Remarks of Earl V. Brown Jr., Solidarity Center
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Introduction

Thank you for inviting me to make this presentation.

My name is Earl Brown, and I am a US practicing labor and employment lawyer. I have worked on Chinese and South-East Asian labor and employment law issues for the AFL-CIO's Solidarity Center for ten years. Prior to my work in Asia, I represented US industrial unions and individual workers in all sorts of labor and employment law matters. I worked for such unions as the United Mine Workers and the Teamsters.

Because China is so vast and diverse, outsiders like me tend to look at China and see reflections of our own experience. The rapid pace of change—a phenomenal growth rate for the past ten years—and the diversity of and lack of transparency in China often defeat our earnest efforts at objectivity. What follows, therefore, is inevitably the perspective of one US labor lawyer with practical legal experience advocating for industrial workers in both the US and Asia. My views also derive from many years of work by colleagues in the American and international labor movements, and in the Solidarity Center, to promote autonomous trade unions and rule of law frameworks that protect workers' rights and interests in Asia. What follows is also accompanied by an awareness of the deterioration of worker rights enforcement in the West and that we are not always the model we would like to be, or represent ourselves to be.

I, along with many others, view China as the most significant experiment in industrial relations in the global economy. Along with issues of the environment, the "labor question" in China is a paramount one for China's own development, for labor movements around the world and for the shape of any global economic recovery. This question of worker voice and power in the Chinese economy encapsulates all the broader governance questions China must address to achieve sustainable and balanced growth. US trade unions and worker rights advocates, as well as many employers and policy makers, are acutely aware that developing viable industrial relations arrangements in China is necessary to sustaining Chinese and global economic progress. It is recognized that China (and other countries) cannot continue to rely on business models that depend upon evasion of labor standards and norms, and that leave working

citizens without channels to effectively redress basic workplace injustices or sufficient purchasing power to afford a decent life for themselves and their families.

The Current Crisis

The impact of the current global economic crisis on China's workers is not yet clear. There is little reliable data that would allow us to tell the story. By the time this current crisis manifested itself in China in 2009, China had already survived wrenching changes as it opened to the global economy and privatized much of its industrial economy. Millions of older state enterprise workers were laid off in the 1990s and first decade of this century, just as millions of younger peasant workers were drawn to the new private sector. In three short decades, China created a huge new private sector employing millions of workers. As the state owned enterprises shed workers and the new private sector industrial geared up, so did labor strife. In the industrial North East, laid off state workers demonstrated for subsidies to survive in old age. In the new industrial zones throughout China, factory and construction workers hit the streets and ringed government offices to get back wages from employers. The dislocations occasioned by this new economic crisis may appear to many in China as yet more of the same---wrenching and continuous changes that can be survived. Many Chinese view these dislocations against a backdrop of astounding economic growth and modernization.

China's new private sector working class contains millions of young peasant workers migrating from rural areas to regimented work in the factories of China's export zones. This new class also includes millions of young skilled, hi-tech and service workers. As this century dawned, China's younger workers from both rural and urban settings began to harbor increasingly distinct notions of their rights as individuals and wage earners and became correspondingly assertive of those rights. Contestation for those rights at all levels—on the streets, in courts and in interactions with often militaristic supervisors—increased, as did rights awareness campaigns by lawyers, women's' groups, legal aid societies and NGOs.

Young rural women, often only teenagers, waved labor regulations that had been faxed to them by legal aid or worker rights groups in the faces of supervisors demanding the full legal measure of wages. Desperate workers often hit the streets, tying up traffic. Sometimes, workers followed abusive supervisors to their homes and exacted private vengeance. Young workers began to quit

employers that offended them, or failed to accommodate their needs for scheduling or promotions. Younger workers began to "shop" for employers. Higher skilled and semi-professional workers also sought to bargain with employers and even, in the case of airline pilots, struck. As did dock workers and taxi drivers. The range of labor disputes expanded beyond recovering wages due but not paid, expanding to demands for improvements in wages, hours, working conditions and status and treatment. The intense level of labor strife in China required some responses by employers and government.

To make the issue more pressing, campaigns by consumer, human rights and trade union groups in global export markets amplified and fueled labor controversy inside China. All this labor strife became a staple of both the Chinese and international media. In response, a significant number of employers in China, both foreign and domestic, and international brands, began programs of social work, relief and compliance with Chinese law.

Yet, in all this furious activity, the entity charged with labor rights enforcement and giving voice to workers' demands and interests, the All China Federation of Trade Unions (ACFTU), seemed largely silent and absent in the lives of workers. Although politically influential at the top, the ACFTU has not represented or defended workers in their actual struggles with employers. At least in other industrializing countries, large-scale industrialization and the accompanying concentration of masses of industrial workers with grievances has pushed workers into trade unions. Programs of social work and legal compliance alone were not enough to meet the level of controversy generated by unremediated industrial grievances. In those situations, employers and government were compelled to recognize and bargain with autonomous worker voice expressed in trade unions. There is little reason to think that industrial China will prove to be an exception to the growth of worker voice and the emergence of bargaining.

By the time the 2009 economic crisis became manifest, China had already launched a series of controversial labor law reforms that strengthened the hands of ordinary workers vis-à-vis employers. Those labor law reforms, enacted in 2008, did not go so far as to create a legal and industrial relations framework compliant with international labor law. Nonetheless, the 2008 reforms do lay the basis for enforcing some fundamental labor standards and have therefore evoked passionate employer opposition in a labor relations culture that already overwhelmingly favors the employer and is rife with employers who make labor law avoidance central to their business operation.

In the 2008 labor law reforms, China sought to define the private sector "employment" relationship—what is an employer and what is an employee and what are their inescapable obligations and rights. This is the fundamental question in labor law, as most obligations and rights—ranging from the "employee's" duty to safeguard the employer's intellectual property interests to the "employer's" duty to honor labor agreements when corporations are transferred -- hinge on the definitions of these two words. The centrality of these definitions is confirmed by the great efforts expended by employers to structure industrial relations so that employers are not "the employers" but rather "contractors" or "purchasers" of naked assets and employees are not "employees" but 'independent contractors", "subcontractors", "interns", "temps" or other legal creatures with lesser rights in the work-place.

The linchpin of the 2008 reforms is the Employee Contract Law. That law was drafted to remedy specific socially disruptive labor abuses such as wide-spread wage arrearages, manipulations of corporate forms to shed labor law obligations for wages and benefits, and devices to classify workers as temporary or contract workers in order to avoid affording them the full legal protections due employees. The Contract Law lays down, for the first time, basic, universal norms: all workers be, they peasant workers, "temps", contract workers, apprentices or probationary employees, regardless of geographical location or industrial sector, are entitled to certain protections and possessed of certain rights. Thus, the Contract Law protects most private sector workers. [1]

The Contract Law also expresses an unambiguous command to judges, arbitrators, mediators and bureaucrats to resolutely enforce the employers' obligation to pay legal and contractually established wages in full and on time. This law further reflects a defined national policy favoring job security by erecting protections against arbitrary dismissal, by promoting long-term employment arrangements and by requiring due notice of and consultation about lay offs (retrenchments). The Law creates a clear right to severance pay for most workers with any seniority. The remaining 2008 legislative enactments seek to channel labor disputes into credible and efficient avenues for dispute resolution—against the backdrop of a judicial and administrative system that is a work in progress. Taken together, these reforms also define and expand the ACFTU's role in representing workers in interactions with employers over a broad range of issues.

[1] I am putting aside the application of this law to public employees and state-owned enterprise employees.

Some employers in China, in the region and in the West have made alarmist forecasts about the economic impact of these laws on business. At the same time, other employers and their lawyers have begun to stress the need for strict adherence to Peoples' Republic of China (PRC) labor laws and regulations, and forthrightly eschewed industrial relations policies founded on strategies of law avoidance and impunity.

Whether this policy of strict adherence to legal norms succeeds in fostering compliance on a significant scale remains to be seen. Will a sufficiently large group of employers implement the advice of their lawyers or will they continue to be tempted by strategies of avoiding labor law obligations? The devolution of labor law obligations through chains of contracting remains a significant obstacle to compliance as well.

Despite these questions, a significant group of employers and employer-side labor lawyers have recognized what many Chinese policy makers and worker rights advocates also understand: that labor law violations cannot continue as the order of the day. Many foreign investors and brands could not sustain the level of controversy sparked by production and business models premised on evasion of fundamental labor standards and norms. These forces, against the backdrop of labor strife, combined to propel the legal reforms described above that stiffened basic labor rights, charged the union with discrete and important functions in protecting workers rights and interests and provided avenues for redress of industrial grievances. Authoritative voices in the Western and Chinese employer bar, the set of lawyers advising employers operating in China, have now firmly counseled strict compliance with Chinese labor law as essential to sound business operation.

Predictably, the 2009 crisis has prompted some employers and policy makers to call for suspension or outright repeal of the prior year's reforms. Just as the initiation of labor law reforms in 2008 sparked a broad and open debate in China, and followed years of contention about the role of workers in China's new society, the 2009 economic crisis has set a new stage for rehearsals of the "labor question." The signs appear to augur for a "Singapore" solution. During downturns in Singapore, there is a public ritual of sacrifice—ministers, among the most highly paid in the world, cut their salaries, managers do also, and government directed union announces corresponding cuts and reductions in hours. Even furloughs. The objective is to freeze or roll back wages while preserving jobs until the crisis passes. The Chinese often cite this Singapore model and there seems to be a temporizing truce now in China that entails

avoiding mass layoffs in favor of wage and hour reductions and preservation of jobs, but no outright repeal of the 2008 reforms. However, it is clear that the economic crisis had caused export and related employers to shed millions of jobs by early 2009.

Lawyers representing multi-national employers in China report that this picture is varied and localized—in some regions with more active official union presence or in sectors where employers seek to avoid employee turnover, these "Singapore" bargains are negotiated with the tools provided the union by the 2008 laws. Workers are furloughed or work light hours rather than being laid off. In other areas, local employers and their allies in the official union ignore the 2008 laws. Some local officials have gone a long way in assuring employers and investors that laws, criminal or civil, should not trouble them. For example, lawyers working with Chinese counterparts on securities and corporate regulations report that Chinese regulators have assured certain investors that they need not be concerned about enforcement actions or prosecutions in any area of regulation ranging from the environment to securities law, and of course, including labor.

There is also the question of the millions of peasant workers who went home last January during the Chinese New Year holiday and have stayed home. Will the countryside absorb them? Will these be the only peasant workers in world history to return to the farm and stay there while young? And what about the millions of young Chinese graduates leaving school this year for this job market? They are smart, educated and have marked ambitions about how to live their lives. Will they access jobs and salaries commensurate with their expectations? These questions, however, should not cause an underestimation of the demonstrated capacity to endure massive economic dislocation in China, or of the agility of the governing party. China in the past thirty years has faced and survived massive economic upheavals.

To my mind, the current crisis presents a more intense version of the long standing internal debate about industrial relations and the power of workers in China. While there are voices calling for repeal of the 2008 reforms, there are other voices inside China that recognize that workers need rights, voice and enhanced worker purchasing power if socially sustainable development is to occur. That these voices inside exist is demonstrated by the 2008 reforms, and the enhanced space for worker rights and collective bargaining opened by those reforms. The question for us is how to engage those Chinese actors inside China

calling for worker rights in a spirit of equality, deference to their agency and with mutual respect.

A Focus on Internal Chinese Private Sector Industrial Relations and Worker Rights Frameworks

Ascertaining how China will deal with the current crisis and its impact on workers requires an assessment of the state of worker rights enforcement and the capacity of China's own institutions to provide worker voice. China's industrial development has progressed to the stage where private-sector industrial relations expertise is required.

Given the level of labor strife in China, even the Chinese government recognizes that there is a need is for private sector institutions to express worker power in the market economy so that peaceful and credible solutions can be negotiated directly by workers and employers rather then on the streets. This means that external worker and human rights advocacy and other external programs should now be supplemented by focused and practical industrial relations capacity building in the private sector. Part of this focus should be on how the ACFTU can adapt to the demands of representing workers vis-à-vis employers in the private sector.

This industrial relations phase of China's development is a stage beyond discrete and localized legal aid experiments, the often sporadic support for labor rights NGOs, concocting better human resource systems or dissemination of media reports about labor abuses. Rather, China must now seriously contemplate industrial relations: the continuous negotiation of industrial and labor grievances in the private sector through autonomous and durable Chinese institutions capable of representing workers and employers in a balanced fashion. [2] The current crisis just makes this long-time need more acute, and this is no time for going backwards. Otherwise, a period of aggravated disruption and strife may be the result of a retreat as workers seek redress.

We do have reservoirs of unique expertise in the US labor movement and industrial relations institutions in the unionized sector that can be of significant utility in today's China. In the pre-New Deal US, we experienced labor strife and

[2] In this respect, I do not mean to advocate for the notion sometimes ascribed to US industrial relations proponents that labor relations must be conflictual and wholly severed from the state. The state is always central to this bargaining, because without legal pressure and appropriate state policy, employers will not bargain with workers.

violence as intense as any in present day China. A long debate over the role of workers, their unions and the state in our society resulted in a framework for negotiation of labor disputes and the creation of an industrial relations system that held sway for a long period.[3]

This system created a rich experience in plant, enterprise and sectoral dispute resolution that, despite limitations, enhanced the wages and purchasing power of industrial workers and was consistently capable of solving industrial problems peacefully. While we surely cannot plant the American flag in Chinese industrial relations, and should therefore never want to, this history has left us with expertise and skills which can be of use to Chinese worker rights actors in the current debate over the role of workers and the union in China in this crisis and thereafter.

How Trade Unions Can Help:

A. Unions and Labor and Social Bargaining:

China's work force is not monochromatic. It includes millions of "unskilled" industrial workers; many are internal migrants of marginal legal status and limited access to schools, health care and housing. It also includes millions of high-tech workers and knowledge workers, service employees, workers in supply chains for foreign brands, and state enterprise workers and civil servants. Labor relations at US, Australian and EU companies are distinctly different from labor relations in Japanese companies, which in turn are different from labor relations in overseas Chinese and Korean companies. Many Chinese workers are under the age of 30, and have distinctive attitudes towards work and their rights at work and in society.

Each of these segments confronts different problems; in the private sector, however, too many workers do not have an accessible union to represent them. China has a web of official union institutions that parallel the state structure. The official union, ACFTU has not yet attained a wide presence in the private sector.

However, the 2008 law reforms afford this union a huge role in labor relations. Not only does the union have an important advisory and gatekeeper role in

[3] William E. Forbath, *Law and the Shaping of the American Labor Movement*, Harvard University Press, 1989, p. 10-36

formulating labor law and regulations, it also has an invigorated mandate to collectively bargain for workers, including migrant workers. Curiously, the 2008 labor law reforms cover most workers within the boundaries of formal employment. This is in contrast to a global tendency to create exceptions to laws governing formal employment of such sweep that they undermine labor law and support the creation of a precarious and vulnerable work force without rights and collective voice. The ACFTU is now specifically charged with insuring the rights of all workers covered by the law. But the law has not created an institutional stage for this larger, encompassing role. China is also staging Hamlet without the Prince of Denmark, because it has not yet developed the necessary autonomous worker institutions at the grass roots to implement collective bargaining.

At the same time, China has experienced a significant growth of worker advocacy institutions and voices outside the union, in NGO worker centers, in GONGOs[4], in legal aid societies, in universities and in government regulatory agencies. These articulate voices for worker rights often provide a welcome contrast to quiescence in the official union, and may spur to the union to assume a more active role in worker representation and labor rights enforcement. Assuming a more active representational role in labor relations, however, will cause the official union to change profoundly. At a minimum, it will need to establish a grass roots presence; it must consult with and secure the allegiance of members; it must have a research department and it must organize employers under agreements in relevant labor markets, sometimes from the bottom up rather than from the top down.

The importance of this new role for the union in this downturn is clear. The union has invoked Article 41 of the 2008 Employee Contract Law to require prior notice to it by the employer of all lay-offs without exception. The union is further using the extensive notice and consultation provisions of Article 41 (governing mass lay-offs of 20 employees or over) to forestall and to initiate bargaining over lay-offs in this downturn.

Article 41 requires extensive consultation with the union and workers prior to any "mass lay-off", and protects certain older and ill employees from lay-off altogether. Via this Article, the union in some places is forcing employers to bargain towards a Singapore solution—reduced hours and/ or furloughs instead of unilateral mass dismissals. Although this economic environment has forced

[4] Governmentally authorized, funded and supervised "NGOs."

many a Hobson's choice, the law here does force the employer to bargain with the union and workers before initiating terminations. The employer cannot act unilaterally. Bargaining and labor negotiation is thus occurring prior to the creation of viable local unions and other similar industrial relations institutions. We cannot foreclose the possibility that the law will force the union into a more active representational role.

Our labor movement can assist in enhancing the capacity of interested officers and staff of the ACFTU union and other worker rights advocacy groups to begin to step into the industrial relations roles assigned unions and workers by the 2008 laws:

- We can provide expertise on structuring unions internally to equip them for the functions of organizing, bargaining, and rights advocacy;
- We can provide expertise and collaboration on occupational health and safety (OSH) technical issues, and on establishing worker capacity to enforce fundamental occupational health and safety norms via worker committees;
- We can share models on how to represent public sector employees;
- We can help enhance the capacity of activists to provide legal and other assistance to injured workers and their families, and the families of deceased workers;
- We can provide expertise on researching labor markets and employers;
- We can provide training in bargaining;
- We can provide training in organizing;
- We can provide models for broad rights advocacy;
- We have expertise in the distinct field of representing high-skilled technical workers and younger works in service industries and working as contractors.

Labor movements in the US and elsewhere are uniquely equipped to provide such assistance as they possess the specific and time tested bargaining and organizing expertise that academics, development firms and NGOs often lack. Mobilizing this experience during this crisis to assist internal actors advocating for worker rights in the Peoples' Republic of China will enable us to participate in addressing, in a targeted way, the universal problems of the global economy—lack of stable employment, competition based on labor law avoidance and lack of worker voice and purchasing power—as well as assist our Chinese counterparts in addressing those very problems in China.

China also needs a labor movement that is also capable of acting outside the formal employment relationship to advocate for and to represent marginalized informal sector workers. The US labor movement has made some strides in giving voice to informal and marginalized wage earners by establishing worker centers and networks of advocates and service providers that operate outside traditional craft and other formal union categories. Interaction between US and Chinese advocates for marginalized workers would be helpful to both sides. In this respect, the Solidarity Center has brought Chinese union lawyers and labor rights activists to US worker rights centers and initiated a dialogue which we hope will continue on how to provide voice to and enforce law on behalf of marginalized workers.

We should understand that EU and Japanese models of industrial relations are also relevant, and that we are not internal actors in China. Nonetheless, Chinese discourse about industrial relations has reached the stage where concrete private sector trade union expertise and skills are needed to assist in building capacity in Chinese labor institutions of all kinds—in the formal union, in worker centers, NGOs, and in legal aid institutions.

This crisis has established that economics premised on the race to the bottom—on relentlessly depressing labor costs and living standards—is not sustainable. One answer to this imbalanced global economy is an invigorated Chinese labor movement. We should seek a role in reversing the race to the bottom with the aid of invigorated labor movements in China, both for the sake of US workers and Chinese workers. This necessarily entails working appropriately with counterparts in China.

Labor, Lawyers and the Rule of Law, Even in Crisis Times:

The labor issue in China is also at the heart of a broad debate about human rights and the rule of law. Until 2008, many employers in China simply discounted labor law compliance. Other employers under imperatives to comply strictly with PRC law, such as foreign employers with their own legal requirements to comply with Chinese law, or those subject to consumer pressure, were constantly undermined competitively by employers who violated Chinese labor norms. This fueled a larger problem: a culture of impunity with regards to compliance with the law. While aspects of labor and employment law, such as the technicalities regarding workers' compensation and work place health and safety may seem arcane, they are critical in China, where industrial death, disease and injury remain at high levels. Unregulated labor competition means that workers are

maimed and slaughtered to save on labor costs. Insuring that effective OSH and worker compensation laws and regulations are in place and enforced is central to a rule of law culture in China as elsewhere.

US union lawyers and activists can assist Chinese counterparts in union, NGO and legal aid society staffs with concrete and particular practice-based advice on infusing rule of law norms into workers' compensation structures, into regulation of work hazards in dangerous industries such as mining, and into providing for social security and protection within the framework of a private economy.

Further, US union lawyers and their colleagues can engage in a continuous dialogue on Chinese labor law compliance with US and other international lawyers who represent multinationals in China. The Solidarity Center has initiated just such a dialogue through participation in relevant ABA committees and finds that foreign lawyers representing employers in China have openly committed to advising compliance with PRC labor law and regulations. This is a major step—in which responsible employers and responsible employer counsel play an indispensable role—towards pushing back the culture of noncompliance and impunity in labor law. Foreign employers have thus often become a force for labor law compliance. Of course, there are many countervailing examples of foreign employers violating basic labor norms.

As noted above, younger and more highly skilled workers in China seem to part of the growth of regional "civil" rights movement among younger workers in East and South East Asia. This movement arises from expectations about autonomy and individual choice that are becoming widespread among all younger workers, and among more skilled workers like IT workers and airline pilots. Many elements of the 2008 labor law reforms address the needs of young and more skilled workers, and they have been used by those workers, both spontaneously and with assistance of union and legal aid staff. Union lawyers and staff in the US movement have attained considerable expertise in representing and reaching out to such workers and can be of assistance.

There is a widely acknowledged problem in China with enforcement of judgments. In this respect, US trade union lawyers can assist Chinese counterparts on the staff of unions, legal aid societies and NGOs to enforce wage and worker compensation judgments. In enforcing judgments, workers'

lawyers may find allies in the business community who also encounter this very problem.

The need to include the labor movement in the core of rule of law dialogue has become even more acute given the massive increases in international and internal migration of workers in the past decade. These migrant peasant-workers are invariable legally disenfranchised and cut off from the most basic rule of law institutions. The international labor movement and its allies realize that the rule of law cannot co-exist with huge populations of marginalized and abused migrant workers cut of from justice institutions and any means of redressing fundamental deprivations of human and worker rights.

The US and international trade union movements can play, by virtue of their institutional networks, a broad role in providing forums and assistance to Chinese worker rights advocates regarding enforcement of rights across national boundaries, against foreign employers, or in enforcing the rights of the ever increasing number of Chinese guest workers abroad. No other institution can match the capacity of the international labor movement to reach across the globe and down into societies through affiliates.

Conclusion:

We should assist Chinese worker rights advocates in unions, law faculties, NGOs and legal aid societies to take up the invitation presented by 2008 labor law reforms to implement the mandate for collective bargaining. In doing so we will be contributing in a modest way to solutions for Chinese workers and workers everywhere in this global crisis sparked by a race to the bottom that has gone too low.

Our assistance should be delivered with deference to the agency of our Chinese colleagues, and with complete awareness that only the Chinese will determine the contours of their labor relations system. Since this global crisis has exposed "Western" and Asian workers, and workers everywhere, to the dire effects of the unregulated race to the bottom, we can contribute to overcoming the crisis by technical assistance in the area of industrial relations and collective bargaining.