
An Article Submitted to

Global Economy Journal

Manuscript 1635

How China's Employment Problems
Became Trade Problems

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Abstract

This article focuses on the potential trade spillovers of Chinese policies to maintain employment and discusses how nations might work collaboratively at the WTO to address this problem. Chinese leaders are determined to maintain employment and have long ignored Chinese employment laws (as well as international law) that could empower workers. Chinese leaders have not made sufficient effort to either educate workers and managers about their rights and responsibilities under the law (demand side of the law) or to educate policymakers throughout China as to their enforcement obligations under the law (supply side). The failure to enforce these laws has distorted trade.

Norms regarding the rule of law underpin the GATT/WTO but they are implicit. China became the first (but not only) nation to have explicit rule of law obligations. China was "required to enforce the rule of law throughout all of its territories." I suggest a way in which WTO members can address this problem and at the same time provide incentives to China to improve its rule of law.

KEYWORDS: China, WTO, employment, rule of law, trade, jobs, labor

*An early version of this article was prepared for Professor Petros Mavroidis, *China in the WTO: An Early Harvest*. I am grateful to Steven Oates of the ILO; Drusilla Brown of Tufts; and Phil Levy of AEI, and attendees at seminars at Georgetown, Louvain and GWU who helped me refine my argument. Aaron Shraberg provided thoughtful comments and invaluable research assistance. I am grateful to the IIEP for research support.

Introduction

The global downturn which began in 2007 has scarred the world's people; many face a future with fewer jobs and opportunities.¹ In January 2010, the International Labor Organization (ILO) estimated that some 212 million of the world's able bodied workers were unemployed-- an increase of 16% from 2007-2009.² The world faces a *global* job crisis, but understandably policymakers have made creating *domestic* jobs their top priority.³ Presidents and prime ministers recognize that if they can't establish an environment conducive to generating private sector jobs, their country may experience stalled economic growth, increased poverty, greater social tensions, political upheaval, and/or increased outmigration. To put it bluntly, without national job growth, these leaders may be out of a job.⁴

Perhaps the pressure to create jobs is greatest in China, the world's most populous nation.⁵ According to China's state council, "To solve the employment issue in China is a strenuous, arduous and pressing task... China has a proactive employment policy...and has done everything possible to... keep the unemployment rate within a socially tolerable range."⁶ In March 2009, Chinese

¹ Ann Harrison and Margaret McMillian, "On the Links Between Globalization and Poverty," *Journal of Economic Inequality* (2007: 5) 123-134; Hubert Escaith, Nannette Lindenberg, and Sebastien Miroudot, "International supply Chains and Trade Elasticity in times of global Crisis," 2/2010, 3, 5 at http://mpira.ub.uni-muenchen.de/20478/1/MPRA_paper_20478.pdf; for an interesting overview of the crisis, see the individual chapters in Richard Baldwin, "The Great Trade Collapse: Causes, Consequences and Prospects," at <http://www.voxeu.org/index.php?q=node/4297>

² ILO, "Global Employment Trends, January 2010," http://webdev.ilo.org/empelm/what/pubs/lang-en/docName--WCMS_120471/index.htm. . Some 21% or 633 million workers work and live on less than \$1.25 a day and some 40% live on some \$2.00 a day.

³ ILO, "Global Employment Trends," January 2009, 7, 9, at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_101461.pdf and <http://www.stwr.org/global-financial-crisis/financial-crisis-unemployment-working-poor-and-vulnerable-employment-to-increase.html>

⁴ Policymakers struggle to get out of a recession with high unemployment. Credit defaults are highly correlated with the unemployment rate, so as unemployment rises, defaults rise, and defaults impair bank capital, causing a further tightening of credit. Tight credit makes it harder for business to invest in people or technologies, and the failure to do so, will keep unemployment high.

⁵ For an interesting analysis, see, Gunter Schucher, "China's Employment Crisis-A Stimulus for Policy Change?" *Journal of Current Chinese Affairs* 38, 2, 121-144.

⁶ Information Office of the State Council, "China's Employment Situation and Policies," 4/26/2004, http://www.chinadaily.com.cn/english/doc/2004-04/26/content_326356.htm

Premier Wen Jiabao forcefully asserted, "We will do everything in our power to stimulate employment."⁷

However, China's willingness to "do everything" may also effect employment and economic growth in other countries. Job creation is not a zero sum game, where the jobs gained in one nation are lost in another. But how a nation creates or preserves jobs can have implications for the terms of trade in another. For example, policymakers can stimulate the demand for workers by increasing demand for various goods (as through domestic stimuli). This approach may or may not distort trade by favoring domestic producers. Alternatively, policymakers can reduce the cost of workers to firms by decreasing payroll taxes, ignoring minimum wages or other job-related costs. They can also reduce the supply of workers (by restricting immigration) or encourage workers to retire. Some governments promote job sharing to keep more people employed; under job sharing, two employees share hours and responsibilities. And finally, policymakers can keep the costs of workers artificially low by reducing the power or ability of workers to organize, bargain collectively, or strike.

In this article, I focus on the potential trade spillovers of Chinese policies to maintain employment and discuss how nations might work collaboratively at the WTO to address this problem. China is certainly not the only country to ignore its labor laws since the downturn.⁸ However, China's trade practices are enormously influential. China is simultaneously the most populous; one of the world's largest trading nations; and governed by a Communist party that intervenes in markets to promote economic growth. The argument unfolds as follows: Chinese leaders are determined to maintain employment and have long ignored Chinese employment laws (as well as international law) that could empower workers. Although China reformed its labor laws in 2007 and 2008 and enhanced protections for workers, the consensus among scholars, NGOs, and the US State Department is that these labor laws are unevenly and rarely enforced. Chinese leaders have not made sufficient effort to either educate workers and managers about their rights and responsibilities under the law (demand side of the law) or to educate policymakers throughout China as to their enforcement obligations under the law (supply side). These men and women recognize if

⁷ Geoff Dyer, "China Sets Sights on 8% Economic Growth," *Financial Times*, 3/5/2009, <http://www.ft.com/cms/s/47bce284-0929-11de-b8b0-0000779fd2ac>. China Daily, "China Pledges More Measures to Promote Employment, 3/5/2009, http://www.chinadaily.com.cn/china/2009npc/2009-03/05/content_7538891.htm

⁸ The International Confederation of Trade Unions (ICFTU) noted that in many countries workers have been threatened by employers with relocation, outsourcing and downsizing. In some industrialized countries, the ICFTU found that employers are increasingly relying on contract labor, third-party labor agency employment which has eroded incomes, labor conditions and rights at work. <http://survey09.ituc-csi.org/survey.php?IDContinent=0&Lang=EN>; and <http://survey09.ituc-csi.org/survey.php?&mode=pr&IDCont=0&Lang=EN>

workers were empowered, labor prices might rise and unemployment could increase. I assert that the failure to enforce these laws has undermined market access for China's WTO trade partners and distorted trade.

WTO members have leverage under WTO rules to address the labor spillovers of Chinese policies.⁹ As part of its accession agreement, China was "required to enforce the rule of law throughout all of its territories."¹⁰ These obligations include the responsibility to enforce all of its laws including those governing labor. Herein I suggest a way in which WTO members can address this problem, while at the same time provide incentives to China to improve its rule of law.¹¹ I explain why all WTO member states will benefit by working multilaterally through the WTO to encourage China to take steps that improve the rule of law. I do not include a separate section on previous scholarship on the relationship of labor law and trade, but instead embed it in the various sections of the article.

Labor laws encompass the employer/employee relationship. Some labor laws relate to conditions of work; others are designed to encourage employment. Labor laws can include regulations of hours of work; laws to regulate labor supply or to prevent unemployment; laws to protect child workers or provisions related to freedom of workers to associate.¹² It is important to note that although national governments decide their labor laws, some labor laws address fundamental human rights which governments are obligated to respect under international law. These include the right to work, freedom of association, the right to join a trade union, and the right to work for a fair wage in a safe environment.¹³

Policymakers have long recognized that employment laws and conditions in one country can affect those in another country. In 1919, the signatories of the Treaty of Versailles established the International Labor Organization (ILO). Its Preamble states, "The failure of any nation to adopt humane conditions of labor is an obstacle in the way of other nations which desire to improve the conditions in their own countries."¹⁴ If a government ignores its own labor laws, it is effectively

⁹ Scholars may debate whether the accession protocol aimed simply to ensure the effectiveness of WTO multilateral disciplines or to help China transform into a market based economy governed by the rule of law. See Julia Ya Qin "The Challenge of Interpreting "WTO Plus Provisions," Wayne State University Law School Legal Studies Research paper Series No. 09-18, 7/2/2009, 40-43.

¹⁰ The accession agreement is at <http://www.mac.doc.gov/China/WTOAccessionPackage.htm>.

¹¹ Kenneth Dam, "China as a Test Case: Is the Rule of law Essential for Economic Growth?" http://papers.ssrn.com/sol3/papers.cfm?abstract_id=880125. See especially fn. 205.

¹² On labor law, <http://encyclopedia2.thefreedictionary.com/labor+law>

¹³ These rights are delineated under the Universal Declaration of Human Rights, <http://www.un.org/en/documents/udhr/>

¹⁴ http://www.ilo.org/global/About_the_ILO/Origins_and_history/lang--en/index.htm

allowing its labor intensive firms to become more cost competitive with imports. Moreover, if the country has international market power (as does China), a contraction in the demand for imports will also reduce the world price of imports, giving rise to a terms-of-trade improvement. If governments attempt to achieve a strategic advantage through their labor standards they are effectively nullifying market access for some of their trade partners.¹⁵ Under GATT Article XXIII, any country in the WTO is entitled to “right of redress” for changes in domestic policy that systematically erode market access commitments even if no explicit GATT rule has been violated.¹⁶ China’s failure to enforce its labor law could effectively erode such market access commitments.

Why is China Different from Other Countries?

In many countries, market forces would eventually address the mismatch between the supply of workers and jobs, and its spillovers into trade. But as noted above, China is not most countries. First, China is a leading player in global trade. Second, China has an oversupply of workers, many of whom are desperate for jobs. Third, Chinese policymakers have taken a wide range of steps to encourage investment in China and to achieve competitive advantage in trade. Finally, although Chinese policymakers have been very successful at stimulating economic growth, Chinese governance is often inadequate, corrupt and opaque.

China’s regulatory and trade practices can move global markets. China acceded to the WTO in 2001.¹⁷ In some 10 years of WTO membership China has advanced from the 7th largest trading nation in 2000 to the world’s 3rd largest trading nation in 2010. It has supplanted Germany as the greatest exporter; it is also the world’s largest recipient of investment, and the world’s leading provider of manufactured goods.¹⁸ By importing a wide range of manufactured goods and

¹⁵ Drusilla K. Brown, “Labor Standards: Where do they Belong on the International Trade Agenda,” Tufts University Working Paper, 2001, pp. 29-31, <http://ase.tufts.edu/econ/papers/200113.pdf>; and Kyle Bagwell and Robert W. Staiger, “The Simple Economics of Labor Standards and the GATT,” NBER Working Paper No. 6604, 1998.

¹⁶ Negotiating Group on dispute Settlement, “Non-violation complaints Under GATT Article XXIII: 2, Note by the Secretariat, MTN.GNG/NG13/W/31, at <http://www.worldtradelaw.net/history/urdsu/w31.pdf>; and Jean Monnet Center, Evolution of Non-violation Cases, centers.law.nyu.edu/jeanmonnet/papers98/98-9—html.

¹⁷ <http://wss.hkcampus.net/~wss-6489/en/02/020126.html>; Nicholas Lardy, “China and the World Trade Organization: Problems on the road to Liberalization,” <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan003154.pdf>; Martin G. Hu, “WTO’s Impact on the Rule of Law in China,” Mansfield Dialogues in Asia; and WTO, “WTO Ministerial Conference Approves China’s Accession,” http://www.wto.org/english/news_e/pres01_e/pr252_e.htm.

¹⁸ According to Bloomberg news, “Foreign direct investment surged 103 percent from a year earlier in December to \$12.1 billion, the Ministry of Commerce reported in Beijing today. The

commodities such as oil, turbines, electrical machinery and plastics, China has clearly created jobs abroad.¹⁹ However, the efficiency and scale of China's manufacturing has pushed down the price of many manufactured products relative to other goods and services.²⁰

Secondly, although China's economic growth has been record-breaking, it has not been sufficient to provide work for every Chinese citizen who wants work. China has about one quarter of the world's workers and about 1.5 times the combined workforce of all developed states. The Chinese workforce is growing some 11% per year.²¹ China's workers are relatively inexpensive and productive. (However, in some sectors workers are scarce or less willing to work for low wages.)²² In 2008, China's average hourly labor wage in the manufacturing sector was about \$1.64 compared to about \$18 in the US. Chinese productivity grew at an average annual rate of 4% from 1990-2008 compared to about 1% growth for the U.S.²³

China's rulers are so afraid of political upheaval that they subsidize inefficient factories to maintain employment and forestall social and political protest. In addition, labor markets in China are opaque; we don't know the true magnitude of employment problems in China. Estimates of unemployment in

value was the second highest on record, according to Bloomberg data." Investment in China fell 2.6 percent in all of 2009 to \$90.03 billion as the global crisis sapped companies' finances. China's non-financial outbound investment rose 6.5 percent to \$43.3 billion. Bloomberg, "China Says U.S. Is Backsliding on Trade, Warns on Google (Update 2), 1/15/2010, <http://www.businessweek.com/news/2010-01-15/china-says-u-s-backsliding-on-trade-warns-on-google-update2-.html>

¹⁹ Testimony of John Frisbie, President, U.S.-China Business Council, "China's Implementation of Its World Trade Organization Commitments," Trade Policy Staff Committee Hearing, 10/2/2009, http://www.uschina.org/public/documents/2009/10/wto_testimony.pdf. For an overview of china's imports and exports, see www.uschina.org/statistics/tradetable.html, up to date for 2008.

²⁰ Commission on Growth, "The Growth Report: Strategies for Sustained Growth and Inclusive Development," 2009, 93-94. The Commission on Growth and Development was set up to examine the policies and strategies that underlie rapid and sustained growth and poverty reduction. It was chaired by Nobel Laureate Michael Spence, and Danny Leipziger, Vice-President, World Bank, was the Commission's Vice-Chair.

http://www.growthcommission.org/index.php?option=com_content&task=view&id=13&Itemid=58

²¹ Shaun Breslin, "Capitalism with Chinese Characteristics: the Public, the Private and the International," Working Paper 104, 2004, 3, <http://wwwarc.murdoch.edu.au/wp/wp104.pdf>; and Niall Ferguson and Moritz Schularick, "The End of Chimerica," Harvard Business School Working Paper, 10-037, 2009, p. 14-15.

²² Bradsher, "Defying global Slump, China has Labor Shortage."

²³ Morrison, "China's Economic Conditions," 5-6; and Economist, "Secret Sauce: China's rapid growth is due not just to heavy investment but also to the world's fastest productivity gains, 11/12/2009

China vary widely, from 17 to 45 million for 2009.²⁴ Scholars and policymakers struggle to develop an exact estimate of unemployment in China, because many Chinese citizens cannot officially register as unemployed. Policymakers regulate worker mobility through a household registration system called hukou, which divides workers into urban and rural. The government requires its citizens to use this system to obtain access to health care, education, and housing.²⁵ However, many migrants are desperate for work and do not register because they fear the state will jail them or send them back home. Thus, these migrants trade benefits for jobs and are thus willing to work for relatively low pay or under difficult conditions.²⁶

The Chinese leadership frequently intervenes to shape markets to ensure export-led economic growth. During the past 30 years, China has relied on a government-directed industrial policy which includes government investment in infrastructure, tax rebates, and the provision of subsidized land, energy and water to foreign investors.²⁷ Chinese policymakers also provide exporting firms with cheap credit.²⁸ Foreign investors have been willing to be patient and to transfer technology, business practices, and business processes in order to possibly serve China's growing and already sizeable consumer markets.²⁹ When China joined

²⁴ Wang Dewen, Cai Fang and Gao Wenshu, "Globalization and Internal Labor Mobility in China: New Trend and Policy Implications," 2006, <http://iple.cass.cn/file/51.pdf>; The World Bank, "Interview with David Dollar and Louis Kuijs on China Quarterly Update," 3/26/2009 <http://discuss.worldbank.org/content/interview/detail/9164/>; and Cai Fang, Du Yang and Wang meiyang, Human Development Research Paper, 2009/09, http://hdr.undp.org/en/reports/global/hdr2009/papers/HDRP_2009_09.pdf

²⁵ Under Chinese law, Chinese citizens were divided into two groups urban and rural. Rural workers were supposed to stay on the farm, as part of China's hukou (registration system. But many firms rely on these migrants for relatively cheap labor and the migrants want factory jobs. However, those without urban registration are often treated as second class citizens. NA "Migration in China: Invisible and Heavy shackles," *The Economist*, 5/6/2010, www.economist.com/displaystory.cfm?story_id=16058750

²⁶ Gunter Schucher, "China's Employment Crisis-A Stimulus for Policy Change?" *Journal of Current Chinese Affairs* 2/2009, 121-144; Virtual Review, China News and Opinion, <http://virtualreview.org/china/zoom/824399/chinas-employment-in-grim-situation-amid-global-crisis>; and Peoples' Daily, "Chinese Premier Discusses Financial Crisis with World Bank Head," <http://english.peopledaily.com.cn/90001/90776/90883/6554780.html>.

²⁷ U.S.-China Economic and Security Review Commission, 2009 Annual Report to Congress, Executive Summary, 4, http://www.uscc.gov/annual_report/2009/executive_summary.pdf

²⁸ Dani Rodrik, "What's so Special About China's Exports?" paper prepared for China and the global Economy, 2010; Pranab Bardhan, "Challenges for China at sixty-Part I," Yaleglobal, <http://yaleglobal.yale.edu/content/challenges-china-sixty-%E2%80%93-part-i>; and Paul Krugman, "Chinese New Year," *New York Times*, 12/31/2009 <http://www.nytimes.com/2010/01/01/opinion/01krugman.html>.

²⁹ Michael Dooley, David Folkerts-Landau and Peter Garber "An Essay on the Revived Bretton-Woods System", NBER Working Paper No. 9971, September, 2003; and Michael Wines, "China's Economic Power Unsettles the Neighbors," *New York Times*, 12/9/2009,

the WTO, China was required to make subsidies transparent and ultimately eliminate them. However, in 2010 the US Government reported that these subsidies have not been eliminated or reduced; these programs are often the result of internal administrative measures; and are not made public or publicized. These strategies have attracted many foreign investors, particularly manufacturers.³⁰

China's success at economic growth has been facilitated by government intervention. In fact, the Chinese Communist party and its members often own and operate or are tied to private enterprises in key sectors such as transportation, energy and banking. As one Chinese banker put it, "It's quite hard to compete when you are playing against the referee."³¹ Moreover, political and economic decisions governing these firms are often made in an unclear and manipulative manner. Sometimes China's laws are enforced; other times they are ignored. China's inadequate governance at the provincial level is due to a wide range of reasons: corruption, a lack of uniformity among rules, and the arbitrary abuse of power. At the national level, the Communist Party is at times willing to ignore its international commitments in order to maintain power.³² As the US Congressional-Executive Commission on China reported in 2009, "the Communist Party rejects the notion that upholding the rule of law should preempt the Party's role in guiding the functions of the state."³³

Finally, many analysts believe that Chinese policymakers deliberately keep the value of its currency, the renminbi (also known as the yuan), low in order to stimulate exports.³⁴ Economists and policymakers increasingly acknowledge

<http://www.nytimes.com/2009/12/10/world/asia/10jakarta.html>. The recent revelations that Chinese hackers had hacked into Google have led some companies to consider (or reconsider) abandoning China despite its huge potential market. Steven Mufson and Peter Whoriskey, "Does China's big market come with a bigger headache?" Washington Post, 1/15/2010, A14.

³⁰ US Trade Representative, "2010 National Trade Estimate Report on Foreign Trade Barriers," China, 10-12,

http://www.ustr.gov/sites/default/files/uploads/reports/2010/NTE/2010_NTE_China_final.pdf

³¹ Quotation from Jamil Anderlini, "Rule of the Iron Rooster," Financial Times, 8/25/2009, http://www.ft.com/cms/s/0/f41d5786-910d-11de-bc99-00144feabdc0.html?nclick_check=1

³² Gregory C. Chow, "The Impact of Joining WTO on China's Economic, Legal and Political Institution," Speech at City University of Hong Kong, 3/22/2001, www.princeton.edu/~gchow/WTO.pdf

³³ Congressional Executive Commission on China, 2009 Annual Report, 1, quotation p. 5.

³⁴ In 2005 China officially removed the peg to the dollar, and the yuan gradually became stronger, moving from 8.35 to the dollar to about 6.8 in July 2008. But with the financial crisis they again made the link and tried to prevent the yuan from strengthening. The yuan has fallen against the Euro since 2005. Wayne M. Morrison and Mark Labonte, "China's Currency: A Summary of the Economic Issues," CRS Report, 12/7/2009, RS21625; Ernest Preeg, "Free Trade Agreements in Asia: US Exports at Risk and Much More," Manufacturers Alliance, 2/2009, <http://www.aei.org/docLib/Asian%20FTAs.pdf>; Stephen Castle and Carter Dougherty, "EU to Press China Over Yuan," New York Times, 11/23/2007,

China's currency practices distort trade.³⁵ Although the nominal exchange rate appreciated by 15% from 1998-2008, Niall Ferguson and Moritz Schularick find that manufacturing in China "is much cheaper in dollar terms than it was eight years ago."³⁶ As a result, labor intensive manufacturers have often shed workers and moved plants to China (as well as to other relatively low wage, high productivity locales.) Some individuals describe China as a low-wage investment haven.³⁷

There is no scholarly consensus on how China's employment and economic policies have affected production and job growth in other countries. As the IMF has reported, it is difficult to disentangle the globalization of labor from other factors such as technological progress.³⁸ Labor economist Freeman states, "we lack compelling evidence that trade underlies the problems of the less skilled." Labor markets have been affected more by factors such as technology, immigration, education, and social policies.³⁹ But in recent years even

<http://www.nytimes.com/2007/11/23/business/worldbusiness/23iht-currency.5.8461214.html>; and James A. Reddy, "EU voices Frustration with China's Currency Policy," *Wall Street Journal*, 12/28/2009,

<http://online.wsj.com/article/SB10001424052748703939404574565271054376320.html>

³⁵ On a bilateral basis, the yuan is undervalued by 41 percent against the U.S. dollar, according to a January 2010 study by the Institute for International Economics. John Williamson and William Cline, "Notes on Equilibrium Exchange Rates," PB 10-2, <http://www.iie.com/publications/pb/pb10-02.pdf> Also see <http://blogs.ft.com/economistsforum/2009/12/why-china%E2%80%99s-exchange-rate-policy-concerns-us/>; and Knowledge at Wharton, "The Costs of China's Currency policy," 1/21/10 at <http://www.forbes.com/2010/01/21/china-currency-policy-entrepreneurs-finance-wharton.html?boxes=Homepagechannels>

³⁶ Ferguson and Schularick, "The End of Chimerica," p. 14-15; and Judith Banister, "Manufacturing in China today: Employment and labor compensation," EPWP, The Conference Board, September 2007, pp.4-5 <http://www.conference-board.org/worldwide/china.cfm>.

³⁷ See as example, Clayton M. Christensen and Michael E. Raynor, *The Innovator's Solution: Creating and Sustaining Successful Growth*, (Cambridge, MA: Harvard Business School Press, 2003); Radio Netherlands, "Global Companies "forced" to move to china," 1/21/2010, <http://www.rnw.nl/english/article/global-companies-forced-move-china>; Wayne M. Morrison, "China's economic conditions, CRS Report for Congress, RL-33534, 12/11/2009 at <http://www.fas.org/sgp/crs/row/RL33534.pdf>

³⁸ IMF, World economic Outlook, Chapter 5, The globalization of Labor, 169-172, <http://www.imf.org/external/pubs/ft/weo/2007/01/pdf/c5.pdf>

³⁹ Richard B. Freeman, "Are your Wages Set in Beijing?" *Journal of Economic Perspectives*, Vol. 9, # 3, Summer, 1995, 30; Richard B. Freeman, "Trade Wars: the Exaggerated Impact of Trade in Economic Debate," NBER Working Paper no. 10000, September 2003; and Gordon H. Hanson, and Raymond Robertson, "China and the manufacturing Exports of Other Developing countries," NBER Working Paper 14497, September 2008, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1305507##. The Rotman School at the University of Toronto had an interesting conference on this issue. Offshore Outsourcing: Capitalizing on Lessons Learned," <http://www.rotman.utoronto.ca/offshoring>

mainstream scholars such as the Nobel Prize winning economist Krugman asserted Chinese mercantilism may end up reducing US employment by around 1.4 million jobs.”⁴⁰ In response, some scholars have tried to measure the specific effects of Chinese policies upon workers in other countries. Their findings vary depending on a wide range of factors such as a country’s factor endowments, locale, exposure to Chinese imports by sector etc....⁴¹ For example, a 2009 study by Mion, Vandenbussche, and Zhu found that China’s imports have a stronger job displacement effect in Belgium than imports from other low-wage countries. Driffield and Chiang found that Taiwanese investment in China has contributed to rising unemployment in Taiwan.⁴² A 2007 study of Canada finds a strong negative association at the industry level between increased exposure to Chinese imports and employment growth, but the authors also found that it did not lead to lower wages for less skilled workers.⁴³ A study by Chen, Cheng et al. uses input-output methodology to estimate how Chinese exports affected US value added and employment, and found for every \$1000 dollars of Chinese exports .242 person-year jobs were created in 2002.⁴⁴ Finally, a 2008 joint ILO/WTO study on the impact of trade upon employment speaks diplomatically and generically about the impact of increased China trade on employment in other countries. The authors noted “increased openness in middle-income countries reduced the

⁴⁰ Paul Krugman, “Chinese New Year,” New York Times, 12/31/2009
<http://www.nytimes.com/2010/01/01/opinion/01krugman.html>.

⁴¹ Adrian Wood and Jorg Mayer, “Has China de-industrialized Other Developing countries?” Working Paper 175, QEH, November 2009; and Daniel Lederman, Marcelo Olarreaga and Eliana Rubiano, “Trade Specialization in Latin America: The impact of China and India,” Review of World Economics, Vol. 144, No. 2 July 2008. Also see Betina Dimaranan, Elena Ianchovichina, and Will Martin, “China, India, and the Future of the World Economy: Fierce Competition or Shared Growth?” World Bank Policy Research Working Paper, 4304, August 2007. While Lederman, Olarreaga and Rubiano find significant effects in Latin America, Adrian Wood and Jorg Mayer find the de-industrializing effect was clearest in East Asia

⁴² Giordano Mion, Hylke Vandenbussche, and Linke Zhu, “Trade with China and Skill Upgrading: Evidence from Belgian Firm level Data,” 10/2009, LICOS Discussion Paper no. 248; Nigel Driffield and P.C. Chiang, “The Effect of Offshoring to China: Reallocation, Employment and Productivity in Taiwan,” International Journal of the Economics of Business, Vol. 16, 1, 2/2009, pp. 19-38. One of the earliest working papers was Marian Jansen, “International Trade and the Position of European Unskilled Labor.” WTO Working Paper, 2001,
http://www.wto.org/english/res_e/reser_e/ae0001_e.htm

⁴³ Alberto Isgut, “The Effect of Imports from China on Canada’s labor markets: Your Wages are Not Set in Beijing,” <http://www.rotman.utoronto.ca/offshoring/Ch12.pdf>

⁴⁴ Xikang Chen, Leonard K. Cheng et al, “Domestic Value Added and Employment Generated by Chinese Exports: A Quantitative Estimation,” Revised 2008, http://mpra.ub.uni-muenchen.de/15663/1/MPRA_paper_15663.pdf

relative demand for unskilled workers by causing sectors of low-skill intensity to contract.”⁴⁵

Although we can't delineate the exact employment effects of Chinese policies, we can examine how foreign investors are responding to failure of the Chinese government to ensure the rule of law at both the federal and provincial level. Since 2007, foreign investors have become increasingly anxious about China. In the face of China's food and product safety scandals, growing numbers have gone public with their concerns.⁴⁶ Several companies including Google, Go Daddy, Steiff, and Scovil announced they would reduce operations or gradually withdraw from China.⁴⁷ In addition, European and American business groups investing in China have warned that they perceive that China is becoming more interventionist and protectionist.⁴⁸ But in general, these foreign investors have not consistently demanded good governance in China. China has a culture of non-compliance, where bad actors set the norm, where laws and regulations are often ignored or unevenly enforced, and where many citizens including workers don't know their rights under the law.⁴⁹

China is in many ways an outlier. Foreign investors would generally not want to move production and research facilities to such a locale, given China's inadequate governance.⁵⁰ Nonetheless, many executives from the US and Europe

⁴⁵ Marion Jansen and Eddy Lee for the ILO and WTO, [Trade and Employment: Challenges for Policy Research](http://www.wto.org/english/res_e/booksp_e/ilo_e.pdf), 16, 45. http://www.wto.org/english/res_e/booksp_e/ilo_e.pdf

⁴⁶ European Business in China “Position Paper 2009-2010,” Executive summary, 9-13; at <http://www.euccc.com.cn/view/media/publications>; and U.S. China Business Council 2009 Member Priorities Survey Results, “US Companies China Outlook,” 14-17, http://www.uschina.org/public/documents/2009/10/uscbc_member_survey.pdf

⁴⁷ <http://www.ajc.com/business/business-brings-jobs-back-491886.html>;
<http://www.telegraph.co.uk/news/worldnews/asia/china/2242665/Steiff-teddy-bears-abandon-China.html>;
<http://www.spiegel.de/international/business/0,1518,569861,00.html>; and
<http://www.msnbc.msn.com/id/36021136>. Each company had different reasons for leaving China.

⁴⁸ European Business in China “Position Paper 2009-2010,” Executive Summary; USTR, 2009 National Trade Estimates Report, http://www.ustr.gov/sites/default/files/uploads/reports/2009/NTE/asset_upload_file868_15464.pdf ; and U.S. China Business Council 2009 Member Priorities Survey Results, “US Companies China Outlook, 2009 ” 9-13.

⁴⁹ Global brands and retailers put tremendous pressure on manufacturers and suppliers to keep costs from rising. AFL CIO, Representative Benjamin L. Cardin and Christopher Smith, Section 301 Petition before the US Trade Representative, 6/8/2006, 44-47; and Department of State, 2008 Human Rights Report: China, www.state.gov/drl/rls/hrrpt/2008/eap/119037.htm#.

⁵⁰ In indicators of the rule of law, china ranks relatively low. See as example, World trade Indicators at <http://info.worldbank.org/etools/wti/2b1.asp?pillarID=1&indList=66,118,152,156,157,158,159,410,161,190&cid=41&comparator=i2&vr=Value&timeperiod1=t1&timeperiod2=t2&timeperiod3=t3&timeperiod4=16> or for rankings,

claim they have no choice but to invest and produce there, given its huge and growing market.⁵¹ Meanwhile, some observers argue that, because of its market power, China cannot be reined in by existing international institutions. However, other countries can use the WTO to work collaboratively to change China's trade distorting practices.

The Historic Albeit Forgotten Link between Trade and Employment

The architects of the world trading system saw trade as a tool to stimulate economic growth and employment. During World War II, these men and women (the post-war planners) conceptualized policies and institutions to govern the global economy that would emerge after the war. They believed that governments had a responsibility to create the conditions for expanded employment. But the postwar planners wanted to link governmental responsibility for employment to trade policies. They believed that “beggar thy neighbor trade policies” had not protected jobs, but in fact limited job creation and economic growth. They hoped that if governments collaborated to regulate protectionism, trade would grow. With more trade, firms would hire more people, creating job growth at both the national and international levels. Thus, they saw multilateral trade liberalization as a means to create jobs, rather than a strategy that could yield job loss. For this reason, they designed an international system to link trade and employment.⁵²

In 1946-1948, officials in the US and British governments put forward plans for a new organization, the International Trade Organization (ITO), to govern not only commercial policies, but employment, competition policy, and other issues that could affect trade flows. Fifty-four countries met at Havana, Cuba from 1947-1948 to negotiate at the International Conference on Trade and Employment. Article 3 of the ITO Charter stated their approach: “Each Member shall take action designed to achieve and maintain full and productive

<http://info.worldbank.org/etools/wti/2b1.asp?pillarID=1&indList=66,118,152,156,157,158,159,410,161,190&cid=41&comparator=i2&vr=Rank&timeperiod1=t1&timeperiod2=t2&timeperiod3=t3&timeperiod4=16>.

⁵¹ European Business in China “Position Paper 2009-2010

<http://www.euccc.com.cn/view/media/publications>; David Barbuda and Brad Stone, “China, Where U.S. Internet Companies Often Fail,” *New York Times* 1/15/2010, <http://www.nytimes.com/2010/01/16/technology/16failure.html>; and Steven Mufson and Peter Whoriskey, “Does China’s Big market Come with a bigger headache?” *Washington Post*, <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/14/AR2010011402482.html>

⁵² Susan Ariel Aaronson, *Trade and the American Dream: A Social History of Postwar Trade Policy* (Lexington: University of Kentucky, 1996), pp. 17-40. This is an archival history of the ITO, GATT, and WTO. See pp. 17-40.

employment and large and steadily growing demand within its own territory through measures appropriate to its political, economic and social institutions.... Measures to sustain employment, production and demand shall be consistent with the other objectives and provisions of this Charter.” Article 7 added an important caveat: “The Members recognize that unfair labor conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.”⁵³

However, the world never achieved clear rules on the relationship between trade and employment. The US Congress never voted on the ITO Charter.⁵⁴ Ever so gradually, policymakers relied on the GATT, the part of the ITO which governed commercial policies (border measures like tariffs and exchange controls). The GATT was supposed to be a temporary replacement, until its contracting parties could negotiate a new formal organization. Alas, that did not happen until the Uruguay Round 1986-1993.

In the decades that followed, some member states tried to include employment issues in the GATT. However, many developing country policymakers feared enhanced language on labor issues would provide a subterfuge for protectionism. The proponents of a more detailed labor rights language consistently failed to convince the bulk of GATT member states to agree to include labor rights.⁵⁵ Although GATT grew in scale and scope, the only mention of trade and employment remained in GATT’s preamble, which stated that trade relations “*should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand.*”⁵⁶

During the Uruguay Round of trade talks from 1986-1993, members agreed to create a new international organization, the World Trade Organization (WTO). But the WTO, which came into existence in 1995, had no explicit language on the relationship between employment policies and trade. As before, some members of the WTO posited trade could create a virtuous circle: by regulating protectionism, trade could expand. Firms could achieve economic efficiencies—producing more goods and services at lower costs. More people would have jobs, access to new opportunities, and ultimately see improvements in economic welfare. By collaborating to regulate protection, the signatories could

⁵³ The Havana Charter at <http://www.worldtradelaw.net/misc/havana.pdf>

⁵⁴ Aaronson, *Trade and the American Dream*, 5, 114-132 and William Diebold, Jr. “The End of the I.T. O,” *Essays in International Finance* 16, (October 1952), 1-37. Many factors contributed to the demise of the ITO including changing international circumstances, party politics, special interest opposition and Truman Administration ambivalence.

⁵⁵ Susan Ariel Aaronson, *Taking Trade to the Streets: The Lost History of Public Efforts to shape Globalization* (Ann Arbor: Michigan, 2001), pp 54-55, fns. 110-112.

⁵⁶ http://www.wto.org/english/docs_e/legal_e/index_g_e.htm

ensure that trade liberalization would essentially work for more of the world's workers. In this way trade would be mutually beneficial for all of the members of the WTO stimulating economic growth *and* creating jobs.⁵⁷

But this supposedly virtuous circle didn't come round for all countries. By the 1990's, it became increasingly clear that given global markets for capital, goods and labor, developing and industrialized countries had a surplus of unskilled labor.⁵⁸ In 1996, the Organization for Economic Cooperation and Development (OECD) issued a study which examined the relationship of trade and labor standards. The researchers reviewed the scholarly literature and found no relationship between the level of labor standards and real wage growth. They also asserted that countries with lower labor standards gained no significant advantage in exporting.⁵⁹ But policymakers, scholars, and workers continued to express concerns about the relationship between trade, employment and labor laws. In 1998, the members of the ILO adopted a Declaration on Fundamental Principles and Rights at Work. This declaration obligates ILO member states to respect four core rights: "freedom of association and recognition of the right to collective bargaining," the "elimination of all forms of forced or compulsory labor," the "effective abolition of child labor," and the "elimination of discrimination in respect of employment and occupation." In addition, member states agreed not to use labor standards for protectionist trade purposes or to ignore such standards in the perceived interest of expanding trade.⁶⁰ Still the ILO and the WTO did not develop a formal working relationship until 2007, when the two organizations agreed to partner to examine the relationship between trade and employment; they issued their first report in 2008.⁶¹

⁵⁷ Steve Charnovitz, "The (Neglected) Employment dimension of the World Trade Organization," Accepted Paper, at ssrn.com/abstract=680141. Charnovitz notes the preamble is actionable. He says that "In its decision in the *Tariff Preferences* case, the Appellate Body stated that the Preamble "informs" all WTO covered agreements. "European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, Report of the Appellate Body, WT/DS246/AB/R, para. 161 (adopted 20 April 2004).

⁵⁸ Commission on Growth and Development, "The Growth Report: Strategies for Sustained Growth and Inclusive Development, 2009, 93-94. For an excellent overview of the debate, see Mita Aggarwal, International Trade, Labor Standards and Labor Market Conditions: An Evaluation of the Linkages, US International Trade Commission Working Paper 95-06-C, 1995; David Kucera, "The Effect of Core Workers Rights on labour costs and foreign Direct Investment: Evaluating the Conventional Wisdom," International Institute for Labour Studies Discussion Paper 130, 2001; and Drusilla Brown, "International Trade and Core Labor Standards: A Review of the Literature," Department of Economics, Tufts Discussion Paper, 2000-05 <http://ase.tufts.edu/econ/papers/200005.pdf>

⁵⁹ OECD, "Trade, Employment and Labour Standards: A Study of Core Workers Rights and International Trade," 1996.

⁶⁰ Article 2, ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 86th Session, Geneva, 1998. [/www.ilo.org/declaration/lang--en/index.htm](http://www.ilo.org/declaration/lang--en/index.htm)

⁶¹ http://www.wto.org/english/res_e/reser_e/wkshop_aug09_e/wkshop_aug09_e.htm

Alas, the two organizations began to collaborate at approximately the same time that the world experienced a financial meltdown. The downturn began in the US and Britain and quickly spread around the world. Trade shrank dramatically, and as noted earlier, many people lost their jobs. The downturn in jobs and credit led to a collapse in trade, which in turn led to further unemployment.⁶²

But the crisis provided an opportunity for policymakers to reassess the links between trade and employment. As the crisis began, the members of the G-20 (the world's 20 largest economies) met in Washington in November 2008 to develop a collaborative response. In a November 2008 summit declaration they stated, "Reforms will only be successful if grounded in a commitment to free market principles, including the rule of law, respect for private property, open trade and investment." They agreed to "refrain from raising new barriers to investment or to trade in goods and services, imposing new export restrictions, or implementing World Trade Organization (WTO) inconsistent measures to stimulate exports."⁶³

At the April 2009 meeting in London, the G-20 agreed to continue to refrain from protectionism, and to "rectify promptly any such measures. We extend this pledge to the end of 2010."⁶⁴ At the behest of the G-20, the WTO agreed to use its trade policy review body to examine the behavior of member states in response to the global downturn. The members agreed to focus on domestic policies that could distort trade, such as the adoption of domestic stimuli.⁶⁵ These governments hoped to use "naming and shaming" to limit trade distortions from these policies and help the global economy recover.⁶⁶ In 2009,

⁶² Spain provides an interesting example of this phenomenon. In recent years, many immigrants from Latin America came to Spain, but not surprisingly these immigrants were among the first to experience unemployment with the downturn. Many left Spain to find new jobs elsewhere, but that out-migration led to a further decline in exports. According to Giovanni Peri and Francisco Requena, with fewer immigrants, Spanish exporters found fewer markets abroad. They concluded, "Such a negative impact on export may actually exacerbate the negative effect of recession on GDP." Peri Giovanni and Francisco Requena (2009) "[The Trade Creation Effect of Immigrants: Evidence from the Remarkable Case of Spain](#)", NBER Working Paper # 15625, November, 2009..

⁶³ G-20, Declaration, "Summit on Financial Markets and the World Economy," 11/15/2008, http://www.g20.org/Documents/g20_summit_declaration.pdf

⁶⁴ London Summit Communiqué: A Plan for Global Recovery and Reform," 4/2/2009, <http://www.pittsburghsummit.gov/resources/125131.htm>

⁶⁵ According Trade Alert, an international monitoring organization, the US has 46 such measures (either proposed or adopted) while China has 29. The difference in the number of "protectionist" measures may reflect greater democracy and transparency in the US rather than greater protectionist intent or actions.

http://www.globaltradealert.org/measure?tid=All&tid_1=494&tid_3=All

⁶⁶ WTO, "Report on G20 Trade and Investment Measures," 9/14/2009, See Annex 1 and 2. See pp. 26-27 for China's measures.

the WTO reported that the drop in global demand “seems to have prompted members whose growth was previously driven to a great extent by exports...to re-evaluate their economic development strategies.”⁶⁷

However, it was not until the September 2009 G-20 summit in Pittsburgh that employment became center stage. The attendees agreed to collaborate to build “an employment-oriented framework for future economic growth....The international institutions should consider ILO standards and the goals of the Jobs Pact in their crisis and post-crisis analysis and policy-making activities...We direct our Ministers to assess the evolving employment situation, review reports from the ILO and other organizations on the impact of policies we have adopted.”⁶⁸ Despite these pretty words, neither the 20 biggest economies (which include China) nor WTO members have discussed how to deal with a country or countries that might distort trade through domestic policies designed to preserve or create jobs. Their silence was, as some say, deafening.

Rule of Law, China and the WTO

The WTO's agreements “provide the legal ground-rules for international commerce.”⁶⁹ These agreements extend the rule of law across borders.⁷⁰ In addition, by creating and transmitting norms of due process, predictability, and transparency, the WTO agreements help make member states accountable not only to foreign market actors, but also to their citizens.⁷¹

As Bagwell, Mavroidis, and Staiger have noted, the GATT agreements create “a system of property rights over negotiated market access commitments

⁶⁷ WTO Trade Policy Review Body, WT/TPR/OV/12, p. A-35.

⁶⁸ G-20, “Leaders Statement: The Pittsburgh Summit,” 9/24-25/2009, <http://www.pittsburghsummit.gov/mediacenter/129639.htm>

⁶⁹ WTO, “Understanding the WTO,” http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm; and Address by James Bacchus, Chairman, Appellate Body, WTO, “Groping Towards Grotius: the WTO and the International Rule of Law,”

⁷⁰ http://www.uiowa.edu/ifdebook/faq/Rule_of_Law.shtml. Scholars generally define the rule of law as a system that attempts to protect the rights of citizens from arbitrary and abusive use of government power. The rule of law thus assures market participants that the government will adopt a hands-off approach to investments and production, allowing those participants to fully exercise their rights in relation to land, labor and capital. The rule of law helps set the “rules of the game” in critical areas such as investments, property, and contracts. The rule of law also serves as an important assurance of social rights and government accountability. Governmental restraint is especially critical for many transitioning economies where a previously planned economy is to be transformed into one that is market-based. When the government is no longer the sole owner of land, capital, and labor, the rule of law guarantees that the crucial elements of the economy will be free from arbitrary governmental actions

⁷¹ Robert Keohane, Andrew Moravcsik, and Stephen Macedo, “[Democracy-Enhancing Multilateralism](#),” *International Organization* (Winter 2009), 18.

that are secure against unilateral government infringement.”⁷² However, unilateral government infringement can include the failure of a country to enforce its own laws. Because the Chinese government often acts in an arbitrary, opaque and corrupt manner, the property rights established under WTO rules are not always “secure” in China.⁷³ The members of the WTO recognized that they would have to hold China on a tight leash. For this reason, they required China to make significant changes both to its laws and the process of governance.

The 2001 Protocol on the Accession of the People’s Republic of China explicitly calls on China to “apply and administer in a uniform, impartial and reasonable manner all its laws, regulations and other measures of the central government as well as local regulations, rules and other measures...pertaining to or affecting trade.... China shall establish a mechanism under which individuals and enterprises can bring to the attention of the national authorities cases of non-uniform application.”⁷⁴

Until China’s accession, nations were presumed to function according to market principles. China was the first (but not the only state) required to implement “market economy practices.” Market economy practices include letting markets determine the demand and supply as well as the prices of most goods. As Qin notes, this became “a matter of WTO law.” Should China fail to honor these market economy commitments, another nation could challenge it to a trade dispute.⁷⁵

Finally, the Accession called on China to ensure that “those laws, regulations and other measures pertaining to and affecting trade shall be enforced.”⁷⁶ This obviously includes laws related to employment.

The members of the WTO have twice reviewed China’s compliance with its WTO commitments in 2006 and in 2008. These reviews reveal a mixed picture. China has generally taken a wide range of steps towards full compliance, but it has yet to meet many of its existing obligations. Moreover, members are not optimistic about China’s future behavior.⁷⁷

⁷² While complaints based upon an alleged "failure of another contracting party to carry out its obligations under this Agreement" (Article XXIII:l(a)) are sometimes referred to as "violation complaints", complaints invoking Article XXIII:l(b) have in a few instances been denoted as "non-violation complaints"¹ or as being based on "the well-established principle of non-violation nullification or impairment".² But the term "non-violation complaint" has never been precisely defined by GATT contracting parties.

⁷³ Breslin, “Capitalism with Chinese,” 15-19.

⁷⁴ WTO, “Accession of the People’s Republic of China, Decision of 10 November 2001,” WT/L/432, (A) 1, 2, <http://www.wto.org>.

⁷⁵ Julia Ya Qin, “The Challenge, 4-6.

⁷⁶ Ibid. Sections (B), (C), 3.

⁷⁷ Karen Halverson, “China’s WTO Accession,” and China Trade Policy Review, WT/TPR/S/199, x-xi.

Qin concluded that “China has shown a mixed record in implementing its Protocol obligations. It “met substantially all of its market access commitments in goods and services,” but “has not fully complied with its special rule obligations of the Protocol.” It delayed notification of its government subsidies and resisted the transitional review mechanism, at times refusing to answer questions posed by other members.⁷⁸

The new labor contract law did not go into effect until January 1 2008, so it may have been too early for WTO member states to discuss it at China’s trade policy review. Nonetheless, some countries brought up the issue of labor policies. For example, during the 2008 review, the representative of the EC “encouraged China to implement efficient social and employment policies to fight poverty while profiting from the fruits of international trade.” He questioned whether China was taking the appropriate steps to foster labor standards.⁷⁹

China’s failure to enforce the rule of law related to employment issues falls under its binding obligations under WTO rules, as set out in China’s Protocol of Accession. The next section delineates China’s recent labor practices and how they may affect China’s trade and trade partners.

Labor Issues in China and the Trade Spillovers

In China, people are plentiful, but the supply of jobs is insufficient. Chinese rulers must not only stimulate economic growth, but find jobs for the tens of millions of workers that enter the economy each year. As a result, Chinese policies lurch between empowering workers and ensuring that both foreign and domestic employers find Chinese workers affordable, docile, and easy to hire or fire.

China’s ability to create jobs for its people has global repercussions. China has more than 750 million workers—more than the workforce of the OECD nations combined. In 2005, the World Bank estimated China’s labor force accounted for almost 26% of the world total of workers and 27% of employed workers. Chinese workers include not only some 800 million peasants, but also some 230 million migrant workers who are not tethered to the land. Both groups are desperate for employment and other means to provide for their families.⁸⁰

⁷⁸ Ya Qin, “China, India, and the Law,” 18-19.

⁷⁹ Trade Policy review, China, Minutes of Meeting, WT/TPR/M/199, May 21, 23, 2008, 99.

⁸⁰ Douglas Zhihua Zeng, “China’s Employment Challenges and Strategies after the WTO Accession, World Bank Policy Research Working Paper, 3522, 2/2005, 2, <http://info.worldbank.org/etools/docs/library/137740/Zeng3522.pdf>; China’s State Council, November 200: <http://www.mingong123.com/news/13/200811/e0662ce6a21a2a9f.html>; and Ray Brooks and Ran Tao, “China’s Labor Market Performance and Challenges,” IMF Working Paper WP/03/210, 11/2003, Table 1.

During the period 1991-2005, the Chinese work force increased on average by some 10 million workers, but only 7.05 million of these workers found jobs.⁸¹ In recent years, the most educated students have had an even harder time finding job including some 30% of university graduates.⁸² China's urban unemployment rate was 4.2 percent at the end of 2008, up 0.2 percentage points from the year before according to the Ministry of Human Resources and Social Security (MOHRSS) in late January 2009. However, officials also noted that this statistic does not include newly graduated college students and migrant workers and is therefore too low.⁸³

As a sovereign country, China is free to develop policies to maintain and increase employment. However, as a member of the WTO, when Chinese leaders make labor policies, the government must not do so in ways that distort trade or breach China's international obligations.

While China's leaders endeavor to create jobs, many of China's people struggle to provide for their families. China is plagued by imbalances in development between urban and rural, between regions, between sexes and between different population groups. As these imbalances become increasingly visible to growing numbers of the Chinese people, some people are taking to the streets.⁸⁴ Unofficial figures put the number of mass protests in 2008 at 127,000, almost 50 percent higher than the last officially released figure of 87,000 in 2005.⁸⁵ Such protests could threaten the informal compact between the Communist party and the Chinese people to deliver economic growth, social and technological progress while maintaining stability and control.

Chinese policymakers rely on trade to increase growth and to provide jobs. Trade official Wu Yi explained China's approach in 1998: "If we cannot keep exports and investment growing, our macroeconomic growth target will be at risk ... It's not exports for exports' sake. We have to help achieve an 8 percent growth rate in GDP Proper export growth is critical in helping the nation reform State-owned enterprises, create jobs and promote social stability."⁸⁶

⁸¹ Dic Lo, "What Are the macro Drivers of Growth Employment and Income in the Chinese Economy-A Case Study in Policy Coherence and Sequencing," Prepared for the ILO, June 2007, 6-7, http://www.networkideas.org/ideasact/Jun07/Beijing_Workshop_07/Dic_Lo.pdf

⁸² European Business in China, Position Paper, "Human Resources Forum," 66, http://www.euccc.com.cn/images/documents/pp_2009-2010/human_resources_en.pdf and Wang Wei, "Cold Winter for Law Graduates," *China Daily*, 1/5/2010
http://www.chinadaily.com.cn/metro/2010-01/05/content_9265492.htm;

⁸³ http://www.chinadaily.com.cn/bizchina/2009-01/20/content_7412656.htm

⁸⁴ UNDP, "Toward Human Development with Equity," China Human Development Report,

⁸⁵ China Labor Bulletin, "Going it Alone: The Workers movement in China," 7/9/2009, 35 at http://www.clb.org.hk/en/files/share/File/research_reports/workers_movement_07-08.pdf. Pages 14-57, 13, 35-37.

⁸⁶ Breslin, "Capitalism with Chinese."

In 2002, the Chinese Communist Party made employment generation one of the government's main policy priorities, stressing that this goal could be achieved by promoting the market power of workers, increasing the protection of workers, and expanding social welfare.⁸⁷ Labor law reforms as well as new programs were designed to achieve these goals. Although a growing number of Chinese citizens have moved from abject poverty to working or middle class, wages have declined in real terms. In the period 1995-2005, *Time Magazine* reported that wages averaged approximately \$80 per month from 1995-2005. In 2008, the Ministry of Labor and Social Security found that average pay in real terms declined by some 30% for factory workers.⁸⁸ In this period, wages (in particular for manufacturing workers) were suppressed by the inability of workers to demand higher wages, the large supply of individuals willing to work for these wages; and the constant pressure on managers to keep costs down.

Analysis of the New Labor Law and China's Commitment to Enforcement

In 2007-2008, the Chinese leadership developed several new laws designed to empower workers. The Labor Mediation and Arbitration Law went into effect May 1, 2008, and the Employment Promotion Law and the new Labor Contract Law went into effect January 1, 2008. The Labor Contract Law requires employers to provide employment contracts for all workers and to accept minimum terms implied by law or collective agreement if workers are not covered under a written contract. This law also set limits to casual employment, mandates firms to allow designated union activities, and mandates employers to consult with the union before adopting or changing policies that have a "direct bearing" on matters of interest to employees.⁸⁹ The new labor laws set limits to employer discretion and made the state more protective of worker interests.⁹⁰ Article 4 of the Labor Contract Law requires all employers to consult with either a union or elected worker representatives before approving enterprise rules on work and employment conditions. Moreover, the law states that employees who become

⁸⁷ Lo, "What Are," 29-33.

⁸⁸ Neil Gouh, "Trouble on the Line," *Time Asia*, 1/23/2005

<http://www.time.com/time/magazine/article/0,9171,1019909,00.html#ixzz0bbjAfYQH>

⁸⁹ The revised law requires employment contracts for all workers; minimum terms implied by law or collective agreement if no written contract; limits continuous casual employment; but, part-time workers who average less than 24 hours/week may be hired without contract and on at-will basis; employer must allow unions; and finally, employers must consult with the union before adopting or changing policies that have a "direct bearing" on matters of interest to employees. Workplace Professor Blog, http://lawprofessors.typepad.com/laborprof_blog/2007/07/labor-law-refor.html

⁹⁰ Harper Ho, Virginia E., "From Contracts to Compliance? An Early Look At Implementation Under China's New Labor Legislation," 2008, 2.

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1432708.

worker representatives shall not be subject to discrimination and shall have access to management and co-workers in order to carry out their representative functions. These provisions redefined the obligations between employer and employee and obligate the government to make sure that employers pay their workers.⁹¹ If these laws were effectively enforced, one would think workers would gain greater power to organize, collectively bargain and obtain higher wages.

The Chinese government claims that the law is already helping workers and improving the work place. Officials assert that more firms have signed long-term contracts with employees and it has not driven up labor costs.⁹² There are no reliable statistics on enforcement of the law, so we must rely on scholar, government, business, and NGO impressions.

Three legal scholars traveled to China to examine the impact of the legislation so far. Virginia Harper Ho believes the new law has already changed China by making it easier for workers to litigate, and prodding employers to pay attention to workers demands. However, Aaron Halegua argues the law is insufficient to change the behavior of employers because it is not enforced and because the official union does not protect the interest of workers.⁹³ Sean Cooney states that the legal “framework is undermined by a profusion of imprecise and sometimes contradictory legal rules, a bureaucratic ‘command and control’ approach to inspection and dispute resolution, and a narrow and ineffective range of tools for inducing compliance.” He concludes that even with these new laws, a culture of non-compliance impedes better compliance with the law.⁹⁴

The US Government agreed with this assessment. In its 2008 and 2009 Human Rights reports for China, the US Department of State also found little improvement for China’s workers with the new law. In 2008, the State Department reported that workers are repeatedly harassed and intimidated by criminal elements (often hired by employers). The labor law mandates a 40-hour standard workweek but standards were regularly violated. “Inadequate and poorly enforced health and safety standards put workers’ well being and live at risk. Although workers were willing to use lawsuits to pursue employers who did not follow the law, access to legal aid was and remains limited.”⁹⁵

⁹¹ Earl V. Brown, Jr., Solidarity Center, “Testimony to the Congressional Executive Commission on China,” 6/19/2009, at www.cecc.gov.

⁹² US Department of State, 2008 Human Rights Report: China, www.state.gov/g/drl/rls/hrrpt/2008/eap/119037.htm#

⁹³ Harper Ho, Virginia E., “From Contracts to Compliance?” and Aaron Halegua, “Getting Paid: Processing the labor disputes of china’s Migrant workers,” *Berkeley Journal of International Law*, Vol 26, no. 1, 320-322.

⁹⁴ Sean Cooney, “Making Chinese labor law Work: The Prospects for Regulatory Innovation in the People’s Republic of China,” University of Melbourne, Legal Studies Research Paper No. 282.

⁹⁵ Department of State, “2008 Human rights Report: China,”

In its 2009 report, the Department of State reported that independent labor rights NGOs and lawyers were closely monitored and in some cases “warned to stop their activities in support of workers’ rights.” Workers frequently protested actual or feared job loss, wage or benefit arrears, and failure-to-honor-contract firms. The Department of State noted that although the right to strike is not protected in law, some jurisdictions showed some tolerance for strikes, while in other areas strikers were detained. Under Chinese law, meetings of more than 200 people require approval from public security forces. It is thus difficult for workers to meet to organize strikes. However, interestingly, the official media aggressively publicized worker protests other than strikes, involving actual or feared job loss, wage or benefit arrears, dissatisfaction with new contracts offered in enterprise restructuring, failure to honor contract terms, or discontent over substandard conditions of employment. More workers filed claims under the new law, but there is little evidence that workers won these claims and were able to pay the costs associated with these claims. The State Department’s analysis concluded that the government enforcement of the labor law was inadequate.⁹⁶ The US China Economic and Security Review Commission also found the labor law’s implementation and enforcement has been spotty,⁹⁷

The Obama Administration has become increasingly concerned about China’s failure to enforce its own labor laws and to protect the rights of its workers. In 2010, it acknowledged that policymakers see such failure as a barrier to trade and its plans to make discussion of labor rights a key part of bilateral and multilateral discussions about trade policy.⁹⁸ In its 2010 report on barriers to trade, the US Trade Representative wrote, “China does not adhere to certain internationally recognized labor standards with respect to freedom of association and the right to bargain collectively. . . . Restrictions on labor mobility continue to distort labor costs. Providing for internationally recognized labor standards and effectively enforcing those standards would help ensure that China is not promoting trade at the expense of its workers and that its goods compete on the global market on more fair terms.”⁹⁹

Independent NGOs both on and off the mainland also found major labor law abuses continue despite the law. The International Trade Union Confederation annually surveys countries for their treatment of workers. It found that labor conditions have not improved especially for those workers who seek to

⁹⁶ 2009 Human Rights Report: China (includes Tibet, Hong Kong, and Macau)
<http://www.state.gov/g/drl/rls/hrrpt/2009/eap/135989.htm>

⁹⁷ US China Economic and Security Review Commission, 2009 Report to Congress, p. 67, fns 285-288. www.uscc.gov/annual_report/2009/09report_chapters.php

⁹⁸ US Trade Representative, The President’s 2010 Trade Policy Agenda, 8-9,
http://www.ustr.gov/webfm_send/1673

⁹⁹ US Trade Representative, National Trade Estimate Report, China, 2010,
http://www.ustr.gov/sites/default/files/uploads/reports/2010/NTE/2010_NTE_China_final.pdf

organize workers.¹⁰⁰ In its 2009 report, it asserted, “Most of the companies reducing staff are doing so with little regard for the Labor Contract Law which details compensation procedures and a consultation process before layoffs. For example, Guangdong Provincial authorities stated that between September and October 2008, in the city of Dongguan alone, 117 employers of Hong Kong origin fled owing unpaid wages to some 20,000 workers.”¹⁰¹

In November 2009, the NGO China Labor Watch reported that several of Wal-mart supplier factories did not provide copies of contracts to their workers. Workers then were unable to quit and obtain compensation for past work. It also found workers were not paid for overtime work violations as required under the law.¹⁰² The NGO found even worse conditions for workers supplying Dollar General, a U.S.-based low price retailer. Workers were not paid on time, were frequently injured and were paid illegally low wages.¹⁰³ The Shenzhen Dagongzhe Migrant Worker Center surveyed workers in different areas of Shenzhen. Some 320 individuals (from 380 sent) responded to the questionnaire. The survey found workers had experienced violations of contracts (such as not writing them in Chinese), incomplete contracts, and 28% of the contracts offered wages lower than the legal minimum wage. The authors claimed that the survey showed 79.2% of workers surveyed were dissatisfied with their work situation and wanted the government to enforce their rights under the law.¹⁰⁴

Although some workers are aware of their rights under the law, the central government has so-far done little to educate workers on these rights or to clarify governmental and managerial obligations under the law.¹⁰⁵ For example, European Union Chamber of Commerce in China, a large business organization, noted that authorities and courts throughout the country interpreted the law differently. In an assessment of Chinese labor policy, it concluded that the new

¹⁰⁰ <http://www.ituc-csi.org/2009-survey-of-violations-of-trade,3789.html?lang=en>; and <http://www.china-labour.org.hk/en/node/100560>

¹⁰¹ <http://survey09.ituc-csi.org/survey.php?IDContinent=3&IDCountry=CHN&Lang=EN>

¹⁰² China Labor Watch, “Wal-Mart Standards Fail, Workers Suffer, November 2009, www.chinalaborwatch.org.

¹⁰³ China Labor Watch, “Investment giant KKR Profits from Dollar General’s Poor labor Record, Report Shows,” December 22, 2009, <http://www.chinalaborwatch.org/20091222kkrdollargeneral.htm>

¹⁰⁴ Shenzhen Dagongzhe Migrant Worker Center, “New Ongoing Violations after the Implementation of labor contract law in China,” 6/12/2009, www.workerempowerment.org/en/newsletter/18. Other examples of violations are at <http://www.china-labour.org.hk/en/node/100019>

¹⁰⁵ Alexandra Stevenson, “Labor law-One Year-On,” *China International business magazine*, 1/7/2009 http://www.cibmagazine.com.cn/Features/Trend.asp?id=786&labor_law_-_one_year_on.html

labor laws actually discouraged “enforcement and adherence to the law.”¹⁰⁶ Perhaps such uneven enforcement should not surprise us; China’s provincial governments have rarely been diligent in the enforcement of national labor legislation, particularly when it is in conflict with local economic interests.¹⁰⁷

Taken in sum, the new law has done little to create a culture of compliance among firms manufacturing in China. Managers are still often unaware of their obligations under the law. Secondly, managers are under even worse financial pressures as before the law. In order to maintain export related jobs, they believe they must keep costs down and thereby suppress worker wages and workers’ ability to challenge labor decisions. Finally, the law does nothing to rectify substandard practices among the firms most directly targeted by the new laws.¹⁰⁸ At the same time, however, some workers do seem more aware of their new rights under the law. Workers have taken advantage of these rights to strike at important suppliers to American companies like Apple and Japanese companies such as Honda and Toyota.¹⁰⁹

Recent Policy Developments to Maintain Employment

Although China rapidly returned to growth, many Chinese workers lost their jobs (or lost wages) in the downturn that began in late 2007. In a June 2009 survey of 100 foreign firms operating in China, 37 reduced employment of Chinese workers.¹¹⁰ The Chinese government responded to this situation by maintaining artificially low labor costs and by stimulating domestic demand and production. These strategies were not always consistent with China’s WTO obligations.

In 2009, the Chinese government reported that 20 million individuals in China's coastal areas had lost their jobs due to the global economic slowdown in 2009. They would soon be joined by a record 6.1 million college students

¹⁰⁶ European business in China Position paper 2009-2010, “Human resources forum,” 66-69, quotation on p. 69,

http://www.euccc.com.cn/images/documents/pp_2009-2010/human_resources_en.pdf

¹⁰⁷ The International Trade Union Committee Annual Survey of Violations of Trade Union Rights said, “Provincial regulations issued in 2008 may however help develop more detailed contracts and a more genuine form of negotiation process. Several cities and provinces issued regulations which deal either with the implementation of existing labor legislation or give more details on collective contract procedures and contents.”

<http://survey09.ituc-csi.org/survey.php?IDContinent=3&IDCountry=CHN&Lang=EN>

¹⁰⁸ Ho, “From Contracts to compliance,” 61; and China Labor Bulletin, “Labor Disputes Escalate in Beijing,” December 2009, <http://www.china-labour.org.hk/en/node/100628>

¹⁰⁹ <http://www.ibtimes.com/articles/29346/20100618/toyota-supplier-strike-is-chinas-latest-labour-woe.htm>; and

http://money.cnn.com/2010/06/10/news/international/china_labor_strikes.fortune/index.htm.

¹¹⁰ U.S. China Business Council 2009 Member Priorities Survey Results, “US Companies China Outlook: Recession Strings, but does not End Market Optimism,” Executive Summary, 4-5, 17-18.

preparing to graduate and join the sea of jobseekers.¹¹¹ Officials acknowledged that the newly unemployed and never-been-employed individuals could affect social stability. In December 2008, the State Council, China's highest governing body, ordered local governments to create jobs for some 230 million migrant workers who had returned from urban areas to their home towns. The *Financial Times* reported that the Communist party was particularly concerned about disgruntled students who might be willing to incite a rebellion, conjuring fears not unlike those which surrounded the Tiananmen Square protests in 1989.¹¹²

Although the Chinese leadership freely acknowledged its concerns about social stability, officials have not called for the law to be revised. Senior legislative official Xin Chunying noted, "The labor contract law has nothing to do with the financial crisis."¹¹³ But the central government did take steps to prod employers to maintain employment. For example, in July 2008, the ACFTU began trying to unionize large foreign companies operating in China. These companies must pay 2% of payroll to local and national union coffers. However, many of the firms surveyed by the US-China Business Council (USCBC) in 2009 said that the union pressure had declined. The USCBC surmised that the government and union leadership decided not to push unionization while companies were "feeling the economic downturn."¹¹⁴

Moreover, the China Labor Bulletin claimed that with the onset of the global economic crisis, federal and provincial officials "became even more willing to turn a blind eye to routine violations of labor laws as long as enterprises did not lay off large numbers of employees at one time." The China Labor Bulletin gave several examples of steps that employers had taken to reduce their labor costs. Some firms refused to give their employees pensions as required under the law for employees who had served ten years or more, and other

¹¹¹<http://economix.blogs.nytimes.com/2009/05/11/unemployment-around-the-world>; "Economists: rising unemployment becomes China's top challenge," *China View*, 2/09/2009 at http://news.xinhuanet.com/english/2009-02/07/content_10778188.htm; and China's efforts to create more jobs pay off: minister, *China View*, 12/19/2009, http://news.xinhuanet.com/english/2009-12/19/content_12672696.htm; and Tyler Cowen, "Economic View: Dangers of an Overheated China," *New York Times*, 11/28/2009, <http://www.nytimes.com/2009/11/29/business/economy/29view.html>; and NA, China's Employment Situation "Grave," Minister, *China Daily* 3/10/2009 http://www.chinadaily.com.cn/china/2009npc/2009-03/10/content_7561971.htm

¹¹² Jamil Anderlini, "China battles unemployment to deter unrest" *Financial Times*, 12/12/2008; Douglas Zhihua Zeng, "China's Employment Challenges and Strategies After the WTO Accession," World Bank Policy research Working Paper 3522, February, 2005; and Bhalla, A. S. and S. Qiu, "China's Accession to WTO: Its Impact on Chinese Employment." UNCTD discussion paper, No. 163, November 2002.

¹¹³ Xinhua, "China Won't revise labor contract law amid financial Crisis: Lawmaker," 3/9/2009,

¹¹⁴ U.S. China Business Council 2009 Member Priorities Survey Results, "US Companies China Outlook," 17-18. <http://www.ituc-csi.org/foxconn-suicides-governments-and.html>

companies laid off long-serving staff or forced them to quit and then sign new short-term employment contracts.¹¹⁵ Other firms let workers go and then offered to rehire them as temporary workers. Such behavior is banned under the new labor law.¹¹⁶ In February 2010, *The People's Daily* reported that Chinese workers are feeling increasingly anxious about their jobs. A 2009 poll found some 32 percent of employees surveyed in bigger cities and 19.4 percent in smaller towns said that they feared job loss if they complained about work stress and were less willing to "job-hop."¹¹⁷

However, in the spring of 2010 the Chinese government seemed to change course regarding labor unrest. They again began to allow some workers to strike as well as to allow coverage of such strikes by the foreign press. Several prominent strikes were allowed at foreign multinationals.¹¹⁸ The press gave extensive coverage to a strike by workers at a Honda parts factory in Foshan. As of this writing, Honda offered them a 24% pay raise. Meanwhile, some 12 workers attempted suicide (10 died) at Foxconn, one of the world's largest assemblers for electronics such as I-Pods and computers. Under pressure from prominent multinationals such as Dell and Apple that source at the company, Foxconn promised workers a 20% wage increase. Analysts contended that these workers were no longer willing to accept low pay and long work hours and were starting to demand their rights under law. In an open letter to Foxconn, nine social scientists wrote, "[The deaths] force us to question the future of the 'factory of the world' and the new generation of migrant workers." The *People's Daily* editorialized that unions, managers, and policymakers needed to be more sensitive to the needs of workers—that the strikes were about job conditions and job security and not just about money. For a time, Chinese citizens used the web to debate China's growth model, although according to the *Financial Times*, the government instructed the media not to give Foxconn "big coverage."¹¹⁹

¹¹⁵ China Labor bulletin, Research Reports: "Going it Alone: The Workers movement in china (2007-2008), 7/9/2009, 10, at

http://www.clb.org.hk/en/files/share/File/research_reports/workers_movement_07-08.pdf

¹¹⁶ Steel Workers Laid-off and rehired as temporary employees for lower pay," 222.china-loabour.org.hk/en/node/100400

¹¹⁷ Peoples Daily, (Xinhua), "Chinese employment attitudes changed by global financial crisis," 2/20/2010, <http://english.peopledaily.com.cn/90001/90776/90882/6897043.html>

¹¹⁸ David Barboza, "Honda Says China's Workers to End Strikes, Take Raise," *New York Times*, 6/1/2010, <http://www.nytimes.com/2010/06/02/business/global/02strike.html>

¹¹⁹ <http://www.ituc-csi.org/foxconn-suicides-governments-and.html>;

<http://english.people.com.cn/90001/90776/90882/7002814.html>;

<http://english.people.com.cn/90001/98986/7002512.html>; Keith Bradsher and David Barboza, Strike in China Highlights Gap in Workers' Pay," *New York Times*, 5/28/2010,

<http://www.nytimes.com/2010/05/29/business/global/29honda.html>; David Pierson, "New Generation of Chinese Workers may Not Put up with Low pay, Brutal Hours," 6/1/2010, *Los Angeles Times*, <http://www.latimes.com/business/la-fi-china-labor-20100602.0.2573020.story>;

The Chinese government seemed to be sending a new message—that workers at foreign companies would be allowed to challenge companies that didn't adhere to labor laws. The message made sense: if the Chinese people earned more, they could buy more foreign made and domestic goods. However, Chinese national champions did not seem to be as hard hit as Japanese multinationals. The Chinese leadership also promised to stimulate local demand in the interest of stimulating growth. In 2009, China adopted a \$586 billion stimuli program in 2009. But to many non-Chinese producers, the stimuli seemed designed to favor national companies. This program included requirements that government-funded projects should purchase domestic products unless they cannot be obtained under reasonable business conditions, and it stipulated that imports paid for from the government's \$586 billion stimulus plan must be approved in advance.¹²⁰

Chinese policymakers were still determined to attract foreign investors with incentives to exports. In 2008, policymakers increased Value Added Tax (VAT) rebates several times on labor-intensive products such as clothing, textiles, and high value added electrical machinery products. The products affected represent approximately 25 percent of China's total exports.¹²¹ Economist Eswar Prasad observed that "China's focus on maintaining export competitiveness to prevent job losses is clearly trumping longer-term considerations of rebalancing growth and reducing reliance on exports."¹²² In a study of China's protective measures for the international research group Global Trade Alert, which monitors protectionism, Yue found that collectively such policies led to the quick renewal

and Kathryn Hille, "China: Showing the Strain," *Financial Times*, 5/28/2010, <http://www.ft.com/cms/s/2/6ef9ae1e-668d-11df-aeb1-00144feab49a.html>

¹²⁰ Björn Etgen and Egmont Seeber China: Government Procurement In China: Can You Get A Piece Of The Pie?, 9/2009, at <http://www.mondaq.com/article.asp?articleid=85690>; and Baker Hostetler, "China Law Blog," <http://www.chinaustradelawblog.com/articles/strategic-economic-dialogue-1/> Circular 1361 was issued by the national Development and Reform commission, <http://english.sina.com/business/2008/1109/197321.html> for a timeline; and <http://english.sina.com/z/090226stimuluspackage/index.shtml>. The opinion on how to source was Circular 1361, Opinions on the Implementation of Decisions on Expanding Domestic Demand and Promoting Economic Growth and Further Strengthening Supervision of Tendering and Bidding for Construction Projects.

¹²¹ US Trade Representative, 2009 National Trade Estimate, 14, http://www.ustr.gov/sites/default/files/uploads/reports/2009/NTE/asset_upload_file868_15464.pdf

¹²² Plastemart, "China's stimulus spending fuels massive overexpansion could lead to protectionism" 11/27/2009, http://www.plastemart.com/Plasticnews_desc.asp?news_id=16659; <http://english.sina.com/z/090226stimuluspackage/index.shtml>; and Keith Bradsher, "As China Stirs Economy, Some See Protectionism," 6/24/2009, http://www.nytimes.com/2009/06/24/business/economy/24yuan.html?_r=1

of export growth.¹²³ But in its annual report to Congress, the US China Economic and Security Commission found that such policies exacerbated global overcapacity.¹²⁴

Conclusion and Recommendations

On November 15, 2008, Chinese President Hu Jintao traveled to Washington to discuss the global financial crisis at the G-20 summit. Hu stated that “steady and relatively fast growth in China is in itself an important contribution to international financial stability and world economic growth.”¹²⁵ Hu is right to make that point; and he can also stress that China had done more than perhaps any other nation to provide jobs for its people. But as always, the world looks different from the Middle Kingdom.

China’s labor law is relatively new and it takes time for new laws to be fully understood and effectively enforced. Workers do seem to be better able to sue for their lost wages, although we have little evidence as to whether or not they are winning these cases. Moreover, workers are taking to the streets to challenge some employers. In some cases, wages have risen. However, the law is unevenly enforced; managers and government officials rarely allow workers to effectively organize, collectively bargain or strike, and most workers have little real ability to determine wages or work conditions.

China’s failure to enforce its labor laws may breach China’s longstanding commitments to fellow WTO members made in 2001 as well as commitments China made at the G-20 meetings. (There China promised to ground reforms in the rule of law and not to implement WTO inconsistent measures.)¹²⁶

Governments have tried to use both the carrot and stick to change China’s behavior regarding the rule of law. The EU is China’s largest trading partner. EU officials frequently complain about China’s currency, trade and employment practices. EU policymakers rely on dialogue and try to train government officials in labor law enforcement (capacity building). However, EU member states recognize this approach has not changed Chinese practices. The Economist reported that Germany, Britain, Sweden and the Netherlands are willing to challenge China for its labor law practices, while other EU member states prefer

¹²³ Yunxia Yue, “China’s Protective State measures in the Crisis Era: Motivation and Effect, in Simon J. Evenett, ed. The Unrelenting Pressure of Protectionism: The 3rd GTA Report, 2009, 84, at <http://www.voxeu.org/reports/GTA3.pdf>

¹²⁴ US China Economic and Security Review Commission, 2009 Report to Congress, p. 4

¹²⁵ Wayne M. Morrison, “China’s Economic Conditions,” CRS Report for Congress, RL33534, 7.

¹²⁶ Karen Halverson, “China’s WTO Accession,” http://www.bc.edu/schools/law/lawreviews/meta-elements/journals/bciclrlr/27_2/06_TXT.htm; and Ya Qin, Trade, investment,” 722.

to use anti-dumping regulations.¹²⁷ Given this divide in the EU's collective China stance, they are unlikely to develop an effective strategy.

The US has also adopted a bifurcated strategy, reflecting differences among Congress and the Executive, as well as Republicans and Democrats. Like the EU, the US government relies on bilateral dialogue and capacity building.¹²⁸ For example, the US uses reportage and the internet to "name and shame" China for its failure to enforce its own laws and internationally accepted labor rights.¹²⁹ China has responded to these reports by saying, on one hand, "China is still a developing country," and, on the other hand, by pointing out America's violation of domestic and international labor laws.¹³⁰

In addition, both the EU and the US have tried to encourage their firms to act responsibly in China by using voluntary Corporate Social Responsibility initiatives (CSR). CSR strategies can include codes of conduct, social audits or factory certifications designed to voluntarily promote labor rights. However, firms that act to protect labor rights find it difficult to compete with employers that violate China's labor norms.¹³¹ In fact many manufacturers sourcing in China complained about China's new labor laws as they were developed. For

¹²⁷ Dragon Nightmares: The European Union Finds it Hard to Agree over How to Deal With China," *Economist*, 4/16/2009; http://www.delchn.ec.europa.eu/home_link_strategy.htm; and http://www.delchn.ec.europa.eu/euch_poli3.htm.

¹²⁸ US Trade Representative, The President's 2010 Trade Policy Agenda, 8-9, http://www.ustr.gov/webfm_send/1673

¹²⁹ US Trade Representative, "2010 National Trade Estimate Report on Foreign Trade Barriers," China, http://www.ustr.gov/sites/default/files/uploads/reports/2010/NTE/2010_NTE_China_final.pdf

¹³⁰ The report used newspaper reports as evidence of U.S. labor and human rights failures. The "unemployment rate in the U.S. in 2009 was the highest in 26 years. Nearly 16 million people were jobless, with 5.6 million, or 35.6 percent of the unemployed, being out of work for more than half a year (The New York Times, November 13, 2009). In September, about 1.6 million young workers, or 25 percent of the total, were jobless, the highest since 1948 when records were kept (The Washington Post, September 7, 2009). In the week ending on March 7, 2009, the continuing jobless claims in the U.S. were 5.47 million, higher than the previous week's 5.29 million (<http://247wallst.com>, March 19, 2009). "Full Text of Human Rights Record of the United States in 2009," http://news.xinhuanet.com/english2010/china/2010-03/12/c_13208219_4.htm

¹³¹ Brown, "Testimony: Congressional-Executive Commission," 11; OECD Investment Policy Review: China 2008, Chapter 4: Encouraging Responsible Business Conduct in China," 148-158 and 171-179. <http://www.nlcnet.org/article.php?id=613>; and China Business Review: Special Report: Corporate Responsibility in China: Best Practices, May-June 2009, www.chinabusinessreview.com/public/0905/corporate-responsibility.... Michael Santoro believes business can make a big difference by demanding the rule of law. Michael Santoro, "Soft Seat on the long March: Foreign Business and the Rule of Law in China," 2/5/2009, at ssrn.com/abstract=1415902

example, the American Chamber of Commerce in Shanghai complained that labor law revisions would restrict employer flexibility and drive up costs.¹³²

Neither bilateral strategies nor CSR initiatives are likely to prod China to fully and effectively enforce its labor laws or to educate its citizens on their rights under the law. As the founders of the ILO and the architects of the GATT/WTO recognized, nations are more likely to be effective *to change market conditions by collaborating*. The WTO is the appropriate venue for such collaboration.

First, under Article XXIII, any country in the WTO is entitled to a “right of redress” for changes in domestic policy that systematically erode market access commitments even if no explicit GATT rule has been violated. Such a “non-violation” complaint entitles the aggrieved party either to compensation in the form of other tariff concessions to “rebalance” market access commitments or the complaining trade partner may withdraw equivalent concessions of its own.¹³³ According to Pauwelyn, “In non-violation cases a WTO panel could, indeed, be called upon to refer to non-WTO rules...in its assessment of whether certain governmental measures, though not in violation of WTO rules, have affected the ‘legitimate expectations’ that could have been derived from a trade concession.” Thus a complainant could invoke these non-WTO rules along the following lines: “when we obtained your trade concession (duty free access for our IPODs), we did so with the expectation that you would continue to respect international labor standards and your own labor laws. But as noted by international observers, Chinese NGOs, scholars and others, it is clear that you are ignoring international labor obligations and your own labor laws in factories that produce for export (such as those that supply foreign companies such as Apple). Thus, your country has violated these non-WTO rules. This violation of labor standards does not violate WTO rules as such, but it does nullify the trade value of your concession, nullification that we could not have foreseen...so as per WTO rules, we are requesting compensation for this nullification under the heading of ‘non-violation’.”¹³⁴

Such a trade dispute may not succeed. As Lester notes, “It would be hard to prove that lack of enforcement could not reasonably have been anticipated; and proving causation in relation to undermining market access for specific products

¹³² U.S.-China Economic and Security Review Commission, 2009 Report, 67; and “Nike Repudiates Am Cham Position on Chinese Law Reform,” 12/20/2006; <http://www.itglwf.org/DisplayDocument.aspx?idarticle=15269&langue=2>; Foreign Policy in focus, “Labor rights in China,” 12/19/2006, http://www.fpif.org/articles/labor_rights_in_china

¹³³ Negotiating Group on dispute Settlement, “Non-violation complaints Under GATT Article XXIII:2, Note by the Secretariat, MTN.GNG/NG13/W/31, at <http://www.worldtradelaw.net/history/urdsu/w31.pdf>; and Jean Monnet Center, Evolution of Non-violation Cases, centers.law.nyu.edu/jeanmonnet/papers98/98-9—html.

¹³⁴ Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, New York: Cambridge University Press, 2003, 456.

could be difficult.”¹³⁵ But a multilateral approach would bring the issue to global attention. Merely by taking this approach, China might be moved to do a better job of educating managers, policymakers and workers on the new law and of monitoring its enforcement at the local level. Officials might also allow workers to take advantage of channels to challenge management workplace practices as required under the laws. Such a strategy would provide incentives to China to enforce its own laws, which could allow China to do a better job of reconciling the imperative of full employment with its obligations not to distort trade and to enforce its own laws.

In addition, WTO members should make better use of the Trade Policy Review (TPR) process to hold China to account for its domestic policies that can distort trade—whether these policies are domestic stimuli or the failure of provincial and national leaders to fully enforce Chinese labor laws. This issue should also be addressed generically as part of the larger G-20 mandate to examine WTO member responses to the global financial crisis.

China’s membership in the WTO has boosted international trade, and provided benefits to people of the world. But China is also exporting its inadequate governance, its unsafe food, toys, and medicines, its corruption, its failure to protect intellectual property, and its failure to sufficiently enforce its own labor laws. As noted in the introduction, policymakers are charged with addressing the employment needs of their citizens, not the global community. But the global financial crisis provides an opportunity, and the WTO/ILO relationship provides a structure, to begin a more honest and fuller discussion of the relationship between trade, employment and labor rights.

China’s governance problems have become our problems, and we are complicit in this problem unless we help the Chinese people and leadership address it. After all, The GATT/WTO, and its sister institutions, the UN and the Bretton Woods Institutions, were built on a radical idea: nations have a responsibility to collaborate in the fields of trade and investment to create employment at both the national and international levels.

¹³⁵ Comments of Simon Lester, International Economic Law and Policy Blog, <http://worldtradelaw.typepad.com/ielpblog/2010/01/nonviolation-complaints-and-the-enforcement-of-labor-laws.html>