past few decades.[169] Despite this boom in international investments, there is currently no existing global investment regulatory scheme.[170] Although some states and organizations attempted to initiate negotiations to form a multilateral agreement on investment ("MAI"), activists vehemently opposed this attempt, arguing that this type of

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164. *Id.* para. 33 ("Wages, benefits and conditions of work offered by multinational enterprises should be not less favourable to the workers than those offered by comparable employers in the country concerned.").

165. *Id.* para. 34 ("When multinational enterprises operate in developing countries, where comparable employers may not exist, they should provide the best possible wages, benefits and conditions of work, within the framework of government policies.").

166. *Id.* para. 42 (stating that workers employed by MNCs have the right to establish and join unions).

167. *Id.* para. 43 (requiring states to adequately protect unions against possible interferences by employers or other parties).

168. *Id.* para. 46 (prohibiting governments from lowering workers' rights or standards in order to attract more investment).

169. *See* Sheffer, *supra* note 19, at 485 ("The frenetic rate of globalization has increased the number of MNCs, and consequently, the frequency of FDI and the use of BITs."); *see also* Footer, *supra* note 20, at 36 ("In the past decade, there has been an explosion of BITs, and other forms of [international investment agreements] . . . .").

170. *See* Sheffer, *supra* note 19, at 485 ("While two [World Trade Organization] agreements touch on trade-related investment they do not constitute comprehensive multilateral investment regulations . . . ."); *see also* ORG. FOR ECON. COOPERATION & DEV., *Multilateral Agreement on Investment*, http://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm [hereinafter OECD, *Multilateral Agreement on Investment*] (describing how, although negotiations on a multilateral agreement on investment were initiated, these negotiations ceased in April 1998).

instrument was essentially a "corporate bill of rights."[171] MAI negotiations ended fifteen years ago and have not yet resumed.[172]

Despite the failure to create an MAI, investment between nations continues to grow, leading to an equally exponential boom in the formation of BITs.[173] Generally, there are five major actors in a BIT.[174] First, there is a host state, the state in which an MNC invests.[175] Second, the home state is the state the MNC-investor is incorporated.[176] The third actors are the investors, which are usually MNCs but may be individuals.[177] Fourth, there are the people or groups affected by the investment.[178] Lastly, the fifth actor is the arbitration tribunal that helps resolve claims arising from a provision of a BIT.[179]

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171. *See* Sheffer, *supra* note 19, at 486 ("Activists argued against the agreement, concerned that it would constitute a corporate bill of rights . . . ."); *see also Multilateral Agreement On Investment*, GLOBAL POL'Y F., http://www.globalpolicy.org/globalization/globalization-of-the-economy-2-1/multilateral-agreement-on-investment-2-5.html (reporting that negotiations for the MAI fell through due to fears that it would threaten state sovereignty and would lead to a "race to the bottom" situation).

172. *See* ORG. FOR ECON. COOPERATION & DEV., *Multilateral Agreement on Investment*, *supra* note 170 (stating that negotiations for an MAI ended in April 1998 and will not resume); *see also* Sheffer, *supra* note 19, at 486 (explaining that negotiations for an MAI ended in April 1998 and have showed no signs of resuming).

173. *See* Sheffer, *supra* note 19, at 485 (describing how the growth of MNCs and FDI has led to the creation of more BITs); *see also* Footer, *supra* note 20, at 36 (describing how the number of BITs has increased exponentially in the past decade).

174. *See* Sheffer, *supra* note 19, at 487 (describing the actors involved in or affected by BITs); *see also* JOHN RUGGIE, JUST BUSINESS 182–84 (2013) (stating that BITs generally involve investors and two states but can also have effects on local communities or peoples).

175. *See* Sheffer, *supra* note 19, at 487 ("First, a 'Host-State' is the State-Party in which an investment exists."); *see also* Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L. J. 67, 89 (2005) (using the term host country to describe the state in which an MNC invests).

176. Sheffer, *supra* note 19, at 487 ("[A] 'Home-State' is the State of corporate citizenship of the investing MNC.").

177. *See* Sheffer, *supra* note 19, at 487 (stating that investors are the third actors involved in BIT proceedings); *see also* Salacuse & Sullivan, *supra* note 175, at 75 (noting that an "impetus behind the rapid expansion of BITs rests in the desire of companies of industrialized states to invest safely and securely in developing countries").

178. *See* Sheffer, *supra* note 19, at 487 ("Fourth, impacted non-State actors are those people [or] groups that are affected by the actions or demands of the investing MNCs."); *see also* RUGGIE, *supra* note 174, at 184 (describing how BITs can sometimes affect local communities).

179. *See* Sheffer, *supra* note 19, at 487 ("Fifth, 'arbitration tribunals' serve as the dispute resolution mechanisms for disputes arising under a BIT."); *see also* RUGGIE,

Under a BIT, the investor can directly bring a claim against the state in a private arbitration tribunal.[180] Arbitration awards are binding on the parties and usually limited to money damages.[181] A leading international arbitration institution devoted to disputes arising between investors and a state is the International Center for the Settlement of Investment Disputes ("ICSID").[182] Under ICSID rules, a party initiates arbitration proceedings by submitting a request and memorials, documents containing a summary of the facts and laws applicable to the case, to the arbitration tribunal.[183] After these documents are submitted, a hearing is held where either party may present witness or expert testimony and other types of evidence to the arbitration tribunal.[184] Although disputes between investors and states are increasing, the exact number of arbitration cases resolved is unknown because the resolutions are usually kept private.[185]

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supra note 174, at 184 (describing how arbitration tribunals are involved in the BIT process).

180. *See* Sheffer, *supra* note 19, at 489 (stating that an "investor may bypass domestic court systems and bring a claim directly against the Host-State before an international arbitration tribunal"); *see also* RUGGIE, *supra* note 174, at 183 ("[T]ypically a BIT permits the investor to initiate compulsory international arbitration claims against the state.").

181. *See* Sheffer, *supra* note 19, at 490 (explaining how arbitration decisions are binding on the parties and usually limited to financial compensation); *see also* Stephan W. Schill, *Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China*, 15 CARDOZO J. INT'L & COMP. L. 73, 87–88 (2007) (explaining that an arbitration award is binding and enforceable).

182. *See* Sheffer, *supra* note 19, at 489 ("The leading international arbitration institution devoted to investor-State dispute settlement is the [ICSID]."); *see also* Schill, *supra* note 181, at 87–88 ("In standard international practice, investor-State arbitration is most often conducted under the rules of the [ICSID].").

183. International Centre for Settlement of Investment Disputes, Convention, Regulations and Rules, rs. 30–31, *available at* https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partF-chap04.htm (last visited Mar. 1, 2014) (outlining the written procedures under ICSID rules and the process of transmitting a request).

184. *Id.* rs. 32–33 (describing ICSID's rules for the oral procedure aspect of an arbitration proceeding as well as for marshalling evidence).

185. *See* Sheffer, *supra* note 19, at 491 ("The exact number of investor-State arbitration cases [is] unknown because the initiation of the arbitration and their results are not always released publicly."); *see also* Footer, *supra* note 20, at 63–64 (stating how, although there has been a move towards greater transparency in investment arbitration, "greater acceptance of non-disputing party rights in international investment arbitration is not yet universal").

Most states have a model BIT that serves as a template when states enter BIT negotiations.[186] One provision found in most BITs is the "national treatment" provision that promises equal treatment for both in-state and out-of-state investors.[187] Other provisions that model BITs commonly include are most-favored nation provisions, guaranteeing out-of-state investors from one state the same rights granted to investors from another state, and fair and equitable treatment provisions, which guarantee out-of-state investors minimum standards of treatment.[188] Some BITs may contain risk-stabilization provisions that freeze regulatory regimes for the duration of a specific investment.[189] BITs may also contain "non-lowering of standards" provisions that prohibit states from derogating from labor standards in order to attract more investment from MNC-investors.[190] For instance, the US Model BIT has two non-lowering of standards provisions, with one addressing environmental standards and the other relating to labor standards.[191] Specifically, Article 13 of

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186. *See* Sheffer, *supra* note 19, at 488 ("Most countries have a Model BIT which serves as a template and is typically used as a starting point to conduct negotiations of new BITs."); *see also* Footer, *supra* note 20, at 36 (listing Canada, Norway, and the United States, among others, as states that have model BITs).

187. *See* Schill, *supra* note 181, at 93 (explaining that national treatment provisions are common in most BITs and require the host state to not discriminate against out-of-state investors); *see also* Sheffer, *supra* note 19, at 488 (describing how BITs commonly contain national treatment provisions protecting investors against discriminatory treatment).

188. *See* RUGGIE, *supra* note 174, at 182 (listing the rights that BITs commonly provide to investors); *see also* Sheffer, *supra* note 19, at 488 (describing how BITs commonly contain national treatment provisions, most-favored nation provisions, and fair and equitable treatment provisions).

189. *See* Sheffer, *supra* note 19, at 497 (explaining that risk-stabilization clauses can sometimes insulate investors from the need to obey certain new laws or regulations); *see also* RUGGIE, *supra* note 174, at 182 (discussing how some BITs contain provisions protecting out-of-state investors against new laws or regulations passed by the state).

190. *See* Footer, *supra* note 20, at 43 (explaining that non-lowering of standards clauses help to "suppress the temptation of host states to lower their environmental or labour standards as an incentive to attract foreign investment"); *see also* RUGGIE, *supra* note 174, at 184–85 (discussing how non-lowering of standards provisions work).

191. U.S. DEP'T OF STATE 2012 U.S. MODEL BILATERAL INVESTMENT TREATY, arts. 12–13 (2012) [hereinafter US MODEL BIT], *available at* http://www.state.gov/documents/organization/188371.pdf (prohibiting signatory states from lowering labor and environmental standards in order to draw in more FDI).

the US Model BIT prohibits signatory-states from lowering their labor standards in order to draw in more investments.[192]

To summarize, the 1994 Labor Law and the changes to employment and labor laws during the 2000s form the basic framework governing the employer-employee relationship in China. Further, the Provisions supplement China's labor laws by providing additional detail about collective negotiations and collective contracts. As a member of the ILO, labor standards in China must comply with the principles expressed in the ILO Declaration on Social Justice and the Tripartite Declaration. Lastly, the growth of the international investment sphere has led to the growth of BITs, instruments geared towards protecting the rights of investors investing in another state.

II. *HOW LABOR VIOLATIONS IN CHINA AND BITS' INVESTOR-ORIENTED APPROACH AFFECT WORKERS' RIGHTS*

Despite the changes in China's labor and employment laws during the 2000s, factories in China continue to use abusive labor practices that violate both state law and ILO labor standards.[193] These labor practices are more prevalent and pervasive in factories that manufacture products for or are in contract with MNCs.[194] Part II.A first addresses how Chinese factories and companies continue to violate labor and employment laws. Part II.B discusses how, despite China's labor laws, labor unions in China still fail to adequately protect workers' rights and interests. Lastly, Part II.C discusses how the

192. US MODEL BIT, *supra* note 191, art. 13 (outlining the US Model BIT's provisions on labor standards).

193. *See, e.g.,* Barboza, *supra* note 29 ("Nearly a decade after some of the most powerful companies in the world . . . began an effort to eliminate sweatshop labor conditions in Asia, worker abuse is still commonplace in many of the Chinese factories that supply Western companies . . . ."); *see also Fresh Labor Violations in Chinese Factory Producing the "Cheap" iPhone*, CHINA LAB. WATCH, Sept. 5, 2013, http://www.chinalaborwatch.org/news/new-463.html (describing how factories in China continue to violate workers' rights by failing to pay overtime wages, violating laws limiting overtime hours, and subjecting their workers to intense work conditions).

194. *See* TRAGEDIES OF GLOBALIZATION, *supra* note 28, at 1 (arguing that abusive labor practices are "firmly entrenched in the global supply-chain system"); *see also Mattel's Unceasing Abuse of Chinese Workers: An Investigation of Six Mattel Supplier Factories*, CHINA LAB. WATCH 1 (2013), http://www.chinalaborwatch.org/pdf/2013.10.15-Mattel-report.pdf [hereinafter *Mattel's Unceasing Abuse*] (revealing how factories in China that produce products for MNCs reduce costs by lowering labor standards).

current BIT regime primarily protects the interests of MNC-investors and not the interests of the state.

A. *Violations of Labor Standards or Laws Concerning Overtime, Adequate Wages, Child Labor, and Safe Working Conditions*

This Part addresses the labor abuses still practiced by factories in China. Part II.A.1 discusses how factories in China still violate legal limits on overtime. Part II.A.2 describes the inadequacy of wages paid to workers in China. Part II.A.3 provides an overview of the dangerous, and sometimes deadly, factory work environments. Part II.A.4 describes the use of child labor by factories in contract with MNCs. Lastly, Part II.A.5 discusses how employers use intermediaries in order to avoid complying with China's labor and employment laws.

1. Overtime Limit Violations

China's employment laws provide that workers shall not work for more than eight hours a day and no more than forty-four hours per week.[195] Although these laws permit some companies to extend hours, they may do so only after seeking and receiving approval from the MLSS.[196] In regards to overtime, employees must not work more than thirty-six overtime hours per month.[197]

Some organizations that investigated China's factories discovered that actual overtime hours worked per month were not in compliance with the legally imposed limits.[198] In some cases, the overtime hours exceeded the legal limit by over 200%.[199] China Labor Watch ("CLW"), an independent non-governmental organization based in New York, investigated ten

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195. 1994 Labor Law, *supra* note 32, art. 36 (explaining China's laws on work hours and overtime hours).

196. *Id.* art. 39 (describing how employers may exempt themselves from work hour limits with the approval of the MLSS).

197. *Id.* art. 41 (stating that workers may not work more than thirty-six overtime hours per month).

198. *See* TRAGEDIES OF GLOBALIZATION, *supra* note 28, at 5 (reporting that some workers' overtime hours went as high as 160 hours per month); *see also Fresh Labor Violations in Chinese Factory Producing the "Cheap" iPhone, supra* note 193 (reporting that at one factory, "110 hours of overtime per month is common").

199. *See* TRAGEDIES OF GLOBALIZATION, *supra* note 28, at 5 (indicating that some workers worked a total of 160 overtime hours per month).

"global brand supplier electronics factories" from October 2010 to June 2011.[200] This report found that electronics factories had "notable sweatshop characteristics" including excessive overtime hours and maintaining extremely high levels of work intensity.[201] Further, some of these factories, in an effort to draw in more business from MNCs, compelled their employees periodically to work these excessive overtime hours.[202]

2. Inadequate or Withheld Wage Payments

China's employment law specifies that a factory's minimum wage must not be lower than the local minimum wage combined with the living expenses of the worker and those family members the worker supports.[203] Employers may not withhold or embezzle wages without justification.[204] Employment law also requires workers to be paid 150% of their normal wage when working overtime hours.[205]

The minimum wage for employees working in electronics factories frequently does not meet local minimum wage standards.[206] In some cases, workers have to take on extra overtime hours in order to break even.[207] In other cases, workers

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200. *Id.* at 1 (detailing the logistics of their investigation).

201. *Id.* at 11 (describing how "[s]ome of the more notable sweatshop characteristics in Chinese electronics factories" include excessive overtime hours, extremely intensive workplace practices, and verbally attacking workers).

202. *Id.* at 11–12 (discussing how supply-chain factories force workers to work "'voluntary' overtime" in order to increase profits); *see also Swimming against the Tide*, CHINA LABOUR BULL. 16 (2010), http://www.clb.org.hk/en/files/File/research_reports/Labour%20Conflict%20Report%20final.pdf (finding that factories contracting with MNCs force their employees to work overtime in order to meet target quotas).

203. 1994 Labor Law, *supra* note 32, arts. 48–49 (stating that a worker's wages should not be lower than local standards of minimum wages and should consider the living expenses of the worker and his family).

204. *Id.* art. 50 ("The wages to be paid to labourers shall not be embezzled nor the payment thereof delayed without justification.").

205. *Id.* art. 44 (stating that employers shall pay "no less than 150 per cent of the normal wages if an extension of working hours is arranged").

206. *See* TRAGEDIES OF GLOBALIZATION, *supra* note 28, at 5 (reporting that the minimum wage in some of these factories does not meet a worker's living costs); *see also Swimming against the Tide*, *supra* note 202, at 17 (discussing how some companies paid less than the legal minimum wage).

207. *See* TRAGEDIES OF GLOBALIZATION, *supra* note 28, at 5 ("Workers cannot earn a living wage from normal working hours alone, and must work excessive overtime hours in order to earn enough money to survive."); *see also Swimming against the Tide*,

did not earn enough because they were still owed either back pay or were not adequately compensated for working overtime hours.[208] Further, some factories used wages as a punishment device by either withholding the wages arbitrarily or unfairly fining workers.[209]

3. Unsafe Workplace Environments

Employment law requires employers to provide workers with a safe work environment. [210] Further, employers are expected to train workers for tasks that require specialized training or qualifications to ensure workers' safety.[211]

Factories in China are notorious for exposing their workers to exceedingly dangerous or unhealthy working conditions.[212] One report in particular found that pneumoconiosis (a/k/a black lung disease), which has no cure, is one of the most prevalent occupational diseases in China.[213] The report revealed that in 2010, black lung disease caused over 149,000 deaths and

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supra note 202, at 18 (stating that some workers had to work excessively long hours just to get CNY¥1417 per month, which equates to approximately US$227).

208. *See Swimming Against the Tide*, *supra* note 202, at 18 (discussing how 14.4% of workers were owed back pay and 37.6% of workers had not been fully paid for working overtime hours); *see also Mattel's Unceasing Abuse*, *supra* note 194, at 3 (reporting that some factories failed to pay workers in a timely manner or failed to pay them for overtime hours).

209. *See Swimming Against the Tide, supra* note 202, at 19 (discussing how some employers withheld one and a half months' worth of wages from workers to prevent them from quitting or leaving); *see also Mattel's Unceasing Abuse*, *supra* note 194, at 4 (discussing how one factory withholds wages from workers for checking their cell phones).

210. 1994 Labor Law, *supra* note 32, art. 52 (stating that employers must establish workplace standards that meeting occupational safety and health standards).

211. *Id.* art. 55 ("Labourers to be engaged in specialized operations must receive specialized training and acquire qualifications for such special operations.").

212 . *See Time to Pay the Bill*, CHINA LABOUR BULL. 4 (2013), http://www.clb.org.hk/en/sites/default/files/File/research_reports/Time%20to%20Pay%20the%20Bill.pdf (discussing how China's government has ignored the epidemic of black lung disease running rampant through their workforce); *see also* TRAGEDIES OF GLOBALIZATION, *supra* note 28, at 110 ("More significantly, investigations revealed that for the majority of job posts in electronics factories, there is a high risk of contraction of occupational illnesses and diseases.").

213. *See Time to Pay the Bill*, *supra* note 212, at 4 (discussing the black lung disease epidemic among workers in China).

additionally infected over 500,000 persons.[214] Further, in 2009 over one hundred workers were poisoned from working with a dangerous chemical used to help clean iPhone touchscreens.[215] Some of these workers were hospitalized for up to nine months after the incident yet still suffer from "weak limbs and other health problems."[216] In 2011, two factories in China that manufacture products for Apple exploded due to the build-up of aluminum dust in the factory area.[217] At one of these factories, Apple's inspectors were onsite just hours before the explosion occurred and spent a total of ten minutes examining the site.[218]

Workers in some of the factories face conditions that could be physically debilitating or exhausting. The act of standing in an assembly line while repeating the same action "every three seconds . . . for ten consecutive hours"[219] has caused some

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214. *See id.* ("The cumulative total, since the [Ministry of Health] started keeping records of pneumoconiosis in China in the 1950s, reached 676,541, with 149,110 deaths and 527,431 people still suffering from the disease at the end of 2010.").

215. *See* Duhigg & Barboza, *supra* note 3 ("Two years ago, 137 workers at an Apple supplier in eastern China were injured after they were ordered to use a poisonous chemical to clean iPhone screens.").

216. *See Apple and Foxconn Are Lying and Calling the Kettle Black*, STUDENTS & SCHOLARS AGAINST CORP. MISBEHAVIOR (Mar. 18, 2012, 11:24 PM), http://sacom.hk/apple-and-foxconn-are-lying-and-calling-the-kettle-black/ (reporting that many of the over one hundred workers poisoned from using a chemical to clean iPhones continue to suffer from health problems).

217. *See* David Barboza, *Explosion at Apple Supplier Caused by Dust, China Says*, N.Y. TIMES, May 24, 2011, http://www.nytimes.com/2011/05/25/technology/25foxconn.html?_r=0 (discussing how an explosion in a factory in China stemmed from combustible dust); *see also* John Brownlee, *Both Foxconn iPad 2 Factories Exploded for the Same Reason*, CULTOFMAC.COM (Dec. 20, 2011, 11:49 AM), http://www.cultofmac.com/136398/both-foxconn-ipad-2-factories-exploded-for-the-same-reason/ (discussing how two explosions caused by a build-up of aluminum dust occurred in iPad factories in China within the span of one year).

218. *See* Josh Ong, *Apple Reportedly Performed Safety Inspections Hours Before 2011 iPad Factory Blast*, APPLE INSIDER (Mar. 13, 2012, 2:00 AM), http://appleinsider.com/articles/12/03/13/apple_reportedly_performed_safety_inspections_hours_before_2011_ipad_factory_blast (discussing how workers reported that Apple inspectors briefly examined one of its supply-chain factories in Shanghai just hours before the factory exploded); *see also* Charles Cooper, *Injured Shanghai Workers Say Apple Visited Factory Hours Before Explosion*, CNET (Mar. 12, 2012, 4:52 AM), http://news.cnet.com/8301-13579_3-57395222-37/injured-shanghai-workers-say-apple-visited-factory-hours-before-explosion ("Workers injured in a December blast at a Chinese factory say that Apple inspectors toured the facility hours before the accident.").

219. *See* TRAGEDIES OF GLOBALIZATION, *supra* note 28, at 109 ("For example, on the HP production line, workers must complete an action every three seconds and repeat this for ten consecutive hours.").

workers' legs to "swell until they can hardly walk."[220] In one factory, workers have reportedly lost or broken about 40,000 fingers while on the job every year.[221]

4. The Use of Child Labor

China has ratified ILO's Convention Nos. 138 and 182, both of which prohibit the use of child labor.[222] Despite this, MNCs like Wal-Mart and Disney have been accused of contracting with factories in China that use child labor to manufacture best-selling toy products.[223] The use of child labor was also discovered in factories that produce electronic products for Apple and Samsung.[224] In some cases, the children employed in these factories were as young as fourteen.[225]

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220. *See* Duhigg & Barboza, *supra* note 3 ("Some say they stand so long that their legs swell until they can hardly walk.").

221. *See* Barboza, *supra* note 29 (reporting that "factory workers lose or break about 40,000 fingers on the job every year").

222 . International Labour Organisation, Convetion (No. 138) Concerning Minimum Age for Admission to Employment art. 1, June 26, 1973, 1015 U.N.T.S. 297 (requiring member states to effectively abolish the use of child labor); International Labour Organisation, Convention (No. 182) Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labour Convention art. 1, June 17, 1999, 2133 U.N.T.S. 161 (insisting that member states "take immediate and effective measure to secure the prohibition and elimination of the worst forms of child labor as a matter of urgency.").

223. *See* David Barboza, *Despite a Decade of Criticism, Worker Abuse Persists in China*, N.Y. TIMES, Jan. 4, 2008, http://www.nytimes.com/2008/01/04/business/worldbusiness/04iht-sweatshop.4.9028448.html?pagewanted=all&_r=0 (discussing how some factories that supply products to Wal-Mart, Dell, and Disney were accused of using child labor); *see also* Gethin Chamberlain, *Disney Factory Faces Probe into Sweatshop Suicide Claims*, GUARDIAN (U.K.) (Aug. 27, 2011, 6:48 PM), http://www.theguardian.com/law/2011/aug/27/disney-factory-sweatshop-suicide-claims (describing how Disney has recently been accused of using child labor to make one of its best-selling toys).

224. *See* Juliette Garside, *Child Labour Uncovered in Apple's Supply Chain*, GUARDIAN (U.K.) (Jan. 25, 2013, 2:22 PM), http://www.theguardian.com/technology/2013/jan/25/apple-child-labour-supply (reporting that one company in China that produces products for Apple employed seventy-four children under the age of sixteen); *see also* Avram Piltch, *Samsung Investigating Alleged Child Labor Abuse at Chinese Factory*, YAHOO (Aug. 7, 2012, 12:51 PM), http://news.yahoo.com/samsung-investigating-alleged-child-labor-abuse-chinese-factory-165148947.html (summarizing a report from CLW detailing how Chinese factories that manufacture products for Samsung uses child labor).

225. *See* Piltch, *supra* note 224 (stating that some of the workers in the factory were as young as fourteen).

5. "Second-Class" Workers

Non-compliance with employment laws is even more exacerbated when employers recruit workers through intermediaries.[226] China's laws state that organizations and individuals are prohibited from using intermediaries as a way to bypass compliance with employment laws.[227] For example, some employers hire dispatched workers and require them to work sixteen-hour days for less pay.[228] Some employers bar dispatched workers from joining unions.[229] Further, intermediaries also treat their employees like second-class workers by requiring them to take on more work-intensive responsibilities in exchange for a lower wage and fewer benefits.[230]

B. *The Inadequacy of China's Unions in Representing Workers' Interests*

The ILO Declaration on Social Justice considers the freedom of association and the right to collective bargaining as indispensable to its four strategic objectives.[231] The Tripartite Declaration also encourages governments to ratify Conventions 87 and 98, which respectively recognize the right to freedom of association and the right to collective bargaining.[232]

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226. *See* CHINA LABOR WATCH, BEYOND FOXCONN, *supra* note 30, at 8–9 (finding that factories use dispatched workers to shift responsibility for worker injuries, prevent workers from unionizing, and to avoid limits on overtime); *see also* Roberts, *supra* note 84 (discussing how employers are frequently using dispatched workers in order to avoid complying with employment laws).

227. Employment Promotion Law, *supra* note 61, art. 39 ("All organizations and individuals are prohibited from infringing on the legitimate rights and interests of the workers by taking advantage of their intermediary activities for employment.").

228. *See* Roberts, *supra* note 84 (reporting that dispatched workers work long hours and are paid "three-quarters the wage earned" by other workers).

229. *See id.* (reporting that dispatched workers at a factory that makes products for Nokio are not permitted to join the official union).

230. *See* CHINA LABOR WATCH, BEYOND FOXCONN, *supra* note 30, at 11 (stating that dispatched workers' "wages are lower, their benefits are worse, and the intensity of their work is much greater"); *see also* Roberts, *supra* note 84 (finding that some dispatched workers are paid less and worked harder).

231. *See* ILO Declaration on Social Justice for a Fair Globalization, *supra* note 150, at 11 (discussing how the freedom of association and the right to collective bargaining are essential to achieving its four strategic objectives).

232. *See* ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, *supra* note 157, para. 9 (encouraging governments to adopt Convention Nos. 87 and 98).

The 2001 TUL requires labor unions to protect and advocate for workers' rights and interests.[233] China, however, represses the formation of any labor union outside of the government-endorsed national union—the All-China Federation of Trade Unions ("ACFTU").[234] Since the ACFTU essentially operates under the leadership of the Chinese Communist Party ("CCP"), the union is expected to not only represent the best interests of the workers, but also to factor in the best interests of the state.[235] For example, in accordance with China's focus on maintaining a harmonious society, the ACFTU lacks the authority to organize or call for a strike.[236] In fact, labor unions established under the ACFTU lack the power to initiate any sort of collective action and act primarily to control the actions of workers rather than to advocate their interests.[237]

After a labor strike erupted in China in 2013, for instance, the ACFTU responded by only issuing statements of "concern and support."[238] Generally, workers in factories in the country

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233. *See supra* notes 124–31 and accompanying text (detailing the provisions of the 2001 TUL).

234. *See* Harper Ho, *supra* note 31, at 59 (arguing that "China's failure to recognize freedom of association outside of the official union, the [ACFTU] and its continued repression of independent union organizing" remain problematic); *see also* Brown, *supra* note 124, at 51–52 (discussing how the All-China Federation of Trade Unions ("AFCTU") has close ties to the Chinese Communist Party and continues to remain the "exclusive trade union in China").

235. *See* Harper Ho, *supra* note 31, at 60 ("First, because all Chinese unions operate under the leadership of the Party, their primary allegiance is to state interests . . . ."); *see also* Brown, *supra* note 124, at 52 (discussing how the ACFTU must play a dual role and struggles between being more active in advocating and representing employees' interests and being responsive to the state's interest in maintaining social stability).

236. *See* Harper Ho, *supra* note 31, at 60–61 (discussing how unions in China lack the authority to initiate collective action); *see also* Biddulph, *supra* note 56, at 48 (discussing how unions in China are "part of the institutional infrastructure constructed to preserve stability").

237. *See* Harper Ho, *supra* note 31, at 60–61 (stating that unions generally lack the authority to initiate collective action or call a strike); *see also* Brown, *supra* note 124, at 55 (noting the idea the "predominant function" of unions in China is to manage workers rather than to advocate for their rights).

238. *See* Han Dongfang, *Han Dongfang Discusses the Fast Emerging Labour Movement in China*, CHINA LABOUR BULL., Sep. 6, 2013, http://www.clb.org.hk/en/content/han-dongfang-discusses-fast-emerging-labour-movement-china (reporting that the official union is "limited to issuing statements of concern and support" to workers after a recent strike occurred); *see also* Harper Ho, *supra* note 31, at 61 (stating that trade unions tend to "retreat where [a labor dispute] may lead to collective action").

are unaware of the purpose of a union as well as of whether unions exist in their factory at all.[239] Even in cases where a worker is aware of the existence of a union, the worker harbors serious doubts about the union's ability to act as an effective advocate for workers' rights.[240]

C. *BITs and How They Favor MNC Investors Over States and People*

The decision to negotiate a US-China BIT was met with mixed reactions.[241] Some responded to these negotiations positively, noting that a BIT between two of the world's largest economies would not only help protect the flow of FDI between the United States and China but further would improve global economics overall.[242] Others have been more hesitant, warning that a quickly hashed out deal between the United States and China could have serious repercussions in the environmental, investment, and labor fields.[243] Notably, the American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO"), the largest federation of labor unions in the United States, opposed the revival of a US-China BIT because

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239. *See* Harper Ho, *supra* note 31, at 60 (describing how workers were unaware of the purpose or relevance of unions); *see also* CHINA LABOR WATCH, BEYOND FOXCONN, *supra* note 30, at 7 ("Most workers are not familiar with unions and their functions.").

240. *See* Harper Ho, *supra* note 31, at 60 (discussing how workers generally view unions as "irrelevant as a source of effective representation"); *see also* Brown, *supra* note 124, at 55 (describing how the understanding of labor unions as a vehicle for enhancing workers' rights is an unorthodox, even unfamiliar concept in China).

241. *Compare* Bourassa, *supra* note 26 (stating that a US-China BIT is beneficial for the United States, China, and the global economy), *with* Celeste Drake, *A BIT With China Is the Wrong Solution to the Wrong Problem*, AFL-CIO NOW (Nov. 12, 2013), http://www.aflcio.org/Blog/Political-Action-Legislation/A-BIT-with-China-Is-the-Wrong-Solution-to-the-Wrong-Problem (warning that a BIT between the United States and China "is likely to cause further harm to U.S.-based producers and America's working families").

242. *See* EVALUATING A POTENTIAL US-CHINA BILATERAL INVESTMENT TREATY: BACKGROUND, CONTEXT, AND IMPLICATIONS, *supra* note 27, at 43 (discussing how a US-China BIT could be positive and increase the flow of investment between the two states); *see also* Bourassa, *supra* note 26 ("A BIT between the world's two largest economies . . . will not only be good for the United States and China, but also for the global economy.").

243. *See* Sarah Anderson, *Memo to US: Only Fools Rush In*, GUARDIAN (U.K.) (March 21, 2010, 11:00 PM), http://www.theguardian.com/commentisfree/cifamerica/2010/mar/18/china-usforeignpolicy (stating that a BIT may give investors too much power vis-a-vis the state); *see also* Drake, *supra* note 241 (arguing that the move to create a BIT with China may make it "exacerbate, rather than improve labor abuses in China").

BITs have historically provided inadequate protections for workers' rights.[244] Specifically, the AFL-CIO argues that the US Model BIT fails to "effectively protect fundamental labor rights," which may make it easier for MNCs in China to further aggravate existing labor abuses.[245]

Further, BITs are primarily investor-oriented instruments in that they were devised to give MNCs an avenue through which to initiate arbitration proceedings against a state.[246] The framework for existing BITs also grants investors stronger rights and protections in relation to a state.[247] For example, the US Model BIT contains a most-favored-nation clause that promises investors "treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party."[248] In other words, under this clause an investor could claim greater rights than the ones agreed to by the state-parties.[249] Some investors have used BITs to hold host states economically liable for any depreciation in the value of their investment, even in cases where an arbitration proceeding could impair the provision of public services like water, sewage management, electricity, waste, oil, and mining.[250]

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244. *See* Drake, *supra* note 241 (discussing how a US-China BIT would impair workers rights because of the inadequate protections provided by BITs).

245. *Id.* (opposing a US-China BIT because the current US Model BIT provides ineffective protection for workers' rights).

246. *See* Schill, *supra* note 181, at 87 ("[M]ost BITs provide the covered investors with a unilateral right to initiate arbitral proceedings against the host country . . . ."); *see also* Sheffer, *supra* note 19, at 489 (describing how most BIT disputes are initiated by investors against states).

247. *See* Dr. Uche Ewelukwa Ofodile, *Africa-China Bilateral Investment Treaties: A Critique*, 35 MICH. J. INT'L L. 131, 147 (2013) (describing how BITs give out-of-state investors greater rights in relation to in-state investors that could affect or limit the regulatory authority of a state); *see also* Sheffer, *supra* note 19, at 488 (detailing different provisions in BITs that provide strongly protect investors' interests).

248. US MODEL BIT, *supra* note 191, art. 4 (outlining the specifics of the US Model BIT's most-favored-nation clause).

249. *See id.*

250. *See* Ofodile, *supra* note 247, at 148 ("Specifically, there are concerns that '[s]ome investors are using bilateral investment treaties to challenge treatment of foreign investments in various sensitive areas, including water and sewage provisions, oil and gas exploitation and mining concessions.'"); *see also* Sheffer, *supra* note 19, at 496 ("According to a 2007 study of concluded and pending ICSID cases, the majority of cases involved either basic public services or energy resources: 42 percent involved water, electricity, telecoms, and waste management, and 29 percent involved oil, gas, and mining.").

In *Tecnicas Medioambientales Tecmed v. Mexico*, for example, an MNC-investor initiated arbitration proceedings against Mexico, claiming that the state's refusal to renew its landfill license was an illegal expropriation that violated an international investment agreement.[251] Mexico refused to renew the license because the investor was storing excessive amounts of waste, some of which were hazardous, within the landfill.[252] Although Mexico argued that their refusal was an exercise of the state's policing power "within the highly regulated and extremely sensitive framework of environmental protection and public health," ICSID ordered the state to pay the MNC-investor $5 million.[253]

The state of Tanzania went into arbitration for violating a BIT provision after unilaterally terminating a water privatization contract with an MNC-investor.[254] Six non-governmental organizations filed a petition requesting to be granted amicus curiae status in the arbitration proceedings, arguing that any decision rendered by the ICSID tribunal critically affects Tanzania's local communities and their access to safe drinking water.[255] More recently, a Hong Kong-based MNC initiated arbitration proceedings possibly worth billions of US dollars against Australia, challenging the state's authority to pass new laws designed to discourage people from smoking.[256] These

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251. Tecnicas Medioambientales Tecmed v. The United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶¶ 95–96 (May 29, 2003) (summarizing the expropriation claims raised by the investor in the arbitration proceeding).

252. *Id.* ¶¶ 97–99 (summarizing the defense arguments raised by the state during arbitration).

253. *Id.* ¶¶ 97, 201.

254. Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural Order No. 1, ¶¶ 1–13 (Mar. 31, 2006) (providing background information on the dispute between Biwater Gauff and Tanzania).

255. Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Petition for Amicus Curiae Status, 7–8 (Nov. 27, 2006) (arguing that this arbitration "goes far beyond merely resolving commercial or private conflicts, but rather has a substantial influence on . . . basic human rights.").

256. *See* Rob Taylor, *Philip Morris Challenges Australia on Plain Pack*, REUTERS (Nov. 20, 2011, 11:46 PM), http://www.reuters.com/article/2011/11/21/us-australia-smoking-idUSTRE7AK09H20111121 (reporting that Philip Morris initiated arbitration proceedings against Australia, challenging the country's new laws regulating tobacco products); *see also Investor-state Arbitration–Tobacco Plain Packaging*, AUSTL. GOV'T ATT'Y-GEN.'S DEP'T, http://www.ag.gov.au/tobaccoplainpackaging (last visited Mar. 1, 2014) (summarizing the developments of the arbitration proceedings between Australia and Philip Morris).

cases show how MNC-investors have used BIT provisions to challenge a state's regulatory or policing power, even when the state is acting in areas pertaining to health or the environment.

The use of private arbitration is also problematic because, since cases are decided on an ad hoc basis, this leads to uncertainty over what an MNC's obligations are in relation to a host state.[257] The arbitrators used in these arbitrations have also been criticized for being primarily investment-oriented and inexperienced in the human rights area.[258] This bias in favor of investors is made worse by the fact that some arbitrators have acted or later will act as legal counsel for the investors involved in the dispute.[259]

Even in cases where a BIT does mention labor standards, it does so using "preambular language."[260] In other words, although some BITs encourage states and MNCs to respect workers' rights, they impose no penalties or sanctions against

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257. *See* Marc Jacob, *International Investment Agreements and Human Rights* 24 (INEF Research Paper Series 03/2010), *available at* http://www.humanrights-business.org/files/international_investment_agreements_and_human_rights.pdf (describing how arbitrations brought under a BIT pose problems because of the "irregularities and legal uncertainty" inherent in arbitration proceedings); *see also* Sheffer, *supra* note 19, at 490 (discussing how, because arbitration decisions only bind the parties, they fail to create a uniform standard of conduct among MNCs).

258. *See* Jacob, *supra* note 257, at 25 ("Most arbitrators that are selected by the parties have commercial backgrounds and do not regularly deal with matters pertaining to human rights law . . . ."); *see also* Sheffer, *supra* note 19, at 495 (describing how arbitrators are required to have commercial and legal experience yet are usually not familiar with human rights-related laws).

259. *See* Jacob, *supra* note 257, at 25-26 (discussing how arbitrators may be self-serving because they "frequently also act as counsel to parties in other cases"); *see also* Drake, *supra* note 241 (arguing that arbitrators may be biased because the attorneys who from the panels come from work in large, international law firms and, as such, are "mouthpieces for global investors").

260. *See* Jacob, *supra* note 257, at 11 (classifying BIT language addressing labor or environmental standards as "preambular language"); *see also* Vid Prislan & Ruben Zandvliet, *Perspectives on Topical Foreign Direct investment issues by the Vale Columbia Center on Sustainable International Investment*, COLUM. FDI PERSPECTIVES (April 1, 2013), http://www.vcc.columbia.edu/content/labor-provisions-bilateral-investment-treaties-does-new-us-model-bit-provide-template-future#_ftn1 ("The amendments to the 2012 Model represent a small but welcome step in bridging the divide between investment law and public policy concerns . . . [b]ut it lacks a clear obligation to adopt and maintain ILO standards as a minimum, and does not allow disputes to be submitted to arbitration.").

these entities should a violation occur.[261] For example, the US Model BIT does not permit a state or an investor to bring arbitrations claims under Article 13, the BIT's sole provision that addresses the significance of workers' rights.[262] If an issue arises under Article 13, a party may only make a request for a consultation meeting.[263]

The combination of China's lax enforcement of labor and employment laws, and BITs strong protections for investors, both weigh against the rights of workers. Despite China's implementation of new labor and employment laws, widespread abusive labor practices continue to persist. Further, unions are constrained in their ability to adequately represent workers' rights. Lastly, BITs and their focus on protecting the value of FDI from MNC-investors can sometimes constrict a state's regulatory authority, making it more difficult for states to pass new regulations or laws that to protect workers.

III. *USING THE INTERNATIONAL INVESTMENT FRAMEWORK AS A TOOL TO AFFIRMATIVELY HOLD MNCS LIABLE FOR EXTRATERRITORIAL HUMAN RIGHTS VIOLATIONS*

Viewing BITs through a purely commercial lens ignores the possibly detrimental effects that international investments may have on a government's regulatory authority and local communities.[264] The simple act of investing in another country can create intimate ties between the signatory-states as well as between the MNCs and the people in the state.[265] Thus, even though Apple may not be *legally* liable for labor violations occurring within their supply-chain factories in China, this does

261. *See* US MODEL BIT, *supra* note 191, art. 24 *(*permitting claims to be brought under provisions that are more investor-oriented and barring claims from being brought under provisions pertaining to labor or environmental standards).

262. *Id.* art. 24(a) (permitting claimants to submit an arbitration claim only if an obligation under Articles 3 through 10 was breached).

263. *Id.* art. 13(4) (permitting a party to request a consultation should a "matter" arise under Article 13).

264. *See supra* notes 19–25, 241–263 and accompanying text (detailing instances in which MNCs have used BITs to protect their financial interests even if it constrains the state's ability to regulate in the health, environmental, or other areas).

265. *See supra* notes 251–255 and accompanying text (discussing cases in which an MNC-investor's arbitration suit against the state affected a communities' access to safe water or damaged the environment).

necessarily mean that Apple is entirely blameless. BITs can serve as the connective bridge between the commercial sphere and the human rights sphere, ensuring that there is an avenue through which to hold MNCs legally liable for permitting or blatantly ignoring the use of abusive labor practices.

Part III.A argues that clauses can easily be strengthened in existing model BITs to provide greater protections for workers' rights. Next, Part III.B argues that incorporating stronger clauses for labor standards levels the playing field between investors and states in a BIT arbitration. Lastly, Part III.C argues that BITs are a practical and effective way to ensure that MNCs respect and protect labor rights, regardless of where these labor violations occur.

A. *Changing the Language of BITS to Address and Protect the State's Right and Obligation to Protect Workers*

The US Model BIT fails to include provisions that give parties the right to bring arbitration claims against a state or investor for violating a worker's rights.[266] Further, the US Model BIT does not have provisions immunizing a state from liability should the state pass new laws or policies that further protects workers' rights and interests.[267]

The US Model BIT already has provisions that protect states from being subjected to arbitration proceedings for passing regulations pertaining to environmental concerns.[268] Further, the US Model BIT contains provisions protecting the state's right to act in matters relating to financial stability.[269] Article 20

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266. *See supra* notes 260–263 and accompanying text (describing the provisions in the US Model BIT that briefly address labor rights).

267. *See supra* notes 260–263 and accompanying text (describing the US Model BIT's labor provisions).

268. US MODEL BIT, *supra* note 191, art. 12. ("Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investing activity in its territory is undertaken in a manner sensitive to environmental concerns.").

269. US MODEL BIT, *supra* note 191, art. 20 ("Notwithstanding any other provision of this Treaty, a Party shall not be prevented from adopting or maintaining measures relating to financial services for prudential reasons, including for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial services supplier, or to ensure the integrity and stability of the financial system.").

provides that a state-party "shall not be prevented from adopting or maintaining measures relating to . . . the integrity and stability of the financial system."[270] In other words, both these provisions protect a state's right to pass new laws or regulations about the environment or the financial sector by shielding them from incurring liability to an investor under a BIT.

A US-China BIT should include similar language pertaining to labor rights. Specifically, a US-China BIT should place affirmative obligations on MNCs and states to respect workers' rights as well as safeguard a state's authority to pass new employment laws or regulations. Further, these provisions should grant investors and states the option to bring arbitration claims in cases where a labor violation does occur.

B. *Incorporating Labor Standards into BITs Will Even the Playing Field Between the State and MNC-Investors*

The current international investment regime is biased towards protecting investors without providing equally strong provisions safeguarding a state's power to regulate.[271] Currently, many standard BITs include investor-oriented clauses such as national treatment provisions, fair and equitable treatment provisions, and expropriation provisions.[272] These clauses guarantee that an investor's rights are protected against arbitrary or discriminatory treatment at the hands of a state.[273] Further, arbitrators in BIT arbitrations are only expected to be experts in the commercial area.[274] These favorable provisions for investors have made it easier to essentially freeze states from passing any new measures relating to regulating the

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270. *See id.*

271. *Compare supra* notes 174–192 and accompanying text (describing how BITs contain provisions protecting investor's rights and granting them minimum protections), *with supra* notes 241–263 (discussing how MNC-investors have used BITs hold states liable for any depreciation in an investment's value).

272. *See supra* notes 174–192 and accompanying text (outlining how BIT provisions protect investors).

273. *See supra* notes 174–192 and accompanying text

274. *See supra* notes 257–259 and accompanying text (discussing how arbitrators in BIT arbitrations usually come from the investment sphere).

environment, labor standards, or other areas of public interest out of fear of being forced to pay enormous an arbitral award.[275]

Including stronger state-oriented clauses in BITs that protect a state's authority to regulate can help correct this imbalance. Some BITs already have provisions relating to areas of public interest, like protecting the stability of financial institutions or preserving the environment.[276] Strengthening provisions relating to labor standards will not, as some might say, be "counterproductive" to trade policy by "inhibit[ing] countries like China . . . from actually concluding bilateral investment treaties with the United States."[277] Instead, it provides states with more bargaining power against MNC investors in the international investment game and gives states the flexibility needed to regulate in sensitive public interest areas.

C. *The Practicality of Including Mandatory Obligations in BITs Requiring MNCs to Respect Worker's Rights*

China already has a history of turning a blind-eye to the abusive labor practices used in some of their factories.[278] China has attempted to ameliorate these practices through changing their labor and employment laws, but these changes are more easily made on paper rather than in practice.[279] Further, the ACFTU remains mostly ineffectual when it comes to encouraging workers to engage in collective action or bringing about any substantive change.[280]

Embedding labor standards into BITs may be more practicable and feasible than advocating for more widespread

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275. *See supra* notes 21–25, 251–256 and accompanying text (describing how MNC-investors have brought claims valued at millions of dollars against states).

276. US MODEL BIT, *supra* note 191, arts. 12, 20 (stating that a state's right to pass laws regulating environmental standards or the financial sector is protected).

277. Doug Palmer, *U.S. Resolves 3-year Debate on Investment Treaty Terms*, CHI. TRIB., April 20, 2012, http://articles.chicagotribune.com/2012-04-20/news/sns-rt-us-usa-investment-treatiesbre83j15l-20120420_1_treaties-foreign-investment-labor-groups.

278. *See supra* notes 195–240 and accompanying text (detailing the labor violations and abuses that occur in China's factories and workplaces).

279. *Compare supra* notes 56–140 and accompanying text (describing the changes to China's labor and employment laws made in the 2000s), *with supra* notes 195–240 (detailing the labor violations and abuses that continue to occur in China's factories).

280. *See supra* note 231–240 and accompanying text (discussing the limits on the ACFTU to represent workers' rights).

changes in China's labor policies.[281] Considering China's prohibition on the establishment of any independent trade union outside of the ACFTU, it is difficult for any real and adequate worker representation to occur.[282] Including non-derogation labor provisions in BITs, however, subtly integrates stronger labor standards into China from without its borders. Further, facing possible arbitration proceedings and the threat of an excessive arbitral award could further motivate the state to raise their labor standards.[283] Most significantly, including provisions in a BIT requiring states to not derogate from international labor standards provides MNCs and states a basis from which to file an arbitration claim. As an illustration, during the Apple-Foxconn scandal, Apple could have initiated arbitration proceedings against China for permitting these labor violations to occur in their supply-chain factories. Although Apple may only be able to recover monetary damages, of the two actors who should be held accountable for the scandal, this method at least holds one of them liable. This example also works when switched: a state may initiate an arbitration proceeding against a, MNC-investor for investing into factories that have violated relevant labor or employment laws.

CONCLUSION

Increasing globalization combined with the strict compartmentalization of issues into commercial and non-commercial areas have complicated the interactions between investments and human rights. The current international investment regime, spearheaded by MNCs, can no longer cling to their myopic blinders that focus purely on matters of economics, finance, and profit. In the end, the increasing number of BITs will inevitably increase the flow of FDI between states and MNCs. This will further blur the line demarcating where state liability ends and where MNC responsibility begins.

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281. *See supra* notes 195–230 and accompanying text (describing how, despite the changes in China's employment laws, abusive labor practices continue to pervade Chinese factories).

282. *See supra* notes 231–240 and accompanying text (describing the ACFTU).

283. *See supra* notes 19–25, 251–256 and accompanying text (discussing cases where investors brought arbitration proceedings against states and were awarded enormous arbitral awards).

Including stronger labor rights-oriented provisions in a US-China BIT can provide a preemptive answer to these future issues. BITs can help establish a governing code of conduct that legally and financially binds the actions of states and MNCs as well as the actions of their affiliates.

Additionally, MNCs and their increasingly global activities make it more difficult to regulate them uniformly across all state lines. Like the Multilateral Agreement on Investments and its subsequent failure, an effort to create some sort of universal, standardized document establishing standards of conduct for all MNCs operating in any jurisdiction may prove impossible. Yet, similar to how the international investment sphere developed, the creation of widely recognized standards on corporate social responsibility for MNCs can advance on a bilateral basis. Although it may be slow to have this movement proceed treaty by treaty, this method provides room for experimentation while simultaneously giving proper respect to each state's individual and unique characteristics.