

Responding to Industrial Unrest in China: Prospects for Strengthening the Role of Collective Bargaining

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Abstract

With the dramatic upsurge in labour unrest in China, there has been renewed official interest in promoting collective contracts as a mechanism for negotiation of workers' interest based claims and as a way of resolving interest based disputes. While negotiation of collective contracts has long been promoted by China's official union organisation, the All-China Federation of Trade Unions, entering into collective contracts at the enterprise level has, to date, been primarily an administrative task to fulfil quotas rather than a vehicle for bargaining over interests. What are the prospects that there is now sufficient political will to transform collective contracting into a more effective mechanism for negotiation of improved wages and conditions? This paper explores this question by examining the recent developments in collective negotiation, including increasing use of sectoral and regional collective contracts and tentative regulatory reforms in some localities. It examines the legal framework governing collective contracting and the stalled recent efforts of the Shenzhen and Guangdong governments to pass local regulations that would facilitate a more robust form of collective bargaining. This paper argues that the promotion of collective contracts can be understood as being less a way of strengthening workers' collective voice than as a regulatory device through which the Party, government and unions seek to institute an orderly mechanism for increasing wages and to promote industrial harmony. This paper concludes that any move toward enabling collective bargaining is constrained by the limitations on both the will and capacity of China's unions to adopt more assertive approaches to collective negotiation, and by the overriding objective of these reforms which is to protect social and industrial stability rather than give workers a stronger mechanism to advance their interests.

I Introduction

With the dramatic increase in labour disputes and intensifying conflict between the interests of labour and capital throughout the 2000s, in 2007 China's official union organisation, the All-China Federation of Trade Unions ('ACFTU')

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reaffirmed the ‘urgent demand for the trade unions earnestly to perform their rights protection functions and to promote harmony and stability in labour relations’.¹ Shortly after the ACFTU’s statement, China’s exports were hit by the unfolding Global Financial Crisis (‘GFC’), and with it, the possibility of improving either rights protection or industrial harmony and stability temporarily retreated. The impact of the GFC has highlighted the extent to which China’s economic growth has become reliant on exports, and the extent to which its economy has become integrated into, and interdependent with, global markets.²

The Chinese state acted decisively to forestall the worst effects of the GFC on the domestic economy by introducing a stimulus package in November 2008 of 4 trillion yuan for 2009 and 2010.³ However, despite tentative steps to reduce reliance on exports to drive economic growth, readjustment of China’s economy to boost domestic consumption remains in its initial stages. An aspect of China’s export performance has been to put pressure on wages and conditions driven by fears, whether well founded or not, of erosion of international competitiveness if labour laws are properly enforced and wages and conditions allowed to improve.⁴ China has managed to capture 10 per cent of the world’s export market using its low cost labour to advantage.⁵ Yet, increasingly, workers are unwilling to accept the low wages and abusive practices of many of their employers, with the result that strikes and protests, some violent, have been increasing dramatically.⁶ The difficulty for the state lies in the fact that the increase in labour disputes, especially large, public protests, not only signals systemic problems with China’s industrial

¹ All-China Federation of Trade Unions (ACFTU), *Blue Paper on the Role of Chinese Trade Unions in Safeguarding the Legitimate Rights and Interests of the Workers* (the ‘Blue Paper’) (19 May 2007) <<http://www.acftu.org.cn/template/10002/file.jsp?cid=67&aid=399>>.

² Yu Yongding, ‘China’s Response to the Global Financial Crisis’, *East Asia Forum* (online), 24 January 2010 <<http://www.eastasiaforum.org/2010/01/24/chinas-response-to-the-global-financial-crisis>>.

³ Fu Jing and Si Tingting, ‘NDRC reveals details of stimulus package’, *China Daily* (online), 27 November 2008 <http://www.chinadaily.com.cn/business/2008-11/27/content_7246758.htm>.

⁴ This debate was focused by passage of the *Labour Contract Law* in 2007 which many feared would increase the cost of doing business in China and potentially lead to capital flight. See, eg, John Cremer, ‘New Clauses Worry Multinationals’, *South China Morning Post* (Hong Kong), 8 June 2007, 2; Joseph Kahn and David Barboza, ‘China Passes a Sweeping Labor Law’, *The New York Times* (New York), 30 June 2007; Dexter Roberts, ‘Rumbles over Labor Reform: Beijing’s Proposed Worked Protections Are Giving Multinationals the Jitters’, *Business Week*, 12 March 2007, 57. Assurances have been made that these concerns will not be realised: see, eg, Guan Xiaofeng, ‘Labor Law “Will Not Hurt Investment Environment”’, *China Daily*, 3 July 2007, 1; Ronald Brown, ‘China’s Collective Contract Provisions: Can Collective Negotiations Embody Collective Bargaining?’ (2006) 16 *Duke Journal of Comparative and International Law* 35, 47.

⁵ Eli Friedman and Ching Kwan Lee, ‘Remaking the World of Chinese Labour: A 30 Year Retrospective’ 48 *British Journal of Industrial Relations* 507, 507; Ruchir Sharma ‘The Post-China World: the end of the boom is now in sight, and the ripple effects of slower growth will span the globe’, *Newsweek* (online), 20 June 2010 <<http://www.newsweek.com/2010/06/20/the-post-china-world.html>>.

⁶ For example, strikes in auto parts suppliers and in early 2010 a spate of suicides at Foxconn, a Taiwanese-run company that manufactures parts for many brand name companies. See, eg, BBC News, *Foxconn Suicides: Workers Feel Quite Lonely* (28 March 2010) BBC <<http://www.bbc.co.uk/news/10182824>>.

relations system, but also raises fears about the potential for this unrest to lead to broader social and political instability.⁷

How has the state responded to this growing volatility in labour relations? There has been a variety of strategies adopted. They range from repressive methods of dealing with protests, such as strengthening emergency response and surveillance mechanisms in the name of protecting social stability, and introducing a range of means to forestall, contain, or repress worker protests, to strategies to address the underlying causes of protests by improving workers' conditions such as raising the minimum wage and demanding that the unions take steps better to represent and protect worker's rights and interests.⁸ This article focuses on one of the strategies adopted to improve working conditions in the context of this ongoing industrial and social unrest. It examines the most recent effort to improve wages and conditions by expanding collective consultation and collective contracts. Strengthening the use of collective contracts and collective consultation is one of the core elements of the unions' 'rights protection function' and seen as a potential path to promoting industrial harmony. This article explores the question: what prospects are there for the collective negotiation of wages and conditions to be reformed into an effective way to promote workers' rights and interests?

Posing such a question may appear surprising given the failure of collective contracts to date to play any significant role in the regulation of labour relations, much less to be used as a tool for representation and negotiation of workers' interests. Despite the enthusiasm shown by China's unions for expanding the reach of collective contracts, a study conducted in the early 2000s concluded that enterprise collective contracts had generally been negotiated and concluded in a very formalistic manner and did not usually include provisions that went beyond the minimum standards prescribed by law.⁹

Chinese forms of collective consultation diverge from concepts of collective bargaining embodied in the International Labor Organization ('ILO') Conventions on freedom of association¹⁰ and the effective recognition of the right to collective bargaining¹¹ which contemplate 'free and voluntary negotiations' between independent representatives of both workers and employers to 'set wages and

⁷ Wei Li, 'Ruhe Yufang he Kongzhi Qunzhong Jiti Shangfang (How to Prevent and Control the Mass Engaging in Collective Petitioning)', (1999) *Mishu zhi You (The Secretary's Friend)* 34; Jae Ho Chung, Hongyi Lai, and Ming Xia, 'Mounting Challenges to Governance in China: Surveying Collective Protestors, Religions Sects and Criminal Organizations' (2006) 56 *The China Journal* 1.

⁸ Wang Ming, '推进工资集体协商·创新工会组建' [Promote Collective Wage Negotiations, and Blaze a New Trail in Union Organization], 《新华日报》 [*Xinhua Daily*], 30 May 2010; 《工会信访工作与法律服务结合之初探》 [A Preliminary Study of the Linking Union Letters and Visits Work and Legal Services] (2009) 4 《中国工运》 [*Chinese Workers' Movement*] 47, 48.

⁹ Bill Taylor, Kai Chang and Qi Li, *Industrial Relations in China* (Edward Elgar, 2003), 190–5; Simon Clarke, Lee Chang-Hee and Li Qi 'Collective Consultation and Industrial Relations in China' (2004) 42 *British Journal of Industrial Relations* 245.

¹⁰ *Convention on Freedom of Association and Protection of the Right to Organise*, signed 9 July 1948 ILO Convention No 87 (entered into force 4 July 1950) <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C087>>.

¹¹ *Convention on the Application of the Principles of the Right to Organise and to Bargain Collectively*, signed 1 July 1949 ILO Convention No 98 (entered into force 19 July 1951) <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C098>>.

conditions of work' and the 'rules governing their relationship'.¹² China's unions do not operate in a manner similar to those in liberal democracies. Despite decisive moves toward a market economy, China's unions remain closely linked to and subject to direction of the Communist Party of China ('the Party'). All unions in China are incorporated within the official federated union organisation, the ACFTU, and are subordinated to the leadership of the Party. It remains illegal to set up a union outside of the official union organisation, and those who have attempted to do so have been punished severely.¹³ Rather than simply representing workers' interests, China's unions fulfil the important role of providing a link between the Party and workers and obtaining worker acceptance for Party programs.¹⁴ Arguably, without the right to establish independent trade unions that are accountable and responsive to their worker constituencies, and the right to take industrial action as part of the bargaining process, the basic conditions for collective bargaining cannot be satisfied. As Ann Kent has noted, the willingness of the Chinese state to introduce reforms to accommodate its international obligations does not extend to reform in an area such as permitting independent trade unions, which is considered to be a 'threat to the existing political system'.¹⁵ An analysis of China's domestic reforms to collective contracts cannot thus readily proceed as a question of either convergence or compliance with international standards set out in the ILO Conventions,¹⁶ as from a foreign point of view at least, there has not been any. Without any significant change in the role and capacity of unions in the Chinese polity, it is difficult to see any prospects for a fundamental change to embrace collective bargaining as a tool of interest representation.

Nevertheless, despite the absence of any real element of bargaining in collective contracting as it is currently implemented, and despite the failure of collective contracts to date to provide an effective mechanism for negotiation and articulation of worker interests, expanding the use of collective contracts has again been strongly promoted in recent years. Collective contracts and collective consultation have featured as core components of the rights protection rhetoric of

¹² ILO, *Collective Bargaining* <<http://www.ilo.org/public/english/dialogue/themes/cb.htm>>.

¹³ See, eg, China Labour Bulletin, *Founder of Independent Trade Union Released from Prison* (27 August 2008) <<http://www.clb.org.hk/en/node/100296>>; Andrew Walder and Gong Xiaoxia, 'Workers in the Tiananmen Protests: The Politics of the Beijing Workers' Autonomous Federation' (1993) 29 *The Australian Journal of Chinese Affairs* 1; Anita Chan, 'Revolution or Corporatism: China's Workers and Trade Unions in Post-Mao China' (1993) 29 *The Australian Journal of Chinese Affairs* 31.

¹⁴ Jude Howell, 'The All-China Federation of Trade Unions Beyond Reform? Slow March of Direct Elections' (2008) 196 *The China Quarterly* 845, 846–7. The dual obligations of the unions under the transmission belt are embodied in the «中华人民共和国工会法 (1992年)» [Trade Union Law of the People's Republic of China (1992)] (People's Republic of China) National People's Congress ('Trade Union Law 1992') arts 4, 5 and 6, and replicated in «中华人民共和国工会法 (2001年)» [Trade Union Law of the People's Republic of China] (People's Republic of China) National People's Congress ('Trade Union Law 2001') arts 4–6.

¹⁵ Ann Kent, *Beyond Compliance: China, International Organizations, and Global Security* (Stanford University Press, 2007) 217.

¹⁶ International Labor Organization, *Country baselines under the ILO Declaration Annual Review (2000-2010): Freedom of Association and the Right to Collective Bargaining (FACB)* <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_091262.pdf>.

the ACFTU.¹⁷ In some parts of China such as Guangdong, Shenzhen and Zhejiang, reforms have been passed, or are proposed, to introduce more robust forms of collective negotiation. Throughout the country, trials have been conducted to use industry and regional collective contracts as a way of improving wages. So what is the significance of the current efforts seeking to strengthen collective consultation as a cornerstone of the unions' rights protection rhetoric?

This article advances the argument that the promotion of collective contracts can be understood as being less a way of strengthening workers' collective voice than a regulatory device through which the Party, government and unions seek to institute an orderly mechanism for increasing wages. Viewed thus, collective contracts comprise a component of the broader program of economic adjustment to reduce over-reliance on exports as the main driver of economic growth. It is only in this limited sense that collective contracts can be viewed as a form of rights protection. This study also argues that more extensive reform of collective contracts is constrained by the limitations on the will and capacity of unions to adopt more assertive approaches to collective negotiation, coupled with the fear that such reform may have a short term negative impact on industrial stability.

In order to explore these issues, this article first contextualises reforms to collective contracts by examining the legal reforms to labour relations and labour contracting that have underpinned and institutionalised development of China's socialist market economy. As Friedman and Lee argue, consistent emphasis on the introduction of a system of individual labour contracts has individualised labour relations and undermined the capacity of workers to exercise collective power.¹⁸ Reforms to collective contracts are thus taking place in a legal regulatory environment in which individual labour contracts continue to be privileged over collective contracts. In part III, the article examines the role of China's unions in collective contracting. The particular position of China's unions, which act in a manner akin to an arm of government, influences both their interpretation of the objective of collective contracts and collective consultations, as well as their capacity to engage in collective consultation on behalf of workers. The article explores how the dual responsibilities of China's unions to protect workers' rights and to preserve social order provide both the impetus for expanding collective negotiation and contracting and the limits on that expansion. Finally, the article examines the law regulating collective contracts and recent reforms to it. It also examines practical changes in collective contracting through the use of industry and regional collective consultation which are focused primarily on introducing wage adjustment mechanisms. The article explores the current fate of tentative efforts in some areas to introduce more robust forms of collective bargaining.

¹⁷ See, eg, *Blue Paper*, above n 1.

¹⁸ Friedman and Lee, above n 5, 507–9.

II Legal Regulation of Labour Relations in China

China's labour market has undergone a dramatic transformation since the mid 1980s when the first steps were taken to move away from an administrative system of allocation of urban workers to state-owned enterprises, toward creation of a legally-regulated, market-based system.¹⁹ Breaking the famous 'iron rice bowl', under which the administrative allocation of work guaranteed a privileged class of urban workers in state-owned enterprises lifetime employment and made provision for comprehensive welfare as part of work, marked an important step in China's transition to a 'socialist market' economy. Starting with a set of four State Council regulations in 1986 and culminating with passage of the *Labour Law* in 1994, workers in most sectors have gradually been brought under a regime of labour regulation governed primarily by individual labour contracts.²⁰ The *Labour Law* established a system of labour relations that individualised the relationship between employee and employer through a labour contract which sets out legally prescribed rights. As a consequence it also effectively individualised the modes of dispute resolution which focus on protection of those rights. By emasculating the capacity of workers to negotiate or act collectively, the system has failed to establish regular mechanisms through which negotiations over interests, such as pay and conditions, could be conducted.²¹

The bulk of reforms since the passage of the *Labour Law* have been to address shortcomings in the labour relations system established in the *Labour Law*. There have been problems of both implementation of the law and the scope of matters regulated by it. Before the mid 2000s, many workers did not have a labour contract at all, as there was unevenness in the rate at which enterprises signed labour contracts with employees, with privately-owned enterprises having particularly low rates.²² The *Labour Law* itself quickly became outdated as new forms of employment proliferated, including non-standard forms of work such as labour hire (under which a firm has work performed by workers ostensibly not employed by the firm but employed and dispatched from a labour hire company) and casual work.²³ The provisions of the *Labour Law* failed to provide adequate protection from abusive practices especially to the ever-growing number of workers leaving rural areas to work in construction, small and medium-sized private enterprises, labour-intensive and export-oriented industries.²⁴ Mechanisms for dispute resolution were cumbersome and expensive and the state's labour

¹⁹ Sarah Biddulph and Sean Cooney, 'Regulation of Trade Unions in the People's Republic of China' (1994) 19 *Melbourne University Law Review* 253, 254–7.

²⁰ *Ibid* 254–8.

²¹ For a discussion of the distinction between rights-based and interest-based disputes see Anita Chan, 'Strikes in China's Export Industries in Comparative Perspective' (2011) 65 *The China Journal* 27, 46–7.

²² Friedman and Lee, above n 5, 509.

²³ Sean Cooney, Sarah Biddulph, Kungang Li and Ying Zhu, 'China's New Labour Contract Law: Responding to the Growing Complexity of Labour Relations in the PRC' (2007) 30 *University of New South Wales Law Journal* 786, 787–9.

²⁴ *Ibid* 787–8.

inspectorate failed to exercise its inspection powers vigorously.²⁵ In fact, the state's approach to formalising labour relations through individual labour contracts has to date proven to be a grossly inadequate way of protecting workers' rights.²⁶

Industrial unrest has been increasing dramatically throughout the 1990s and the 2000s with major causes in privately-owned sectors being; wage arrears, failure to provide compensation for workplace related injuries, and workplace disciplinary violence.²⁷ In the state-owned sector, since the Party's decision to reorganise state-owned enterprises in 1997, there has been large-scale retrenchment of state sector workers.²⁸ There have been growing incidents of mass protest resulting from corrupt misappropriation of corporate assets, enterprise bankruptcy and corporate reorganisations that have deprived workers of their employment, wages and pensions.²⁹ Worker unrest in the transforming state-owned sector continued to escalate during the 2000s.³⁰ Even though it is generally acknowledged that the protesters have a real grievance, initial responses to mass protests have been to suppress the protests and punish the leaders.³¹ However, a response to address the substance of these grievances is also required. The state has adopted both short and longer term measures to rectify the worst abuses in an effort to stem labour unrest.

²⁵ Virginia Ho, 'From Contracts to Compliance? An Early Look at Implementation under China's New Labor Legislation' (2009) 23(1) *Columbia Journal of Asian Law* 35.

²⁶ Marc Blecher, 'What Are Chinese Workers Thinking?' (Working Paper presented to the Joint Study on China's Newly Emerging Systems of Politics and Economy from Inter-disciplinary and International Approaches, Keio University, Ohio, 2004) 22.

²⁷ Chen Feng, 'Subsistence Crises, Managerial Corruption and Labour Protests in China' (2000) 44 *The China Journal* 41, 41–2; Ching Kwan Lee, 'The Labor Politics of Market Socialism' (1998) 24 *Modern China* 3, 3–5; Ching Kwan Lee, *Against the Law: Labor Protests in China's Rustbelt and Sunbelt* (University of California Press, 2007) 163–4; Ren Hongjie, *Shehui Wending Wenti Qianyan Tansuo* [A Preliminary Exploration of Problems of Social Stability] (Zhongguo Renmin Gong'an Daxue Chubanshe) [Chinese People's Public Security University Press, 2005] 59; asserting that between 1997 and 2003 there was an annual average increase of over 30 per cent in labour disputes.

²⁸ One estimate is that over 30 million workers in state-owned enterprises were retrenched between 1995 and 2002. China Labour Bulletin, 'Swimming Against the Tide: A Short History of Labor Disputes and the Government's Attempts to Control It', Research Notes (October 2010) 6.

²⁹ Chen Feng 'Industrial Restructuring and Workers' Resistance in China' (2003) 29 *Modern China* 237; Thomas Lum, 'Social Unrest in China', (Congressional Research Service: Reports and Issue Briefs, 2006) 5–7.

³⁰ Ching Kwan Lee, 'Livelihood Struggles and Market Reform (un)making Chinese Labour after State Socialism' (UNRISD Occasional Paper, February 2005).

³¹ The Chinese state's insistence on characterising the conduct of leaders of the 2002 protests at the Ferrous Alloy Factory in Liaoning as the criminal offence of subverting state power and its refusal to contemplate the alternative interpretation presented by the International Metalworkers Association — that Yao Fuxin and Xiao Yunliang were punished by virtue of their role as worker representatives in Case 2189 before the Committee on Freedom of Association — illustrates this preoccupation with punishing conduct which disrupts social order, whatever the reason: *Complaint against the Government of China (presented by the International Confederation of Free Trade Unions (ICFTU) and the International Metalworkers' Federation (IMF)) (interim conclusions)* (International Labor Organization, Case No 2189, Report No 333 (China)) <<http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=1322&chapter=3&query=China%40ref&highlight=&querytype=bool&context=0>>; and see the discussion of this case in Ann Kent, *Beyond Compliance: China, International Organizations, and Global Security* (Stanford University Press, 2007) 199–202.

Two of the mechanisms discussed here are raising the minimum wage and law reform.³²

Since the Ministry of Human Resources and Social Security ('MOHRSS') issued the *Minimum Wage Regulations* in 2004,³³ one area of emphasis has been to improve the minimum wage in order to improve the conditions of China's lowest paid workers, who are often paid at the minimum wage rate. Recently governments in over 30 provinces have increased the minimum wage. In some provinces these rises have been significant, with Guangdong raising the minimum wage in 2010 on average by over 20 per cent.³⁴ Continuing to increase the minimum wage to improve the living conditions of the most vulnerable workers, predominantly migrant workers, is articulated as a priority of the ACFTU.³⁵ Indeed, reform of the wages system was included as a task of the Party's 12th Five Year Economic and Social Development Plan launched in March 2011.³⁶ The stated objective of this reform is to improve workers' livelihood and to preserve social stability.³⁷ Whether this move actually improves worker income and achieves its objectives of 'stabilising the workforce' remains to be seen.³⁸ Collective contracts, especially industry or regional-level contracts, have the capacity to act as a complement to these minimum wage provisions by providing an annual wage adjustment mechanism for the most vulnerable workers.

Major reforms to the regulation of labour relations, aimed at rectifying some of the outstanding problems in the law, were enacted in 2007 and 2008 with passage of the *Labour Contract Law*, *Labour Disputes Mediation and Arbitration Law* ('LDMA') and the *Employment Promotion Law*. These reforms sought to shift the regulatory balance between protection of employer and employee struck in the 1994 *Labour Law* to one of a better protection of employees. It is not surprising then that the process of drafting the *Labour Contract Law* was one of the most controversial in recent times.³⁹ The *Labour Contract Law* went a long way to rectifying legislative gaps in the regulation of non-standard forms of work such as labour hire;⁴⁰ strengthening obligations to pay wages,⁴¹ prohibiting employers taking a security deposit from employees,⁴² and imposing stricter conditions for termination of certain types of employment.⁴³

³² Lum, above n 29, 8–9.

³³ Passed on 30 December 2003, to take effect on 1 March 2004.

³⁴ Su Zhenhua, '提高最低工资标准不是“稳工”好方法' [Minimum Wage is not a good way to 'Stabilize the Workforce'], 新闻晨报 [Morning News] (online), 21 January 2011 <<http://finance.ifeng.com/job/xshq/20110121/3269954.shtml>>.

³⁵ ACTFU, Wage Work of Chinese Trade Unions (15 November 2007), <<http://www.acftu.org.cn/template/10002/file.jsp?cid=81&aid=232>>.

³⁶ Ch 32 s 1, reproduced at <<http://news.sina.com.cn/c/2011-03-17/055622129864.shtml>>.

³⁷ Ibid ch 31 s 3.

³⁸ Su, above n 34, expressing scepticism while the disparity between the power of workers and capital remains so wide.

³⁹ For a description of the process of drafting the *Labour Contract Law* and its main provisions see Cooney, Biddulph, Li and Zhu, above n 23, 789–90.

⁴⁰ «中华人民共和国劳动合同法» [Labor Contract Law of the People's Republic of China] (People's Republic of China) National People's Congress ('*Labour Contract Law*') arts 57–67.

⁴¹ Ibid art 30.

⁴² Ibid art 36.

⁴³ Ibid ch IV, arts 36–50.

While the ACFTU has viewed implementation of the system of collective contracts as being of primary importance,⁴⁴ MOHRSS has given priority to concluding individual contracts.⁴⁵ The preference of MOHRSS for individual labour contracts continued to prevail in the text of the *Labour Contract Law*. The primary regulatory focus of the *Labour Contract Law* remains on the formalisation of employment relations through concluding written individual contracts rather than on collective contracts, which are dealt with only in outline in the law.⁴⁶ For instance, art 82 provides that an employer failing to enter into a written labour contract (except for casual work) will be penalised double wages from the date the written contract should have been signed. After passage of the *Labour Contract Law*, there has reportedly been a significant increase in the number of workers covered by labour contracts, with individual labour contracts concluded in over 97 per cent of national level enterprises and 65 per cent of small-scale enterprises by the end of 2010.⁴⁷

The *Employment Promotion Law* enacted in domestic legislation China's obligations under ILO Convention 111 prohibiting discrimination against migrant workers.⁴⁸ In implementing its anti-discrimination obligations, there is much left to be done, not least to eliminate the household registration system, which underpins the discriminatory treatment of migrant workers on the basis of their rural registration status.⁴⁹ The *LDMA* lowered barriers to employees seeking to commence formal dispute resolution by removing the fee for filing an arbitration claim.⁵⁰ This appears to have encouraged individuals to commence proceedings to pursue breaches of their legal rights. After the passage of the *Labour Contract Law* and the *LDMA*, the number of disputes filed with labour arbitration organs and with the courts exploded.⁵¹ In 2008 the number of cases accepted by labour arbitration bodies was 693 456 compared to 350 182 in 2007. In the same period the number of collective labour disputes brought to labour arbitration increased from 12 784 in 2007 to 21 880 in 2008.⁵²

⁴⁴ Xinhua Web, 全总就实施“彩虹”计划答本网记者问 [The ACFTU responds to this reporter's questions on implementation of the 'Rainbow' Program], «新华网» [Xinhua News Agency] (online), 4 June 2010. <http://news.xinhuanet.com/politics/2010-06/04/c_12181248.htm>.

⁴⁵ Taylor, Chang and Li, above n 9, 188–9; Clark, Lee and Li, above n 9.

⁴⁶ «中华人民共和国就业促进法» [Employment Promotion Law of the People's Republic of China] (People's Republic of China) National People's Congress ('Employment Promotion Law') arts 51–6.

⁴⁷ 预计年末全国规模以上企业劳动合同签订率达97% [It is expected that by the end of the year over 97 per cent of national scale enterprises will have signed labour contracts], «新浪网» [Sina] (online), 30 December 2010 <<http://finance.sina.com.cn/g/20101230/12219187021.shtml>>.

⁴⁸ Arts 25, 31.

⁴⁹ See discussion in Na Lan, 'Is There New Hope in Labor Rights Protection for Chinese Migrant Workers?' (2009) 10 *Asian-Pacific Law & Policy Journal* 482, 494–5; Dorothy Solinger, *Contesting Citizenship in Urban China: Peasant Migrants, the State, and the Logic of the Market* (University of California Press, 1999).

⁵⁰ *Employment Promotion Law*, above n 46, art 53.

⁵¹ 劳动争议案数量仍居高不下 [The Number of Labour Disputes Remains High], «中国青年报» [China Youth Daily] (online), 19 January 2010 <http://zqb.cyou.com/content/2010-01/19/content_3045611.htm>.

⁵² «2009 中国人力资源和社会保障年鉴» [China Human Resources and Social Security Yearbook] (China Human Resources and Social Security Publishers, 2009) 1272.

However, these legal reforms do little to strengthen existing legal mechanisms for collective negotiation and contracting. They leave in place the basic policy of regulating labour relations primarily through individual contracts. The law provides no penalties for failure to enter into a collective contract. In fact, it is not mandatory to enter into a collective contract.⁵³ The general ambivalence toward the possibility of collective contracts being developed into any form of collective bargaining over interests is underlined by the strident objections made even to the relatively cursory treatment of collective contracts in the *Labour Contract Law*. One well-known Chinese scholar has criticised inclusion of collective contracts in this law as a blind and inappropriate copying from the west. Professor Liang Huixing argues it is a mistake to implement a system of collective contracts as it is based on an assumption that an independent union will represent the interests of workers in bargaining with the enterprise. He continues:

China does not implement the capitalist countries' so-called system of independent unions. In China the workers' interests are not only represented and protected by the unions, that role is primarily exercised by the Communist Party of China and central and local governments, followed by the unions, the Communist Youth League and the All China Women's Federation, and besides that there are the Employee Representative Councils, which have Chinese characteristics.⁵⁴

III The ACFTU: Protecting Rights in Order to Protect Stability

The monopoly enjoyed by the ACFTU over union organisation comes at the cost of subordination to the Party in terms of both organisation and policy.⁵⁵ Unions thus owe a dual loyalty both to 'safeguard the concrete interests of the Chinese workers' but to do so while 'safeguarding the overall interests of the people throughout the country...[and to] strive for the realisation of China's socialist modernisation.'⁵⁶ Union organisation and responsibilities continue to reflect the Leninist idea of the transmission belt under which unions act as an intermediary between the Party and workers.⁵⁷ The top-down aspect of the transmission belt requires the unions to carry out the directions of the Party, implement Party policy and educate workers in Party policy. In the reform era, that has primarily been to obtain worker's cooperation in improving productivity and making a

⁵³ *Labour Contract Law*, above n 40, art 51 provides that the parties 'may' conclude a collective contract. The *Collective Contracts Provisions* 2004 art 32 provides that a party may not refuse a written request to negotiate a collective contract 'without proper reason'. The provisions do not specify what constitutes a proper reason.

⁵⁴ Liang Huixing, 'Laodong Hetongfa: You Shenma Cuo? Weishenma Cuo? (The Labour Contract Law: What is wrong with it? Why is it wrong?)' (8 September 2009) <http://blog.sina.com.cn/s/blog_4b93bd250100facs.html>.

⁵⁵ Gordon White, Jude Howell and Xiaoyuan Shang, *In Search of Civil Society: Market Reform and Social Change in Contemporary China* (Clarendon Press, 1996) 40–1.

⁵⁶ ACFTU, *A Brief Introduction of the All-China Federation of Trade Unions* (20 September 2007) <<http://english.acftu.org/template/10002/file.jsp?cid=63&aid=156>>.

⁵⁷ Paul Harper, 'The Party and Unions in Communist China' (1969) 37 *The China Quarterly* 84, 85–9.

positive contribution to economic reform.⁵⁸ The bottom-up aspect, the mass line, requires the union movement to represent the interests of workers in the Party apparatus.⁵⁹

But, as Harper pointed out in 1969, the responsibilities of the unions to implement Party policy must inevitably conflict with their responsibilities to represent and protect worker interests, as the Party makes policy in the long term national interest which ‘cannot but at times go sharply against the immediate material interests of the workers’.⁶⁰ Thirty years of economic reform have stripped away the pretence that there is no fundamental conflict between the rights of workers and management, which has in turn highlighted the conflict between the dual roles played by the unions.⁶¹ Economic reform has also undermined the traditional role played by unions of ‘integrating workers into the state socialist system’ as a representative of the state.⁶² This is not least due to the diversification and fragmentation of the workforce and the increasing power of enterprises and management.⁶³ Throughout the history of the PRC and particularly in the reform period, there have been changes in the extent to which obligations to implement Party policy take preference over the interests of workers, as well as internal divisions within the ACFTU about what is the appropriate balance between these dual responsibilities.⁶⁴ These tensions are present in the current program to expand the use of collective contracts.

After the crisis in governance that arose in 1989 and which saw the emergence of an independent union, the Beijing Workers’ Autonomous Federation, during the Tiananmen protests,⁶⁵ the Party realised that more needed to be done to address the discontent of urban workers. Unions, too, face becoming irrelevant to workers if they fail to respond adequately to their needs.⁶⁶ Starting from the mid 2000s, the ACFTU, at the behest of the government, has adopted a range of policies that advocate strengthening their representation and protection of workers’ rights.⁶⁷ The rhetorical commitment to strengthening the protection of labour rights

⁵⁸ *Trade Union Law 2001*, above n 14, art 7.

⁵⁹ Harper, above n 57, 87–8.

⁶⁰ *Ibid* 88.

⁶¹ Chen Feng, ‘Between the State and Labour: the Conflict of Chinese Trade Unions’ Double Identity in Market Reform’ (2003) *The China Quarterly* 1006, 1010.

⁶² Simon Clarke, ‘Post-socialist trade unions: China and Russia’ (2005) 36 *Industrial Relations Journal* 2, 3.

⁶³ Gordon White, Jude Howell and Xiaoyuan Shang, *In Search of Civil Society: Market Reform and Social Change in Contemporary China* (Clarendon Press, 1996) 45–6.

⁶⁴ Anita Chan documents five times up until 1989 when the Party reasserted control over unions after they were judged to have overstepped their role of advocating for worker interests: Anita Chan, ‘Revolution or Corporatism: China’s Workers and Trade Unions in Post-Mao China’ (1993) 29 *The Australian Journal of Chinese Affairs* 31.

⁶⁵ Discussed in Andrew Walder and Gong Xiaoxia, ‘Workers in the Tiananmen Protests: The Politics of the Beijing Workers’ Autonomous Federation’ (1993) 29 *The Australian Journal of Chinese Affairs* 1.

⁶⁶ Many scholars now go so far as to argue that rights protection is the basic reason for the unions’ existence: see Yang Pengfei, 金融危机背景下工会的两难处境与对策 [The Dilemmas and Countermeasures of Trade Union under the Financial Crisis] (2009) 4 《工会理论研究》 [Labour Union Studies] 1, 2.

⁶⁷ Jude Howell, ‘The All-China Federation of Trade Unions beyond Reform? Slow March of Direct Elections’ (2008) 196 *The China Quarterly* 845, 847; Zhu Ying, Malcolm Warner and Feng

appears in a number of policy documents,⁶⁸ culminating in the amendment to the ACFTU *Constitution* in 2008.⁶⁹ A recent articulation is the *Blue Paper on the Role of Chinese Trade Unions in Safeguarding the Legitimate Rights and Interests of the Workers* ('*Blue Paper*') issued by the ACFTU in 2007, which emphasises expanding collective contracts and improving the processes of collective consultation, particularly in respect of wages, as a way of protecting the rights of workers.⁷⁰

The actual meaning of the 'rights protection' to be implemented by collective contracts is shaped by Party policy and by the ACFTU's interpretation of how Party policy is to be implemented. The *Blue Paper* sets out the interpretive framework for the concept of rights protection, in which the dual responsibilities of the unions are to 'implement Party policy, to protect national social and economic development' and at the same time to 'protect the rights of workers to participate in the benefits of economic and social development'.⁷¹ The concept of rights protection must thus be understood as an acknowledgement that workers should be able to share in the benefits of economic and social development, rather than some more extensive promise of rights. In the case of collective contracts, the right to share in the benefits of economic and development more readily translates into the use of collective negotiation as a mechanism to improve wages, than as a commitment to some more extensive form of industrial democracy. The discussion of the shape of recent reforms to collective contracts in section four below lends weight to this interpretation.

It is also important not to forget that the Party's program of national social and economic development is understood to be dependent upon the maintenance of social and political stability. This point was articulated by Deng Xiaoping on a number of occasions, famously on 26 February 1989 when he said:

Tongqing, 'Employment relations "with Chinese characteristics": The role of trade unions in China' (2011) 150(1-2) *International Labour Review* 127; China Labour Bulletin, *The Case of China: The Challenge of Labour Unrest in a Communist-run Capitalist Economy* (4 December 2008) <<http://www.clb.org.hk/en/node/100349>>.

⁶⁸ In 2004, the Wang Zhaoguo, member of the Political Bureau of the CCP Central Committee, Vice Chairman of the National People's Congress (NPC) Standing Committee, and Chairman of the ACFTU announced the program: 'Get organized, conscientiously protect rights' Chang Gansheng, 组织起来 切实维权 [Get Organised, Conscientiously Protect Rights] 11 工会工会 [Labour Union Expo] 6.

⁶⁹ At the ACFTU's 15th Congress the following provision was added to art 28: 'Adhere to the path of developing socialist trade unions with Chinese characteristics, adhere to the "Get Organized and Conscientiously Protect Rights" work plan, put workers first, take the initiative in protecting rights in a scientific way and according to law.' Wang Ming, 中国工会修改章程 扩大对农民工权益的保护 [China's Unions Revise their Constitution to Expand their Protection of the Rights and Interests of Migrant Workers], *Xinhua Web* (online), 21 October 2008 <http://news.xinhuanet.com/newscenter/2008-10/21/content_10229720.htm>. See also Yang Lin, 抓住重新审视劳资格局, 消除劳资矛盾隐患, 调整劳工政策的机会 [Seize the opportunity to re-evaluate labour relations, eliminate potential labour problems, and reformulate labour policy], *Civil Society* (online), 16 December 2009 <<http://www.gms.org.cn/news/view.asp?id=19701>>, 2.

⁷⁰ The *Blue Paper*, above n 1.

⁷¹ *Ibid.*

Of China's problems, the need for stability overrides all else. Without a stable environment, nothing can be achieved, and all that has been achieved will be lost.⁷²

If anything, the protection of social stability has recently been raised to the highest policy level. A central focus of the 2011 National People's Congress (NPC) meeting was 'stability protection' and 'social management' with allocation of massive funding to support establishment of the institutional infrastructure, including stability preservation committees, to support these programs.⁷³ The overwhelming importance of stability has resulted in adjustment of the rhetorical focus of the unions from one of rights protection to one which gives more prominence to stability protection. For instance, on 29 May 2010 the ACFTU issued an *Opinion on doing a Better Job of Protecting Workers and Stabilizing Society* which, whilst it retained the rhetoric of rights protection, emphasised the centrality of stability.⁷⁴

The absolute priority afforded to preservation of social stability provides the context within which the unions' already constrained rights protection agenda is articulated and implemented. That is; the protection of the right to participate in the benefits of economic development is for the purpose of promoting stability in labour relations.⁷⁵ This interpretation of rights and their relationship to stability was articulated in the Harmonious Society Policy which proposes to promote social stability through enabling all people to share the benefits of economic reform and development.⁷⁶ This policy imperative was subsequently reflected by the ACFTU in a range of documents including the 2006 *Decision on Strengthening the Coordination of Labor Relations, Earnestly Safeguarding the Legitimate Rights and Interests of the Workers and Facilitating the Construction of a Harmonious Socialist Society*,⁷⁷ and the 2007 *Blue Paper*.⁷⁸ Programs to expand collective

⁷² 中共党史上的80句口号(72) '稳定压倒一切' [80 Slogans in Party History No 72 'Stability overrides all else'], *People's Daily* (online), <<http://www.people.com.cn/GB/shizheng/252/5303/5304/20010626/497648.html>>.

⁷³ Willy Lam, 'Beijing's Blueprint for Tackling Mass Incidents and Social Management' (2011) 11(5) *China Brief* 3 <http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=37696&tx_ttnews%5BbackPid%5D=517>.

⁷⁴ ACFTU, «关于进一步做好维护职工队伍和社会稳定工作的意见» 29 May 2010 <<http://www.acftu.org/template/10004/file.jsp?cid=222&aid=83548>>. Again, at the 6th Executive Committee of the ACFTU Congress held on 25 July 2010 Chairman Wang Zhaoguo articulated the important tasks of unions as strengthening enterprise union construction and 'rights protection, stability protection work' [维权维稳工作].

⁷⁵ Wang Quanbao, 全国总工会:以维权来维稳 [ACFTU: Protecting Stability by Protecting Rights] 4 «中国新闻周刊» [China Newsweek] 20.

⁷⁶ The Harmonious Society policy was formally adopted at the close of the Sixth Plenary Session of the 16th CPC Central Committee meeting on 11 October 2006 in the Resolution on Major Issues Regarding the Building of a Harmonious Socialist Society, announced at <<http://www.china.org.cn/english/report/189591.htm>>.

⁷⁷ «中华全国总工会关于加强协调劳动关系、切实维护职工合法权益、推动构建社会主义和谐社会的决定» [ACFTU Decision on Strengthening the Coordination of Labor Relations, Earnestly Safeguarding Workers' Lawful Rights and Interests and Promoting the Establishment of a Socialist Harmonious Society]. Adopted by the third session of the 14th Executive Committee of the ACFTU《中国科学院金属研究所》[Institute of Metal Research at the China Academy of Social Sciences], 13 December 2005, <http://www.imr.cas.cn/dj/gh/gzzd_gh/200911/t20091119_2671963.html>.

consultation as well as other programs such as expanding unionisation of workplaces are contingent upon the overall objective of achieving a stable workforce.⁷⁹ They must promote rather than imperil industrial harmony. While the ILO advocates collective bargaining as a way of ‘stabilizing industrial relations’,⁸⁰ many in China have argued that collective bargaining would lead to an increase in strikes and other forms of industrial disruption. One economist has even argued that collective wage negotiations will lead to an increase in strikes and be a disaster for industry.⁸¹

China’s unions are part of the institutional infrastructure constructed to preserve stability and undertake special responsibilities to promote harmony and stability in industrial relations. Within these stability preservation committees, unions have particular responsibility to liaise with the Party, government and other organs to establish early warning and emergency response and coordinating mechanisms, to anticipate and prevent escalation of labour disputes and when that fails, send representatives onto the street to help resolve public protests.⁸² One very practical illustration of the way in which enterprise unions understand their role in preventing the escalation of labour disputes is their approach to dealing with strikes. As Feng Chen’s study shows, the role of unions in resolving strikes is to defuse the situation and mediate a resolution. Enterprise unions rarely act unequivocally to represent workers’ demands, but commonly act or seek to act as an intermediary between employees and employers, giving priority to obtaining a return to work over representing worker demands.⁸³ A recent highly publicised example is illustrative. That is the intervention of the local Shishan union in a strike at the Honda Motors Nanhai Factory in 2010. On 17 May 2010 a group of workers walked off the job with a set of demands including a wage increase, preservation of end of year bonuses, better training programs and reorganising the enterprise union to include worker elected representatives.⁸⁴ Throughout the strike,

⁷⁸ *Blue Paper*, above n 1.

⁷⁹ «进一步加强企业工会建设和维权维稳工作» [Gradually Strengthening the Construction of Enterprise Unions and Rights Protection Stability Protection Work], «法制网» [Legal System Daily], 26 July 2010, <http://www.legaldaily.com.cn/bm/content/2010-07/26/content_2208010.htm?node=20735>.

⁸⁰ ILO, above n 12.

⁸¹ Zhang Wuchang, ‘Gongzi jiti xieshang geng rongyi dao zhi bagong shi yanzhong huohai’ (Collective Wage negotiations are more likely to lead to strikes — it is seriously harmful) 工资集体协商更容易导致罢工 是严重祸害’ (1 June 2010) <<http://expert.bossline.com/1551/viewspace-19226>>.

⁸² Wang Ming, ‘推进工资集体协商，创新工会组建’ [Promote Collective Wage Negotiations, and Blaze a New Trail in Union Organization], «新华日报» [Xinhua Daily], 30 May 2010 <http://news.xinhuanet.com/mrdx/2010-05/30/content_13588129.htm>; «工会信访工作与法律服务结合之初探» [A Preliminary Study of the Linking Union Letters and Visits Work and Legal Services] (2009) 4v 中国工运» [Chinese Workers’ Movement] 47, 48.

⁸³ Chen Feng, ‘Trade Unions and the Quadripartite Interactions in Strike Settlement in China’ (2010) 102 *The China Quarterly* 104.

⁸⁴ Anonymous, *Open Letter from The Nanhai District General Trade Union and Shishan Town General Trade Union to the Workers of Honda Motors Nanhai Component and Parts Factory* (3 June 2010) China Study Group <<http://chinastudygroup.net/2010/06/translation-of-an-open-letter-from-the-nanhai-district-general-trade-union-and-shishan-town-general-trade-union-to-the-workers-of-honda-motors-nanhai-component-and-parts-factory/>>.

the union was reported to have adopted a 'neutral stance', until 31 May 2010 when a meeting between striking workers and people purporting to be representatives of the local Shishan township, Nanhai District trade union, ended up in a physical altercation in which some of the striking workers were beaten up.⁸⁵ The next day, after widespread adverse publicity, the union issued a public letter of explanation/apology. In it, the union insisted that there had been a misunderstanding and that the union representatives had only been seeking to mediate a settlement to obtain an agreement by workers to return to work and not to intimidate workers.⁸⁶ This explanation demonstrates how the union sees its role, as an intermediary between the disputing parties, and certainly not as an advocate on behalf of the workers. Such an attitude directly impacts on the role that enterprise unions might be expected to play during collective wage negotiations in the event that workers take industrial action in support of wage claims.

IV Collective Contracts

A *Implementing a System of Collective Contracts and Collective Consultation*

Despite the priority that has been given to implementing the system of individual labour contracts as discussed above, in recent years there has been increasing pressure to expand collective consultation and the reach of collective contracts, especially in relation to wages. In theory the use of collective contracts is one mechanism with the potential to redress the unequal bargaining power between employees and employers. In practice collective contracts have not functioned in this way. During discussions about reform of the economic system in 1984 the union movement advocated introduction of equal consultation and collective contracts as mechanisms for 'coordinating' and 'stabilising' the relationship between labour and capital.⁸⁷

In the 1990s, the ACFTU sought, unsuccessfully, to implement the system of collective contracts without the support or collaboration of government.⁸⁸ The lack of success of this approach was acknowledged in the 2001 when the *Joint Circular on Promoting Collective Consultation and Collective Contracts* mandated the involvement of a range of interested state agencies and enterprise associations. China ratified ILO Convention 144 in 1990 and established a system of tripartite consultation,⁸⁹ comprising the ACFTU, MOHRSS, the Chinese Enterprise'

⁸⁵ Striking workers at Nanhai Honda Attacked by Local Union Officials (31 May 2010) <<http://worldlabour.org/eng/node/350>> last accessed on 11 June 2011.

⁸⁶ «南海区总工会、狮山镇总工会致本田员工的公开信» [An Open Letter from Nanhai District Union Federation, Shishan Township Union Federation to Honda Workers] (3 June 2010) <<http://business.sohu.com/20100603/n272552380.shtml>> last accessed on 11 June 2011.

⁸⁷ The principle of 'equal consultation' as the basis for negotiation of wages and conditions was reiterated in art 4 of the *Labour Contract Law* and art 6 of the *Trade Union Law 2001*.

⁸⁸ Clarke, Lee and Li, above n 9, 239.

⁸⁹ *Tripartite Consultation (International Labour Standards) Convention*, signed 21 June 1976; ILO Convention No 144 (entered into force 16 May 1978) <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C144>>.

Federation and the Chinese Entrepreneurs' Association.⁹⁰ After establishment of the tripartite meeting system in 2001, expanding the scope of collective contracts has been one of its main priorities.⁹¹

During the 2000s, Chinese trade unions have continued 'vigorously to promote the establishment of the system of equal consultation and collective contract according to law.'⁹² According to the press release issued after the 15th National Congress of Trade Unions held in October 2008, more than 140 million Chinese workers were then covered by a collective contract.⁹³ In January 2010, it was reported that 1.11 million collective contracts had been entered into by unions at and above the local level, covering 1.9 million enterprises and approximately 150 million employees, accounting for 60.2 per cent of all employees in China.⁹⁴ In terms of numbers, this looks like a very successful outcome.

However, collective contracts have been a poor vehicle for negotiating wages and conditions. While regulations require that negotiations be conducted cooperatively and in good faith,⁹⁵ in practice, implementation of the system of collective contracts has been a top-down process, carried out administratively through quotas and instructions issued jointly by the Party, government and higher level union organisations.⁹⁶ A study in 2002 by Clarke et al concluded that collective contracts generally included provisions that reflected minimum legal standards and, while it was not accurate to view collective contracts as a way of extending Party supervision into private enterprises, neither had they served to introduce a more adversarial approach to the negotiation of wages and conditions.⁹⁷

A fundamental barrier to the emergence of a form of collective consultation and collective contracts that acts as a form of social dialogue is the unions

⁹⁰ *Blue Paper*, above n 1, s 7.

⁹¹ Chen Feng, 'Trade Unions and the Quadripartite Interactions in Strike Settlement in China' (2010) 102 *The China Quarterly* 104, 107; Clarke, Lee and Li, above n 9, 240.

⁹² ACFTU, *Collective Agreements* (Beijing, 2005); ACFTU, 'Statement of Position Regarding Collective Agreements' (Beijing, 2005).

⁹³ Li Ma (ed), '全国签订集体合同 109.1 万份 覆盖职工 1.4 亿人' [1.091 Million Collective Contracts Signed Nationally; 140 Million People Covered], «中国网» China Network, 7 October 2008 <http://www.china.com.cn/gonghui/2008-10/07/content_16577631.htm> see also 'Updates to collective bargaining and collective contracts: New laws - same deal?', IHLO, February 2009, <<http://www.ihlo.org/LRC/ACFTU/040309.html>>.

⁹⁴ Juan Shen (ed), '多数省份规模以上企业劳动合同签订率逾 90%' [The Majority of Enterprises of Provincial level and above scale have a labour contract signing rate of over 90%] «全国人民代表大会» [The National People's Congress of the People's Republic of China] (online) (2 March 2010), <http://www.npc.gov.cn/npc/zq/ldhftsslzn/2010-03/02/content_1546872.htm>, 16–17.

⁹⁵ «集体合同规定 (2004)» [Collective Contracts Provisions 2004] (People's Republic of China) Labour and Social Security Bureau, ('*Collective Contract Provisions*') art 5; Ronald Brown, 'China's Collective Contract Provisions: Can Collective Negotiations Embody Collective Bargaining?' (2006) 16 *Duke Journal of Comparative and International Law* 35, 43–4 characterises negotiating obligations under the categories of fair and consultative representation, duty to negotiate and fair treatment of employees.

⁹⁶ See, eg, Shanghai Municipal Human Resources and Social Security Bureau et al, *Notice on Promoting the Work of Collective Wage Consultation in 2008*, 7 March 2008, <http://www.12333sh.gov.cn/07zcfg/gfxwj/200803/t20080321_1047468.shtml>.

⁹⁷ Clarke, Lee and Li, above n 9, 245, 249–50.

themselves; in both their dual responsibilities discussed above, and in the fact that union officials frequently occupy management positions in the enterprise. As a result of the conflict of interest arising from occupying both union and enterprise management positions, union representatives have had difficulty representing worker interests where they might conflict with Party and government policy, or enterprise interest.⁹⁸ A small-scale investigation on labour rights carried out in Shantou in 2008 concluded that enterprise unions are unable to fulfil their legally-prescribed role in representing worker interests because ‘they are not independent’. It pointed out that many union officials were on good wages and conditions and were not really interested in taking active steps to advocate for worker interests in collective consultations and so were not held in high esteem by workers.⁹⁹ The few trade union officials who did intervene in labour disputes on behalf of workers, suffered retaliation from the enterprise.¹⁰⁰

B *Innovations in Collective Contracts and Collective Consultation*

One way to strengthen the role unions might play in collective consultation has been to move beyond collective consultation at the enterprise level to encourage the development and use of regional or trade collective contracts.¹⁰¹ This type of negotiation takes place at the equivalent of county level. It has been used primarily to fix wage rates and wage increases and has been concentrated in sectors such as construction, mining, textiles, food, security, service and the taxi industry, where there is a concentration of small or medium-sized privately owned enterprises in a particular district.¹⁰² In these situations, regional unions have organised trade-based union associations to represent workers in the same industry, to fix common wage standards and working conditions.¹⁰³

One of the earliest and better known is the Wenling model of tripartite collective bargaining in the woollen knitwear industry in Xinhe township, Wenling, which started in 2003. In 2002, the sweater industry in Wenling comprised around 113 very small-scale enterprises, with only 12 being of a larger scale. Work was very seasonal and in the peak season of July and August each year employers, seeking to ensure workers did not leave during the busy season, took a range of measures to prevent them from doing so, including non-payment of wages. As a result, during those periods there was pronounced industrial disruption including strikes, go slows and mass petitioning to higher levels.¹⁰⁴ Collective

⁹⁸ Chen, above n 91, 107–8; Clarke, Lee and Li, above n 9, 242; Liu Mingwei, ‘Union Organizing in China: Still a Monolithic Labor Movement?’ (2010) 64 *Industrial and Labor Relations Review* 30, 35–6.

⁹⁹ Shantou University, *Investigative Report on the Issue of Enterprise Labour Rights in Guangdong Province* (not published) 23.

¹⁰⁰ *Ibid* 26.

¹⁰¹ *Wage Work of Chinese Trade Unions*, above n 35.

¹⁰² Xinhua Web, above n 44.

¹⁰³ For a detailed analysis see Liu Mingwei, ‘Union Organizing in China: Still a Monolithic Labor Movement?’ (2010) 64 *Industrial and Labor Relations Review* 30, 44–7.

¹⁰⁴ Wen Xiaoyi, ‘集体谈判的内部国家机制 - 以温岭羊毛衫行业工价集体谈判为例’ [The Internal State Mechanisms in Collective Bargaining: Evidence from the Collective Bargaining by Wenling Sweater Industry (sic)] (2011) 1《社会》 [Society] 112, 116–17.

consultation was initiated as a way of responding to this unrest. A collective agreement was ultimately concluded between the Changyu knitwear industry union and the Xinhe town industry association, which had been established in 2002.¹⁰⁵ However, the success of collective wage consultation depended upon the support given to the local industry union by the Xinhe Party Committee and local government which was needed to bring reluctant enterprises to the negotiations.¹⁰⁶ This collective agreement has been lauded as being successful in stemming industrial unrest and has delivered modest annual pay increases. Since 2003 it is reported that annual collective consultations have set wage standards in all woollen knitwear enterprises, incorporating annual increases of between five and 15 per cent.¹⁰⁷

In 2006, the ACFTU, MOHRSS, Chinese Enterprises' Federation and the Chinese Entrepreneurs' Association jointly determined to promote development of regional and industry level collective consultation.¹⁰⁸ This model of industry level wage negotiation has also received favourable attention at the top political levels, with Wen Jiabao noting in 2007 that the 'Wenling model can be studied and promoted'.¹⁰⁹ One major attraction for Party and government of this model is that it was reputed to be effective in resolving serious problems of labour unrest including strikes and petitioning. This form of collective agreement is expanding, with reports that in January 2010, 200 000 industrial or regional collective contracts and 417 000 collective contracts involving wage collective bargaining covering 51.1 million employees had been concluded.¹¹⁰ While this model of negotiation enables union organisations established at county level to be more independent from individual enterprises than enterprise unions engaged in enterprise level collective consultation, the example of Wenling demonstrates that collective consultations depend upon government and Party support, at both the policy and practical levels.¹¹¹

C *Legal Regulation of Collective Contracts and Collective Consultation*

While the system of collective contracts has been in place for a number of years, legal definition of many aspects of collective consultation and collective contracts remains poor. In the reform era, trade unions were authorised to conclude collective contracts with the employer at enterprise level in the 1992 *Trade Union Law*.¹¹² The system of enterprise level collective contracts was

¹⁰⁵ Ibid 117, but the Association did not represent all enterprises.

¹⁰⁶ China Labor News Translations, *Collective Wage Consultation: A Breakthrough for Resolving Labor Disputes in Wenling Zhejiang, China* Business Report (10 October 2008) <http://cntranslations.org/file_download/87>.

¹⁰⁷ Ibid 1.

¹⁰⁸ «关于开展区域性行业性集体协商工作的意见» [*Opinion on Developing Regional and Industry Level Collective Consultation Work*] <http://www.molss.gov.cn/gb/zxwj/2006-10/24/content_140633.htm>.

¹⁰⁹ China Labor News Translations, above n 106.

¹¹⁰ Juan Shen (ed), above n 94.

¹¹¹ See also discussion in Liu, above n 98, 48.

¹¹² *Trade Union Law 1992*, art 20.

formally established in arts 33–5 of the *Labour Law* in 1994 and reiterated in the 2001 *Trade Union Law*,¹¹³ but it was not until 2004 that more detailed administrative regulations were passed in the form of the *Collective Contracts Provisions*.¹¹⁴ These provisions continue in effect to the extent they are not superseded by provisions of the *Labour Contract Law*.

The *Labour Contract Law* outlines the regulatory regime for collective contracts, dividing them into general and specialised contracts. Specialised collective contracts deal with wage adjustments, labour safety, hygiene and female employees.¹¹⁵ Wage negotiations are conducted annually under the provisions of the 2000 MOHRSS *Interim Measures on Collective Wage Consultation*.¹¹⁶ These annual wage negotiations are concluded as a type of specialised collective contract which may be appended to an existing general collective contract, if one exists.¹¹⁷ The *Labour Contract Law* art 51 requires that a draft collective contract be submitted to the enterprise Employee Representative Council ('ERC') or to all workers for discussion, but gives primary responsibility for negotiating and signing the contract to the enterprise union, or the union at the higher level if the enterprise has no union. Workers thus in law and in practice have little direct input into the process of negotiation or conclusion of collective contracts.¹¹⁸ After a concluded agreement has been filed with the local Bureau of Human Resources and Social Security, the document will become legally binding if no objections are raised within 15 days of filing.¹¹⁹

The *Labour Contract Law* provides a regulatory outline for enterprise collective contracts and at art 53 provides in principle authorisation for industry and regional-level collective contracts. However, the existing law fails to address a number of important problems with both the *scope* and *process* of reaching a collective agreement. The scope of workers able to enter into collective contracts under the *Labour Contract Law* is restricted to 'enterprise employees' (art 51) which does not include workers employed and dispatched by a labour hire company to work at the enterprise. As the use of labour hire has become widespread, this is a significant omission in the law.

Problems with the process may be summarised as: 'unwillingness to negotiate, too afraid to negotiate, lacking competence to negotiate, and inability to negotiate an outcome'.¹²⁰ The emergence of industry and regional level collective contracts has only highlighted these regulatory gaps. While the law requires that

¹¹³ «中华人民共和国劳动法» [Labour Law of the People's Republic of China] (People's Republic of China) National People's Congress ('Labour Law') art 33. See also *Trade Union Law 2001* art 6, 20.

¹¹⁴ Passed on 1 May 2004 by the Ministry of Labour and Social Security ('MOLSS') as it then was (now Ministry of Human Resources and Social Security (MOHRSS)). These provisions supersede the 1994 *Collective Contracts Provisions* and provide the current legal framework for conclusion of collective contracts.

¹¹⁵ *Labour Contract Law*, above n 40, art 52; also *Collective Contract Provisions* art 3.

¹¹⁶ *Labour Contract Law*, above n 40, art 24.

¹¹⁷ *Interim Measures on Collective Wage Consultation* art 3. A general collective contract may be signed for a period of between one and three years: *Collective Contracts Provisions* art 38.

¹¹⁸ Clarke, Lee and Li, above n 9, discussing practice in the early 2000s.

¹¹⁹ *Labour Contract Law*, above n 40, art 54.

¹²⁰ Discussed in Xinhua Web, above n 44.

parties negotiate in good faith and prohibits the use of intimidation,¹²¹ it contains no effective remedy or penalty for breach of these provisions. Similarly, parties are required to respond to a written request to negotiate unless they have a proper reason.¹²² Without definition of what constitutes a proper reason, the obligation to negotiate is weak. In any case, the only recourse if an employer refuses to negotiate, or negotiates in bad faith, is to submit the matter to the local Bureau of Human Resources and Social Security to commence dispute resolution procedures.¹²³ Absence of provisions in national level regulations to penalise the offending party means there is little incentive for a reluctant party to participate in collective consultations. Additional issues arise with industry level agreements where an enterprise is not a member of the representative industry body. An illustration of this difficulty was seen during the 2006 negotiations on wages in Shanghai's textile industry, where a tripartite system of negotiation involving local government, the industry union and employer's association was established. Such a negotiation was made difficult where no counterpart employer's association existed, in which case a form of employer entity was constructed on an ad hoc basis to enable negotiations to go ahead.¹²⁴ As the Wenling case illustrates, successful conclusion of negotiations depended upon intervention by local Party and government to bring all enterprises to the table rather than upon any legally-enforceable obligation to negotiate.

In the absence of a more comprehensive national law on collective consultation, a number of local regulations have been passed to address some of the existing lacuna in national regulation of collective contracts.¹²⁵ The *Shenzhen Regulations on the Promotion of Harmonious Labour Relations* which took effect on 1 November 2008 is an example.¹²⁶ The time within which a party must respond to a written request for collective consultation has been shortened to 10 days and no exceptions are permitted for refusing to negotiate.¹²⁷ These regulations add a provision that requires the enterprise to make available necessary information, materials and conditions to the union and worker representatives to enable them to engage in collective consultations.¹²⁸ If the parties reach a deadlock

¹²¹ *Collective Contract Provisions*, above n 95, arts 5, 26, 27.

¹²² *Ibid* arts 32.

¹²³ *Ibid* art 49, 54.

¹²⁴ Wang Shuiguan, '增强行业工会组织活力 推动行业性工资集体协商' [Revitalise Industry Trade Unions to Push forward Collective Negotiations on Wages] (2010) 5《工会理论与实践》 [Labour Union Studies] 23, 24.

¹²⁵ Such as the 2007 Shanghai *Collective Contracts Provisions*, 上海市集体合同条例 <<http://www.shanghai.gov.cn/shanghai/node2314/node3124/node3125/node3130/u6ai1845.html>>; 2009 Hainan *Collective Contracts Provisions*, 海南省集体合同条例 <<http://www.51labour.com/show/138813.html>>; and the Guangdong *Guidelines on Enterprise Collective Consultation on Wages* passed on 5 August 2010 广东省企业工资集体协商指引 <<http://www.gd.lss.gov.cn/ztbd/newsinfo.do?classid=627&id=2220>>.

¹²⁶ 《深圳经济特区和谐劳动关系促进条例》 [Shenzhen Regulations on the Promotion of Harmonious Labour Relations] (People's Republic of China) Shenzhen People's Congress ('*Shenzhen Harmonious Labour Relations Regulations*') art 26.

¹²⁷ *Ibid* art 28, shortening the time within which the other party must respond and removing the proviso that a party may not refuse to negotiate without a proper reason.

¹²⁸ *Ibid* art 27, information includes gross salaries, operating costs, financial situation of the enterprise, plans for technical upgrades and replacement of machinery, social insurance costs and payments, training budgets and costs.

in negotiations, either one or both parties may make a written request to the local Bureau of Human Resources and Social Security to act as an intermediary.¹²⁹ Significantly, these regulations enable a penalty to be imposed for breach of these obligations. If the enterprise refuses to negotiate, or make the necessary information available as required, the local Bureau of Human Resources and Social Security may issue an order to comply within five days, after which it may impose a fine of between RMB 2000 and 10 000.¹³⁰

Another regional reform initiative is the *Zhejiang Province Collective Contracts Provisions* passed by the Zhejiang Provincial Peoples' Congress to take effect on 1 January 2011. These provisions seek to deal with some of the problems of both the scope of collective contracts and process of collective consultation discussed above. Article 11 extends the scope of collective contracts to cover workers employed under labour hire arrangements by enabling representatives to negotiate a collective contract with the labour hire company. It adds a requirement that enterprises that use a 'comparatively large number' of labour hire workers should 'participate in a collective negotiation meeting' with representatives of workers provided to that enterprise under labour hire arrangements, 'listen to their views' and 'protect their lawful rights and interests'. A number of key elements of this latter obligation remain undefined including what constitutes a comparatively large number of labour hire workers. The provision is also ambiguous in terms of what, if any binding agreement may be produced by the collective negotiation meeting, or the consequences of failing to convene such a meeting. In terms of process, like the *Shenzhen Regulations on the Promotion of Harmonious Labour Relations*, these provisions make collective consultation mandatory once a party makes a written request (art 7). In negotiations, workers are represented by a negotiating team including one enterprise union representative, with the other representatives being selected by the Employee Representative Council (art 10). Composing the negotiating team in this way is an acknowledgment of the enterprise union representative's conflict of interest in negotiating on behalf of workers while occupying a management position in the enterprise. It enables workers to be directly represented on the negotiating team by two of their own representatives. These provisions require that the conditions agreed may not be below the minimum legal standards. In contrast to *Labour Contract Law* art 55, which provides that conditions agreed in a collective contract not be lower than, and so may be the same as, the locally specified minimum standards, the Zhejiang provisions require that wages must be above the locally-specified minimum wage (art 5).

V Responding to a Crisis: the GFC and its Aftermath

The onset of the GFC put implementation of the 2007/2008 legislative reforms to a hard test almost as soon as they were enacted, particularly between the first

¹²⁹ Ibid art 30.

¹³⁰ Ibid art 65.

quarter of 2008 and the third quarter of 2009.¹³¹ Public attention was focused by a number of well publicised violent mass protests in 2009, such as the protest by workers in July 2009 against the takeover of the Tonghua Iron and Steel Group in Jilin which ended in a senior manager being beaten to death,¹³² a large-scale protest against job losses at the Baoding Yimian Cotton Mill and the subsequent march of over one thousand workers toward Beijing in April 2009,¹³³ and the strike by taxi drivers in a number of cities from November 2008.¹³⁴ In Guangzhou, for example, labour disputes have been identified as one of the most serious causes of social instability. It was reported that in 2008, over 20 000 workers were affected when 497 companies failed to pay wages. As a result, the incidence of labour unrest and labour related litigation increased dramatically, with many street protests and mass petitions. Labour related protests in Guangzhou accounted for 38 per cent of all protests in 2008.¹³⁵

A number of extraordinary measures were adopted in late 2008 to deal with the GFC. In November 2008, MOHRSS announced it would allow a temporary freeze on the minimum wage.¹³⁶ Reportedly some local governments indicated they would not vigorously enforce the new *Labour Contract Law*.¹³⁷ The Second Executive Committee meeting of the 15th ACFTU in December 2008 adopted a programme of ‘Mutually Agreed Action’ (共同约定行动) to strengthen the union’s role in assisting enterprises in difficulty as a result of the GFC, forestall employee layoffs and preserve social stability.¹³⁸

In February 2009, the State Labour Relations Tripartite Consultative Conference formulated a guiding instruction, the *Guiding Opinion on Dealing with the Current Economic Situation and Stabilizing Labour Relations*.¹³⁹ It reflected instructions from the CPC Central Committee and the State Council on the

¹³¹ Yang Lin, 2009 年劳资矛盾背景：国际金融危机 [2009 Background to Conflicts Between Labour and Capital: the Global Financial Crisis], 《新浪》 [Sina] (online), 14 December 2009 <http://news.sina.com.cn/c/sd/2009-12-14/094219255581_2.shtml>.

¹³² Sky Canaves, ‘Chinese Steelworkers Fight Privatization Effort’, *Wall Street Journal* (online), 27 July 2009 <<http://online.wsj.com/article/SB124863589915981859.html>>.

¹³³ *Baoding workers’ rally: Harbinger of a Long March?*, (April 2009) IHLO, <<http://www.ihlo.org/LRC/WC/210409f.html>>.

¹³⁴ Tania Branigan, ‘China taxi drivers strike as economic unrest spreads’, *The Guardian* (online), 24 November 2008 <<http://www.guardian.co.uk/world/2008/nov/24/china-taxis>>.

¹³⁵ 广州：劳资纠纷成为影响社会稳定第一因素 [Guangzhou: Disputes between Labour and Capital have Become the Primary Factor Affecting Social Stability] (19 March 2010) ACFTU <<http://acftu.people.com.cn/GB/11177287.html>>.

¹³⁶ Yang, above n 131, discussing freezes at the local level; see Friedman and Lee, above n 5, 528; Liu, above n 98, 49.

¹³⁷ Friedman and Lee, above n 5, 528–9.

¹³⁸ Pan Yue, ‘大力开展工会与企业、职工的“共同约定行动” 团结动员广大职工为促进经济平稳较快发展做贡献’ [Vigorously Implement the ‘Mutually Agreed Action’ between Trade Unions, Enterprises and Employees to promote unity and to mobilize the broad masses of workers to contribute to stable and rapid economic development], 《全国人民代表大会》 [The National People’s Congress of the People’s Republic of China] (online), 30 December 2008, <http://www.npc.gov.cn/npc/xinwen/syxw/2008-12/30/content_1465498.htm>.

¹³⁹ MOHRSS, 关于应对当前经济形势稳定劳动关系的指导意见 [Guiding Opinion on Stabilising Labour Relations in the Current Economic Situation], *Xinhua Net* (online), 2 February 2009, <http://news.xinhuanet.com/newscenter/2009-02/02/content_10748179.htm>.

measures to be taken during the GFC by each party to stabilise the relationship between employees and employers, under the rubric of the 'Mutually Agreed Action'.¹⁴⁰ MOHRSS was instructed to work with companies to preserve employment and use funds earmarked for unemployment benefits to preserve employment. Employers were encouraged to act in a socially responsible manner and to minimise employee retrenchment. Unions were instructed to encourage workers to cooperate with companies, support flexible working hours, improve productivity and reduce cost. Collective consultation and expanding the scope of collective contracts, particularly industry level agreements under the rubric of the 'Rainbow Programme' was advocated as a key strategy for getting through the crisis by risk sharing and establishing a 'shared development plan'.¹⁴¹

All parties were instructed to work together to implement vocational training programs and set up or expand wages guarantee funds. In particular, where workers were to be retrenched, or where enterprises were in financial difficulty, it required that priority be given to ensuring that wage arrears were paid in full and to prevent labour disputes.¹⁴² The document places special emphasis on setting up effective early response mechanisms to emergencies in the form of large scale or violent mass incidents; through strengthening information sharing between unions, enterprises and government, and taking concerted action in serious cases. Documents such as these, which allocate tasks to the different actors in the tripartite industrial relations structure, illustrate the impulse of the Party/state to manage serious problems administratively. They also illustrate the central importance placed on preventing social instability and protest.

This document was followed on 4 March 2009 by a notice jointly issued by the ACFTU and the All-China Federation of Industry and Commerce; *Notice on Encouraging Non State-owned Enterprises and Workers to Pull Together and Work for a Common Development*; with the stated aim of protecting enterprises, employment and social stability, implementing the Mutually Agreed Action through emphasising the mechanism of collective consultations.¹⁴³ However, reports suggest that, in addition to already existing grievances, while enterprises were exhorted to protect the core interests of workers, many enterprises took advantage of the leniency extended to them during the Mutually Agreed Action to transfer assets, restructure enterprises and lay off workers without making adequate provision for payment of liabilities, leading to a dramatic increase in collective labour disputes and protests.¹⁴⁴

¹⁴⁰ Ibid.

¹⁴¹ Ibid para 3.

¹⁴² Ibid paras 4, 5.

¹⁴³ «关于推动非公有制企业与职工同舟共济、共谋发展工作的通知» [Notice on Promoting the Solidarity between Non state-owned Enterprises and Workers and Working Together for a Common Development], (6 March 2009) ACFTU <<http://acftu.people.com.cn/GB/67560/8915384.html>>.

¹⁴⁴ Yang, above n 131.

A *Promoting the Use of Collective Contracts*

While the immediate effects of the GFC passed relatively quickly, some programs implemented at this time continued in the longer term. An important component of the Mutually Agreed Action and the Rainbow Program was to promote more widespread use of collective contracts, concentrating on collective wage agreements, with the primary objective being to stabilise labour relations.¹⁴⁵ The malleability of the primary purpose to be served by collective contracts to serve short term policy goals was highlighted during the emergency responses to the GFC. From being a mechanism for increasing wages and enhancing workers' ability to benefit from economic development, collective contracts rapidly transformed into a device for increasing workplace flexibility and risk sharing. After the crisis passed, collective contracting again became seen as a way of protecting social stability by underpinning wage increases in the lowest paid sectors of the Chinese economy.

The targets set under the Rainbow Program are: to introduce collective contracts into all enterprises with unions within the three-year period 2010–12; and, in small enterprises without unions, to conclude industry or regional collective agreements.¹⁴⁶ In addition to targeting enterprises without collective contracts, the focus of this program is on wages; to ensure collective contracts providing for annual wage increases are put in place, to target enterprises without mechanisms for annual wage increases, or which provide for low wage increases, as well as those enterprises where the pay rates of over 50 per cent of workers are below 50 per cent of the local average wage, and state and collective enterprises implementing an annual salary system.¹⁴⁷ The Party's 12th Five Year Economic and Social Development Plan has also emphasised increasing nationwide coverage of collective wages negotiation and reducing wage disparities between industries.¹⁴⁸ In response, a number of well-publicised large-scale collective wage agreements have been concluded. For example, in May 2011, the *China Daily* reported that a collective agreement concerning pay and conditions covering up to 450 000 workers in the catering industry in Wuhan, reached between the Wuhan Labor Union Federation of Trade, Finance and Tobacco and the Wuhan Catering Association, had been submitted for approval to the Wuhan Bureau of Human Resources and Social Security.¹⁴⁹ The significance of this agreement is that it was negotiated and agreed at city level, one administrative level higher than previous industry and regional collective agreements.

¹⁴⁵ In June 2008 it issued the ACFTU Opinion on Establishing a Collective Contracts Leadership Group (中华全国总工会关于建立集体协商指导员队伍的意见), the ACFTU Opinion on Launching a Collective Consultation Campaign (中华全国总工会关于开展集体协商要约行动的意见) and in July 2009 the ACFTU Guiding Opinion on Vigorously Launching Industry Level Wages Collective Consultation Work (中华全国总工会关于积极开展行业性工资集体协商工作的指导意见).

¹⁴⁶ Xinhua Web, above n 44.

¹⁴⁷ Ibid.

¹⁴⁸ Five Year Economic and Social Development Plan, above n 36, ch 32 s1.

¹⁴⁹ Chen Xin and Guo Rui, 'Contract to Give Catering Employees Higher Wages', *China Daily*, 4 May 2011 <http://www.chinadaily.com.cn/china/2011-05/04/content_12438838.htm>.

In addition to promoting collective wage agreements, the Rainbow Program also provides an acknowledgment at the policy level of the need to improve the whole range of procedural aspects of collective contract negotiation; from initiation of negotiation, the conduct and conclusion of negotiations, ratification of the agreement to supervising its implementation.¹⁵⁰ For example, the Director of the ACFTU's Collective Contracts Bureau, Zhang Jianguo, advocated strengthening the capacity and responsiveness of enterprise unions to worker interests by continuing to introduce direct elections of the enterprise union chair, which he acknowledges is an important aspect of strengthening the collective contracts system.¹⁵¹

B A Move to Collective Bargaining?

A number of reports have started to use the term 'collective bargaining' (集体谈判) rather than the more commonly employed term of 'collective consultation' (集体协商), thus hinting at a greater willingness in some areas to acknowledge existence of a conflict between the interests of labour and capital and to endorse international standards of collective bargaining. For example, in March 2010 the head of the National Economic Reform Research Committee and member of the Party, Song Xiaowu, is reported as stating that a system of collective bargaining should be introduced into state-owned enterprises and that the equal status of the unions in the bargaining process be guaranteed.¹⁵² What are we to make of these calls to institute a system of collective bargaining? It is difficult to determine at the moment whether use of this terminology is more than a linguistic sleight of hand.¹⁵³ There are signs of willingness in some regions to reform the existing system of negotiating collective contracts toward permitting more vigorous forms of collective negotiation to take place, particularly in Shenzhen and Guangdong. There are also signs of resistance to more radical reforms.

In 2008, the Shenzhen Congress Standing Committee issued the *Shenzhen Measures on Implementing the PRC Trade Union Law* ('Shenzhen Measures') which explicitly provided that collective bargaining, not the commonly used term collective consultation, would be the core focus of union work. In a speech at the promulgation of the *Shenzhen Measures*, the head of the Legal Department of the Municipal Union, Zhang Youquan asserted that the use of the term 'collective bargaining' reflected the objective reality that there is a conflict of interest between labour and capital in Shenzhen. He continued that such a provision better reflects

¹⁵⁰ Under the Rainbow Program launched by the ACFTU from June 2008, discussed in Xinhua Web, above n 44.

¹⁵¹ Xinhua Web, above n 44. For a discussion of the slow uptake of program for direct elections of union chairs see Jude Howell, 'The All-China Federation of Trade Unions beyond Reform? Slow March of Direct Elections' (2008) 196 *The China Quarterly* 845.

¹⁵² 健全集体谈判机制 发挥工会作用 [Perfect the system of collective bargaining: give full play to the role of the unions], «中国县域社会经济网» [China County Economic News] (online), 15 March 2010 <<http://www.xyshj.cn/bz/xyjj/sib/201003/40260.html>> 4.

¹⁵³ Zheng Guanghuai, '劳工权益与安抚型国家 ——以珠江三角洲农民工为例' [Workers' Rights and Interests and the Appeasing State- Migrant Workers in the Pearl River Delta Region as an Example] (2010) 5 《开放时代》 [Open Times] 27.

the actual labour environment in Shenzhen which has a high proportion of foreign investment enterprises and small and medium-sized privately owned enterprises.¹⁵⁴ However, subsequent reports and regulations on collective contracts in Shenzhen have not continued to use the term ‘collective bargaining’, but have preferred the more commonly used form of ‘collective consultation’. These measures include a number of specific provisions to facilitate stronger accountability by the union to its members. These include; requiring that any enterprise with more than 10 union members, or more than 25 employees must establish and register a union committee within six months of enterprise registration,¹⁵⁵ setting up a system of direct election of union leadership,¹⁵⁶ and prohibiting the enterprise management personnel including the legal representative, general and deputy general manager, cadres with equivalent positions, responsible people in the personnel department, or any relatives of these categories of person working in the same enterprise from occupying leadership positions in the union.¹⁵⁷ These provisions are a significant departure from the weak provisions in the *Trade Union Law* on management representation in the enterprise union.¹⁵⁸

Other reform proposals, such as the draft *Guangdong Regulations on the Democratic Management of Enterprises*,¹⁵⁹ promise to introduce reforms that could enable a more adversarial approach to be taken to collective wage negotiations. The third draft of these regulations, released for public comment in August 2010, enabled workers rather than the enterprise union to initiate wage negotiations where more than 20 per cent of the employees make a demand to the enterprise union, which would then be required to raise the issue with the enterprise.¹⁶⁰ They prevent workers or the employer from taking any actions during negotiations to intensify conflict, such as the use of violence or intimidation.¹⁶¹ Industrial action is not permitted prior to a demand for negotiation being made or during collective wage negotiations.¹⁶² However, the draft regulations also contain a provision that appears to sanction industrial action by providing that the employer is not entitled to terminate the labour contract of workers stopping work or on a go slow as a result of the employer delaying or obstructing the wage negotiations.¹⁶³ If the parties reach a deadlock in negotiations, art 53 of the draft

¹⁵⁴ Li Wei, Chen Xiaowei, Shi Xisheng and Liu Yan, ‘工会将代表职工集体谈判’ [The Union to Represent Workers in Collective Bargaining], 《深圳商报》 [Shenzhen Business News] (Shenzhen) 31 July 2008, 5.

¹⁵⁵ *Shenzhen Measures* art 7, which also provides that where the enterprise has less than 10 union members, they may establish a basic level union committee with union members from other local enterprises in the same industry.

¹⁵⁶ *Shenzhen Measures* art11(1), which provides that candidates for the positions of union chair and vice chair and standing committee members shall be nominated by union members, approved by the higher level union and subject to direct election by the union general assembly.

¹⁵⁷ *Shenzhen Measures* art 11(3).

¹⁵⁸ *Trade Union Law 2001*, above n 14, art 9 merely prohibits close relatives of main management personnel of enterprises from membership of grass-root trade union committees. It does not expressly prohibit managers themselves form membership of the enterprise union committee.

¹⁵⁹ Draft *Guangdong Regulations on the Democratic Management of Enterprises* <<http://law.51labour.com/lawshow-90971.html>>.

¹⁶⁰ *Ibid* art 40.

¹⁶¹ *Ibid* arts 48, 49.

¹⁶² *Ibid* art 50.

¹⁶³ *Ibid* art 51.

provides for a cooling off period not exceeding 60 days. This reform proposal has faced intense opposition and lobbying from Hong Kong, Japanese and Taiwanese industry representatives and as a result the regulations have not yet been passed. In January 2011 a new draft for consultation was released but, unlike the third draft, the latest draft has not been made publicly available.¹⁶⁴

Similarly, in August 2010, the Draft *Shenzhen Labour Relations Collective Consultation Regulations* ('Draft Shenzhen Regulations') were released for public comment. In the 20-day consultation period, over 5000 comments were submitted.¹⁶⁵ These draft regulations would enable collective consultation on a broad range of matters including wages and conditions of work such as working hours and intensity, training, holidays and work rules that affect the interests of workers.¹⁶⁶ These regulations set out detailed rules concerning the process of collective consultation including a provision requiring that the parties negotiate in good faith.¹⁶⁷ They increase the monetary penalties for refusal to do so after ordered by the Bureau of Human Resources and Social Security to between RMB 10 000 and 50 000.¹⁶⁸ In this situation unions would be authorised to make a public criticism of the company.¹⁶⁹ These regulations also contain a provision to penalise union officials who fail to fulfil their duty to negotiate in the interests of workers.¹⁷⁰ Due to intense industry lobbying, passage of these regulations has been delayed and are currently under a second round of review and drafting.¹⁷¹

In other places, such as Shanghai, new regulations have been passed to strengthen workplace democracy by requiring establishment of ERCs in each enterprise and regularising their functions.¹⁷² Article 25 requires that no more than 20 per cent of representatives on the ERC be drawn from middle or senior management, to ensure that the ERC does not merely reflect management views. While not directly regulating collective consultations, the ERCs are given a role in negotiation and concluding collective contracts which has the potential to increase worker input into collective consultation processes. ERCs are entitled to be consulted about the ongoing collective consultations over wage adjustments, layoffs, collective labour disputes, areas of high potential risk of accidents in the

¹⁶⁴ Salans, 'Salans News: Employment Law China' (March 2011) <<http://www.scribd.com/doc/52472549/1103-Salans-Employment-Newsletter-April-Issue-en-110331>> See comments on the new draft at <<http://www.jtpp.cn/a/report/opinion/2011/0219/889.html>>.

¹⁶⁵ Chen Xiaowei, '深圳集体协商条例草案：防最低工资标准成“最高” [The Draft Shenzhen Collective Consultation Regulations: Stop the minimum wage standard becoming the highest]', «东方财富网» [East Money] (online), 27 September 2010 <<http://finance.eastmoney.com/news/1350,2010092797798072.html>>.

¹⁶⁶ Draft Shenzhen Regulations, art 10.

¹⁶⁷ Draft Shenzhen Regulations, art 24-6.

¹⁶⁸ Draft Shenzhen Regulations, art 57 where a party refuses to rectify conduct in breach of art 24, 26 and 41 after ordered to make a correction by the relevant Bureau of Human Resources and Social Security.

¹⁶⁹ Draft Shenzhen Regulations, art 59.

¹⁷⁰ Draft Shenzhen Regulations, art 61. The duty is articulated in art 5.

¹⁷¹ Chen, above n 149.

¹⁷² «上海市职工代表大会条例» [Shanghai Provisions on Employee Representative Councils] (People's Republic of China), Shanghai People's Congress (passed by the Shanghai People's Congress on 23 December 2010) ('*Shanghai Provisions on Employees Representative Councils*') arts 2, 3.

production process and occupational hazards.¹⁷³ It has the power to review and approve draft collective contracts dealing with wages and work conditions such as working time, holidays insurance and special collective contracts dealing with wage adjustments before they can be binding on employees.¹⁷⁴

VI Conclusion

While these proposed reforms indicate willingness of local governments to facilitate more robust forms of collective negotiation, without a more fundamental change to the unions, or reforms that enable the unions to be bypassed in the process of collective bargaining, these reforms will be hindered by the weakness of enterprise unions in representing workers' interests in negotiations. A fundamental problem with enterprise unions remains their inability to represent workers interests because of their position in enterprise management. Some of the recent reforms have attempted to mitigate that problem. Industry and regional level agreements involve union organisations at a higher level than the enterprise union such as the Wenling collective agreement which was concluded at county level. The recent collective contract concluded in Wuhan broke new ground as it was concluded at city level. Reforms such as the *Zhejiang Collective Contracts Provisions*, the draft *Guangdong Regulations on the Democratic Management of Enterprises* the *Shanghai Provisions on Employee Representative Councils* introduce reforms that give more direct voice to worker representatives in the process of collective consultation and break the enterprise union monopoly on negotiating collective agreements. An examination of the recent innovations in collective contracting such as the Wenling model of industry-wide collective consultation reveals that its success depended very much on the initiative and support of the local Party and government. In this case, the unions worked closely with the support and encouragement of the local Party committee in carrying out wage negotiations. Similarly, the draft Shenzhen and Guangdong regulations on collective consultation depend for their implementation upon support and enforcement by local government agencies.

The tentative steps toward strengthening the processes of collective consultation, while framed as 'rights protection', are most readily understood as seeking to address the weakness in the current system of labour relations for negotiating periodic wage increases. The volume of disputes arising over wages claims, coupled with the policy to readjust China's economy to reduce its reliance on exports, have provided the impetus to test whether strengthening processes of collective consultation and collective contracts might provide a way to increase wages and reduce the occurrence of wage-based disputes. Articulation of a 'rights protection' strategy framed as a way of enabling workers to participate in the benefits of economic and social development through the expansion of collective contracting, may result in concrete benefits to workers. However, the rapid reversal of this strategy during the GFC to harness collective contracts to the purpose of shoring up the profitability of enterprises through temporarily freezing wage rises

¹⁷³ Ibid art 9(3).

¹⁷⁴ Ibid art 11; see also 2007 *Shanghai Collective Contracts Provisions* arts 26, 28.

and introducing risk sharing measures, demonstrates that collective contracts are not immutably for the purpose of improving workers wages and conditions and may be harnessed for other purposes when considered necessary. The recent reforms to expand collective contracts thus do not hold out any promise that the Party/state or the unions would or could countenance expansion of collective bargaining in the sense articulated by the ILO.

The approach by enterprises unions to strike settlement, by acting as an intermediary to resolve the dispute and to facilitate an early return to work, is in conformity with the Party's priority on preventing disputes, preventing their escalation or resolving them as quickly as possible. In an environment where the Party/state perceives social and political stability as under threat, the demand for industrial stability is immediate and short term. It requires the prevention of disruptive conduct and tends to view a wide range of behaviour as disruptive. This view contrasts with alternative conceptions of the conditions necessary to underpin longer-term stability, which understands stability as being based on a robust system to represent and protect worker rights and interests and to resolve disputes over those claims. The longer-term view of stability does not have the same need to repress all forms of contestation or disruption and would encourage collective bargaining as a way of underpinning long term industrial stability. However, this is not the view of rights or the relationship between rights and stability that is revealed by this study of collective contracts. Collective contracts remain a way of addressing a regulatory problem, that is, to provide a mechanism for wage adjustments in a way that complements the broader economic adjustment program. The local level reforms to date have introduced measures to address some of the weaknesses in existing processes of collective negotiation, including the role played by enterprise unions. With the major reforms proposed by the Shenzhen and Guangdong governments now placed on hold, the legal infrastructure that might have supported a more robust form of negotiations has been forestalled.