

# CHINESE WORKERS VS. WALMART: BRAINSTORMING SOLUTIONS TO FUNDING STRATEGIC LABOR LITIGATION IN THE WAKE OF CHINA'S 2017 FOREIGN NGO LAW

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*Over the past two years, China's treatment of labor advocates was full of conflicting norms: Though the Party remained hostile toward labor organizing directed at domestic employers, certain conditions caused state officials to hesitate in violently cracking down on labor organizing directed at Western companies. Against this backdrop, groups like the Walmart Chinese Workers' Association (WCWA) were leading successful campaigns to fight worker exploitation through organizing and legal remedies. In order to fund litigation against Walmart, the WCWA received litigation funding from nonprofit groups like the Hong Kong-based China Labour Bulletin (CLB). However, in January 2017, China passed a new Foreign Non-Governmental Organization Law (FNGO), which requires both foreign and Hong Kong nonprofits, like CLB, to register and submit themselves to greater government control in order to continue working in China. As a result, labor nonprofits like CLB are no longer able to fund litigation for groups like the WCWA. This Note proposes one way that Chinese labor organizations and NGOs could address the funding issues caused by the FNGO Law. Part I will discuss the state-controlled All-China Federation of Trade Unions (ACFTU), explain the role it plays in the larger Communist Party agenda, and discuss the conditions in China that have created an opportunity for labor groups like the WCWA to form. Part II will discuss how the WCWA had been using strategic litigation prior to the FNGO Law, as well as how the FNGO Law affected the WCWA's use of strategic litigation. Finally, Part III will suggest third-party litigation funding as a potential solution to this problem.*

INTRODUCTION .....	1855
I. LABOR ORGANIZING IN CHINA .....	1858
A. <i>The All-China Federation of Trade Unions</i> .....	1859

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B. <i>The Rise of the Walmart Chinese Workers' Association and Other Labor Organizations</i> .....	1861
1. <i>Societal Conditions that Created Organizing Opportunities for Labor Groups</i> .....	1863
a. Economic Slowdown.....	1864
b. Rhetoric Shift: Framing Protests in Nationalist Language .....	1865
c. Political Ambition .....	1866
d. Coordinated Labor Activism .....	1867
2. <i>Changes in Chinese Labor Law that Created Organizing Opportunities for Labor Groups</i> ....	1868
a. The Labour Mediation and Arbitration Law.....	1869
b. The Labour Contract Law .....	1871
II. THE WALMART CHINESE WORKERS' ASSOCIATION AND LITIGATION FUNDING .....	1872
A. <i>Funding Prior to the FNGO Law</i> .....	1872
B. <i>The FNGO Law and Its Effects</i> .....	1875
III. THIRD-PARTY LITIGATION FUNDING: AN IMPERFECT BUT INTRIGUING POTENTIAL FUNDING AVENUE .....	1877
CONCLUSION .....	1882

## INTRODUCTION

As human rights lawyers were beaten, tortured into false confessions, and abused across China during the period from 2010 to 2015,<sup>1</sup> one group of activists was thriving: Western-facing labor advocates. Though the Chinese Communist Party (Party) remained violently hostile to workers' rights activism directed against domestic employers,<sup>2</sup> certain political, economic, societal, and legal conditions made state officials increasingly reluctant to use force as a means of cracking down on labor organizing targeted at Western companies. Against this backdrop of conflicting norms, a window for niche labor organizing opened. Several innovative, Western-facing workers' rights groups

<sup>1</sup> See AMNESTY INT'L, *No End in Sight: Torture and Forced Confessions in China*, at 8–13, AI Index ASA 17/2730/2015 (2015) (reporting on the accounts of 37 Chinese human rights lawyers describing instances of torture between 2010 and 2015).

<sup>2</sup> See Michelle Chen, *China's Latest Crackdown on Workers Is Unprecedented*, NATION (Dec. 18, 2015), <https://www.thenation.com/article/chinas-latest-crackdown-on-workers-is-unprecedented/> (describing the Chinese government's "harsh crackdown" on community-based groups and domestic worker-activists); *Labour Activists Detained for Doing the Job of the Trade Union*, CHINA LAB. BULL. (May 12, 2015), <http://www.clb.org.hk/en/content/labour-activists-detained-doing-job-trade-union> (discussing the detention of prominent labor activists amidst escalating labor tension in the Guangdong manufacturing province).

took advantage of this window and rose to prominence, including the well-known Walmart Chinese Workers' Association (WCWA) (沃尔玛中国员工联谊会).<sup>3</sup> Made up of retail workers, the WCWA organized in support of better conditions at Walmart stores throughout the mainland.<sup>4</sup>

While the WCWA has been around for several years, its activities between 2015 and 2016 culminated in some of its most visible and successful challenges to exploitation by Walmart retail stores. In support of its organizing, the WCWA sought legal remedies for workers whose rights were violated by the superstore.<sup>5</sup> To fund lawsuits in a country where contingency fees are generally banned for labor advocacy,<sup>6</sup> the WCWA received litigation funding and bargaining support from Hong Kong-based NGOs.<sup>7</sup> As a result of the 2017 Foreign NGO Law (中华人民共和国境外非政府组织境内活动管理法) (FNGO Law),<sup>8</sup> however, most of these avenues for financial support have been removed. By construing "foreign" or "overseas" NGOs to include Hong Kong, the FNGO Law gives the Party authority to force Hong Kong nonprofits to comply with harsher requirements.<sup>9</sup> For

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<sup>3</sup> See Linda van der Horst, *Wal-Mart Uprising: The Battle for Labor Rights in China*, DIPLOMAT (Nov. 14, 2015), <https://thediplomat.com/2015/11/wal-mart-uprising-the-battle-for-labor-rights-in-china/> (detailing the origins of WCWA in challenging Wal-Mart labor policies); TIM PRINGLE & GEOFFREY CROTHALL, CHINA LAB. BULL., CHINA'S WALMART WORKERS: CREATING AN OPPORTUNITY FOR GENUINE TRADE UNIONISM 17–19 (2017), <http://www.clb.org.hk/sites/default/files/Walmart%20report%20Final.pdf> (assessing the importance of the WCWA's online forum in organizing Walmart workers across China).

<sup>4</sup> See van der Horst, *supra* note 3 (describing the WCWA's role in the battle for labor rights in China).

<sup>5</sup> See *id.*

<sup>6</sup> See AARON HALEGUA, U.S.-ASIA L. INST., WHO WILL REPRESENT CHINA'S WORKERS? LAWYERS, LEGAL AID, AND THE ENFORCEMENT OF LABOR RIGHTS 19 (2016), <https://www.aaronhalegua.com/chinasworkers/> (noting China's general ban on contingency fees).

<sup>7</sup> The Labour Rights Litigation (LRL) Program section of the China Labor Bulletin website has a case summary section describing, in reverse chronological order, some of the most important cases adopted and funded by the LRL program. See *Labour Rights Litigation*, CHINA LAB. BULL., <http://www.clb.org.hk/section/labour-rights-litigation> (last visited Oct. 3, 2018). For example, the LRL funded the arbitration case brought by prominent WCWA activist Wang Shishu. See *A Thorn in the Side of Walmart: Wang Shishu Goes to Court Again*, CHINA LAB. BULL. (July 27, 2015), <http://www.clb.org.hk/en/content/thorn-side-walmart-wang-shishu-goes-court-again>.

<sup>8</sup> Zhong Hua Ren Min Gong He Guo Jin Wai Fei Zheng Fu Zu Zhi Jin Nei Huo Dong Guan Li Fa (中华人民共和国境外非政府组织境内活动管理法) [Law of the People's Republic of China on Administration of Activities of Overseas Nongovernmental Organizations in the Mainland of China] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 28, 2016, effective Jan. 1, 2017) (China) [hereinafter FNGO Law], <http://www.mps.gov.cn/n2254314/n2254409/n4904353/c5548987/content.html>.

<sup>9</sup> See *id.* art. 5 (defining "overseas NGOs" as "nongovernmental organizations from outside China's mainland"); *Fact Sheet on China's Foreign NGO Law*, CHINAFILE (Nov. 1, 2017), <http://www.chinafile.com/ngo/latest/fact-sheet-chinas-foreign-ngo-law> (citing *Are*

example, in order to register and continue funding projects on the mainland, these nonprofits are now required to secure sponsorship from one of the government or government-affiliated organizations that the Chinese Ministry of Public Security (MPS) has approved to act as an official sponsor.<sup>10</sup> To get sponsored, nonprofits must accept direct Party supervision and stop funding work that is considered political.<sup>11</sup> Because labor advocacy is often considered “sensitive,”<sup>12</sup> no prominent Hong Kong labor NGO has been allowed to register.<sup>13</sup>

As will be discussed in this Note, trends indicate that the Party would still continue to allow labor organization and litigation; however, since the FNGO Law has brought these organizations’ litigation funding to a halt, they now lack money for lawyers. Free from threats of litigation or arbitration, Walmart now has the opportunity to grow bolder in firing WCWA leaders and organizers. Labor statutes in the United States reflect the notion that this form of intimidation is incredibly effective in frightening workers and crushing organizing.<sup>14</sup> Because of this, the longer the WCWA goes without funding for litigation, the greater the risk of its movement falling apart. Funding here could mean the difference between change or extinction, solidarity or suppression. The question of this Note is thus urgent: In the aftermath of a dramatic resource drain, how can labor groups like the WCWA come up with other ways to fund litigation?

This problem and question, in the context of China, has never been explored at length in legal literature. Although this Note focuses

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*NGOs in Taiwan, Hong Kong, and Macau Subject to This Law?*, CHINAFILE (Apr. 23, 2017), <http://www.chinafile.com/ngo/faq/are-ngos-taiwan-hong-kong-and-macau-subject-law> (noting that the term “foreign” or “overseas,” for the purposes of the FNGO Law, encompasses Hong Kong).

<sup>10</sup> See FNGO Law, *supra* note 8, art. 6 (“Relevant departments and offices of the State Council and of provincial-level people’s governments shall be in charge of corresponding activities of overseas NGOs in China’s mainland.”); see also *id.* art. 11 (“Overseas NGOs that apply to register and establish representative offices in the mainland of China shall seek the approval of organizations in charge of their operations.”).

<sup>11</sup> See *id.* art. 5 (“Overseas NGOs shall not engage in or finance profit-making or political activities in the mainland of China, and they shall not illegally engage in or finance religious activities.”).

<sup>12</sup> See Hilary K. Josephs, *Labor Law in a “Socialist Market Economy”: The Case of China*, 33 COLUM. J. TRANSNAT’L L. 559, 560 (1995).

<sup>13</sup> See The China NGO Project, *Registered Foreign NGO Representative Offices Interactive Map and Filterable Table*, CHINAFILE, <http://www.chinafile.com/ngo/registered-foreign-ngo-offices-map-full-screen> (last updated July 9, 2018) (listing zero currently-registered labor NGOs located or permitted to operate in Hong Kong).

<sup>14</sup> In the United States, the idea that it is intimidating and chilling to fire labor leaders in retaliation for organizing is memorialized in statute. See National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(3) (2012) (prohibiting an employer from engaging in “unfair labor practice[s],” which include “encourag[ing] or discourag[ing] membership in any labor organization” as a precondition for employment).

on China, it can easily find an audience in lawyers from many other countries. Over the past three years, more than sixty countries have passed or drafted laws that curtail the activity of non-governmental and civil society organizations.<sup>15</sup> In what the Carnegie Endowment has described as a “viral-like spread of new laws,” ninety-six countries have taken steps to harass or undermine NGOs, or prevent them from operating at full capacity.<sup>16</sup> James Savage, former head of Amnesty International’s Human Rights Defenders Program, said it best: “This global wave of restrictions has a rapidity and breadth to its spread we’ve not seen before, that arguably represents a seismic shift and closing down of human rights space not seen in a generation.”<sup>17</sup>

This Note will describe and propose potential legal solutions which the WCWA, and similar workers’ rights groups targeting international companies in China, can use to fund strategic labor litigation in the face of the FNGO Law. Part I will discuss the state-controlled All-China Federation of Trade Unions (ACFTU), explain the role it plays in the larger Communist Party agenda, and discuss the conditions in China that have created an opportunity for labor groups like the WCWA to form. Part II will discuss how the WCWA had been using strategic litigation prior to the FNGO Law, as well as how the FNGO Law affected the WCWA’s use of strategic litigation. Part III will explore the viability of third-party litigation funding as a potential solution to funding problems.

## I

### LABOR ORGANIZING IN CHINA

When many people think of employment in China, they immediately turn to the subject of sweatshops. Photos of Foxconn suicide nets stick in the public conscience,<sup>18</sup> and campaigns to end child labor are common topics of human rights activism. With these images in mind, people are often surprised to learn that China has a large, national

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<sup>15</sup> Harriet Sherwood, *Human Rights Groups Face Global Crackdown ‘Not Seen in a Generation,’* GUARDIAN (Aug. 26, 2015), <https://www.theguardian.com/law/2015/aug/26/ngos-face-restrictions-laws-human-rights-generation>.

<sup>16</sup> See THOMAS CAROTHERS & SASKIA BRECHENMACHER, CARNEGIE ENDOWMENT FOR INT’L PEACE, *CLOSING SPACES: DEMOCRACY AND HUMAN RIGHTS SUPPORT UNDER FIRE 1* (2014), [http://carnegieendowment.org/files/closing\\_space.pdf](http://carnegieendowment.org/files/closing_space.pdf); Sherwood, *supra* note 15.

<sup>17</sup> Sherwood, *supra* note 15.

<sup>18</sup> See Joel Johnson, *1 Million Workers. 90 Million iPhones. 17 Suicides. Who’s to Blame?,* WIRED (Feb. 28, 2011), [https://www.wired.com/2011/02/ff\\_joelinchina/](https://www.wired.com/2011/02/ff_joelinchina/) (describing the use of suicide nets, which would catch jumping workers, at the Foxconn factory in Shenzhen as a “[d]amage [c]ontrol” measure to restore public confidence following several suicides).

union in place. These people fail to recognize, however, that trade unions in post-socialist countries come from a very different tradition than those in capitalist countries.<sup>19</sup> By looking at the ACFTU's history and fee structure, one can begin to understand the union's role in China and, in turn, why labor organizing outside of state channels has become increasingly common.

### A. *The All-China Federation of Trade Unions*

As a “quasi-governmental agency,”<sup>20</sup> the All-China Federation of Trade Unions (ACFTU) is subordinate to the Party.<sup>21</sup> Although the purported purpose of a union is to represent workers, this Party loyalty creates a tension that was aptly described by a 2002 Human Rights Watch report:

[T]he dual position of the ACFTU—as upholder of working-class interests and as loyal servant to the Party—makes it impossible for the union to promote free association in accordance with international standards. . . . It has not defended the principle of independent union organizing, and it has never spoken out against laws and regulations routinely employed to justify imprisonment of labor activists who organize outside its aegis.<sup>22</sup>

In its over fifty years of operation, the ACFTU has “never initiated, and only once backed, a genuine strike.”<sup>23</sup> Issues like this point to the fact that, while the ACFTU is a very effective tool for the Party, it is a much less effective tool for workers. If the ACFTU were a real union it would probably not be re-elected by its members. Since its conception, however, being accountable to members has never been its main purpose.

One of the primary goals of the ACFTU is to prevent the rise of independent unions.<sup>24</sup> The ACFTU is a way for the Party to control

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<sup>19</sup> For more information on trade unions in post-socialist countries, see TIM PRINGLE & SIMON CLARKE, *THE CHALLENGE OF TRANSITION: TRADE UNIONS IN RUSSIA, CHINA AND VIETNAM* (2011).

<sup>20</sup> See Ronald C. Brown, *China's Collective Contract Provisions: Can Collective Negotiations Embody Collective Bargaining?*, 16 DUKE J. COMP. & INT'L L. 35, 51–52 (2006) (describing the ACFTU as dual purpose and “quasi-governmental” in its promotion of both “employee interests and economic reforms and social stability”).

<sup>21</sup> See PRINGLE & CLARKE, *supra* note 19, at 13–14, 19–20 (noting that despite ACFTU's attempts to operate independently, China's Trade Union Law has consistently determined the “subordination of ACFTU to the leadership of the Communist Party”).

<sup>22</sup> HUMAN RIGHTS WATCH, *PAYING THE PRICE: WORKER UNREST IN NORTHEAST CHINA* 11 (2002), <https://www.hrw.org/reports/2002/chinalbr02/chinalbr0802.pdf>.

<sup>23</sup> Harold Meyerson, *Why China Has Strikes Without Unions*, AM. PROSPECT (June 27, 2014), <http://prospect.org/article/why-china-has-strikes-without-unions>.

<sup>24</sup> See, e.g., Editorial, *Laboring in Hong Kong*, NATION, July 14, 1997, at 3, 4 (“Massive and monolithic, the ACFTU is really an arm of Chinese state management, dedicated to suppressing worker protest.”); see also Stephen F. Diamond, *The Race to the Bottom*

worker organizing while simultaneously allowing workers to vent frustration and feel a small sense of control over their employment conditions. Broadly speaking, this can arguably be traced back to the history of the Communist Party, and its early interactions with worker movements internationally. In 1949, the Party came to power partly because of its ability to unite and inspire the working class.<sup>25</sup> By the 1980s, however, it was already beginning to see workers as a threat.<sup>26</sup> During this time—less than thirty years after the Party took power—worker grievances were fueling the Solidarity Movement in Poland.<sup>27</sup> The Polish uprising marked the first quasi-successful worker-led revolution in a workers' state and caused great alarm in the socialist world. At one point, concern was so great that Chinese leaders disdainfully referred to the uprising as the “Polish disease.”<sup>28</sup> As a result of these experiences, many scholars have argued that the Party is wary of the threat posed by genuine labor solidarity.<sup>29</sup>

Beyond its role in suppressing independent unionization efforts, the ACFTU also works as a jobs program and money-making device for the Party. In its role as job-creator, the ACFTU employs over 900,000 people.<sup>30</sup> Since the party gains support from its ability to create jobs and control the economy, this achieves an important political goal by solidifying the image of the party as a force of economic prosperity. The ACFTU also generates revenue for the Party, as each

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*Returns: China's Challenge to the International Labor Movement*, 10 U.C. DAVIS J. INT'L L. & POL'Y 39, 60 (noting the transformation of the original character of the ACFTU “into a party-run transmission belt organization” following the expulsions of its independent leaders).

<sup>25</sup> See, e.g., CYNTHIA ESTLUND, *A NEW DEAL FOR CHINA'S WORKERS?* 45–46 (2017) (arguing that the ACFTU facilitated the revolution by serving as a “transmission belt[ ]” to unify workers and help consolidate the Party's basis of rule).

<sup>26</sup> See *id.* at 46.

<sup>27</sup> See Jeanne L. Wilson, “*The Polish Lesson: China and Poland 1980–1990*,” 23 *STUD. COMP. COMMUNISM* 259, 259–79 (1990) (describing the political, economic, and social effects the Polish Solidarity movement of the 1980s had on Chinese rulers).

<sup>28</sup> LAWRENCE R. SULLIVAN, *HISTORICAL DICTIONARY OF THE PEOPLE'S REPUBLIC OF CHINA* 398 (2d ed. 2007).

<sup>29</sup> For references to the influence of the Polish crisis in China, see Harry Harding, *Political Development in Post-Mao China*, in *MODERNIZING CHINA: POST-MAO REFORM AND DEVELOPMENT* 13, 22 (A. Doak Barnett & Ralph N. Clough eds., 1986) (noting that the Polish crisis likely resulted in China refusing to grant workers a constitutional “right to strike”); ANDREW J. NATHAN, *CHINESE DEMOCRACY* 41, 204, 206, 230 (Alfred A. Knopf ed., 1985) (describing the potential that a “Polish-style workers' rebellion” had in possibly forcing the PRC to allow for “political pluralism”); RICHARD H. SOLOMON, *MAO'S REVOLUTION AND THE CHINESE POLITICAL CULTURE* 268–69 (1971) (discussing the “liberalizing ferment” in Poland and the resulting concern about “erosion in the ‘socialist camp’” in China).

<sup>30</sup> See Tom Mitchell, *Union Star Rises from Walmart China Labour Dispute*, *FIN. TIMES* (Apr. 7, 2014), <https://www.ft.com/content/fb915628-bd60-11e3-a5ba-00144feabdc0>.

unionized facility is required to pay a percentage to the union, and the Party is often suspected of dipping into those funds.<sup>31</sup> Currently, both domestic and foreign companies are required to pay two percent of their total wages to support the ACFTU's activities.<sup>32</sup> At the ACFTU's inception, however, this fee was only imposed on domestic companies because the union did not organize foreign enterprises.<sup>33</sup> It was not until the number of state-controlled enterprises began to drop in the 1990s that this began to change.

When China started to experiment with market approaches involving more private ownership, ACFTU membership went into a sharp decline.<sup>34</sup> This was a big issue for the Party because the ACFTU needs membership in order to effectively serve its dual purposes. As such, the ACFTU decided to boost membership by pushing for recognition in foreign-owned businesses.<sup>35</sup> It was under these circumstances that the ACFTU turned its attentions toward Walmart.

### *B. The Rise of the Walmart Chinese Workers' Association and Other Labor Organizations*

Walmart was the ACFTU's first foreign target for unionization.<sup>36</sup> As Walmart was the largest and most high-profile retailer in China,<sup>37</sup> the ACFTU likely believed that if they could make an example out of it, other foreign companies would more easily submit to their demands. Walmart, however, was not interested in unionization. As was consistent with Walmart's labor practices internationally,<sup>38</sup> the superstore immediately took a strong anti-union position. When confronted with ACFTU pressure, Walmart repeatedly refused to meet with ACFTU officials.<sup>39</sup>

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<sup>31</sup> For a discussion about the state and organization of ACFTU finances, see CIA, FINANCIAL OPERATIONS OF LABOR UNIONS IN CHINA 3–5 (2011), <https://www.cia.gov/library/readingroom/docs/CIA-RDP80-00809A000700230022-0.pdf>.

<sup>32</sup> See Matthew Kirdahy, *Wal-Mart Strikes Pay Deal with Chinese Union*, FORBES (June 25, 2008), [https://www.forbes.com/2008/07/25/walmart-china-unions-lead-cx\\_mk\\_0725acftu.html](https://www.forbes.com/2008/07/25/walmart-china-unions-lead-cx_mk_0725acftu.html).

<sup>33</sup> Cf. Anita Chan, *Made in China: Wal-Mart Unions*, YALEGLOBAL ONLINE (Oct. 12, 2006), <http://yaleglobal.yale.edu/content/made-china-wal-mart-unions> (noting the unprecedented move for ACFTU to engage in swift unionization of Walmart stores using grassroots mobilization).

<sup>34</sup> See *id.* (noting the decline in ACFTU national membership in light of the drop in state-owned enterprises).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*



After Walmart declined to cooperate with the ACFTU, the union began a campaign to force their hand. Initially, this involved the use of legal threats: In an unprecedented move, the ACFTU said that they would take Walmart to court for violating China's trade union laws.<sup>40</sup> Since no Walmart workers had applied to join the ACFTU, however, they lacked plaintiffs. This led the ACFTU to engage in its first grass-roots organizing campaign with the goal of encouraging workers to petition for union representation.<sup>41</sup> After many failed attempts, the ACFTU finally found its champion in Ke Yulong, a twenty-nine-year-old employee at the Jinjiang Walmart store in Quanzhou City, Fujian.<sup>42</sup> After Ke filed a petition for union representation at the Fujian location, other store locations followed, and representation votes were held.<sup>43</sup>

While Walmart initially responded with threats to withhold the two percent wage payment to ACFTU, it ultimately decided to unionize as the number of stores under attack grew.<sup>44</sup> With much of its future expansion plan focused on the Chinese market, Walmart believed they had more to lose from fighting the Party than from accepting a union as undisruptive and pro-management as the ACFTU. When asked why Walmart agreed to allow trade unions in its Chinese stores despite the fact that it zealously resisted unionization in other countries, Jonathan Dong, one of Walmart's publicists, said: "The [ACFTU] has made it clear that its goal is to work with employers not promote confrontation."<sup>45</sup> Joe Hatfield, the president of Walmart Asia, echoed this sentiment when he added that Walmart management expected to be "working collaboratively with the leadership of the ACFTU and union organizations at all levels to create a model working relationship."<sup>46</sup> Ultimately, Walmart's expectations have proven correct.

Although the Walmart organizing campaign could have been a turning point toward genuine solidarity for the ACFTU, this has not been the case. Since getting Walmart to agree to unionization, the ACFTU has dropped its confrontational campaigns and resumed its

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> See Marc Blecher, *When Wal-Mart Wimped Out: Globalization and Unionization in China*, 40 *CRITICAL ASIAN STUD.* 263, 268–69 (2008); Chan, *supra* note 33.

<sup>43</sup> See Blecher, *supra* note 42, at 269 (describing the ensuing unionization of all sixty-six Walmart stores in China in the aftermath of Fujian).

<sup>44</sup> *Id.* at 270.

<sup>45</sup> See *id.* at 273.

<sup>46</sup> Jonathan Watts, *Wal-Mart Backs Down and Allows Chinese Workers to Join Union*, *GUARDIAN* (Aug. 11, 2006), <https://www.theguardian.com/business/2006/aug/11/china.supermarkets>.

tradition of cooperating with employers and silencing worker-led organizing.<sup>47</sup> By halting its grassroots fight, however, the ACFTU inadvertently inspired a rise in activism. Frustrated with the ACFTU's return to complacency, workers within Walmart began organizing outside of state channels. The WCWA is a prominent group that formed under these circumstances.

The WCWA is a grassroots labor organization that uses “WeChat, QQ, blogs and other social media tools” to “provide[ ] guidance and other recommendations on laws and rights for Walmart employees.”<sup>48</sup> The group was started in 2014 by four Walmart workers who were frustrated by both their workplace conditions and the ACFTU's unwillingness to allow genuine labor advocates<sup>49</sup> to campaign for union leadership.<sup>50</sup> Currently, the WCWA focuses the majority of its attention on problems workers face in Walmart retail stores. Its most high-profile work has involved Walmart's Comprehensive Working Hours System (CWHS) (综合工时制度), which is a sobering example of how employers abuse workers through exploitative scheduling practices.<sup>51</sup>

Though worker frustration and ACFTU indifference are major reasons that the WCWA was able to form, other factors were critical in allowing this to happen. In particular, certain societal conditions and improvements to labor laws played important roles in creating a unique organizing opportunity for Western-facing labor groups.

### 1. *Societal Conditions that Created Organizing Opportunities for Labor Groups*

Though the past few years were not the first time that wildcat labor activity has surged in China,<sup>52</sup> the recent activity was nonethe-

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<sup>47</sup> See Esther Wang, *As Wal-Mart Swallows China's Economy, Workers Fight Back*, AM. PROSPECT (Apr. 23, 2013), <http://prospect.org/article/wal-mart-swallows-chinas-economy-workers-fight-back> (“[H]opes [that the ACFTU would continue making confrontational campaigns] proved to be too optimistic. The ACFTU soon abandoned any pursuit of union democracy—colluding with management at one store, for example, to appoint a store manager as the union head after the elected chair had to step down.”).

<sup>48</sup> Zhang Jun, *Support Walmart China Workers' Association (WCWA)'s Work!*, BORDERLESS MOVEMENT (Dec. 31, 2016), <https://borderless-hk.com/2017/01/12/support-walmart-china-workers-association-wcwas-work>.

<sup>49</sup> Here, I use the term “genuine labor advocate” to refer to activists who engage in collective action on behalf of themselves and other workers, but who are not agents of either the employer or the ACFTU.

<sup>50</sup> See Anita Chan, *The Resistance of Walmart Workers in China: A Breakthrough in the Chinese Labour Movement*, CHINOIRESIE (July 7, 2016), <http://www.chinoiresie.info/the-resistance-of-walmart-workers-in-china-a-breakthrough-in-the-chinese-labour-movement/>.

<sup>51</sup> See *id.*

<sup>52</sup> Historically, the term “wildcat” has referred to labor strikes and organizing activity that is conducted independently by workers, outside of the union context. For some

less unique because of the response it solicited from the Party. Unlike past efforts for organizing outside the ACFTU,<sup>53</sup> labor organizing and strategic litigation against foreign companies were met with relative Party silence from 2015 to 2017. Many factors contributed to this silence, but four particularly stand out: economic slowdown, a rhetoric shift invoking the language of nationalism, political ambition, and digital labor activism.

#### a. Economic Slowdown

In China, lay-offs and plant closings have been increasing in frequency since the early 2000s, and unrest has arguably surged as a result.<sup>54</sup> This is a major problem for the Party, which derives much of its legitimacy from its ability to control the economy.<sup>55</sup> With control slipping as the economy struggles, the Party has strategically chosen to take a more neutral position on organizing—particularly organizing involving foreign businesses—as part of a larger plan to assert more influence over those businesses.<sup>56</sup> This position has given workers room to organize. Unemployed and frustrated by the nonchalant attitude of ACFTU leadership, the workers are pushing for more power in the ACFTU. This power is bolstered by economic pressures created by labor shortages.

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background on this phenomenon, see Shaun Richman, *With 3 Recent High-Profile Walkoffs, Is the Wildcat Strike Back?*, IN THESE TIMES (Feb. 12, 2016), <https://inthesetimes.com/working/entry/18855/wildcat-strike-uber-walkoff-unions-labor-radicalism>.

<sup>53</sup> For more information about the problems and strengths of some past Walmart protests, including the 2010 Ma'anshan protest which involved violent police intervention, see Chunyin Li & Mingwei Liu, *Overcoming Collective Action Problems Facing Chinese Workers: Lessons from Four Protests Against Walmart*, 71 INDUS. & LAB. REL. REV. 1078 (2018).

<sup>54</sup> See, e.g., Albert Keidel, *The Economic Basis for Social Unrest in China* (May 26, 2005) (memorandum presented at the Third European-American Dialogue on China, George Washington University), [https://carnegieendowment.org/files/Keidel\\_Social\\_Unrest.pdf](https://carnegieendowment.org/files/Keidel_Social_Unrest.pdf) (“Since 2000, while growth has boomed, SOE and collective layoffs have continued, with more than 20 million additional lost SOE and collective jobs by the end of 2004. Meanwhile, reform and restructuring have taken additional forms that generate new dislocations without alleviating earlier ones.”).

<sup>55</sup> ROBERT D. BLACKWILL & KURT M. CAMPBELL, COUNCIL ON FOREIGN RELATIONS, *XI JINPING ON THE GLOBAL STAGE: CHINESE FOREIGN POLICY UNDER A POWERFUL BUT EXPOSED LEADER* 11 (2016), <https://www.cfr.org/report/xi-jinping-global-stage> (stating that “[t]he real risk to China’s economy, and to Xi’s fortunes, comes not from the stock market’s raw economic impact but from the damage done to the government’s credibility,” and that “Xi’s strongman image suffered in the wake of the market collapse”).

<sup>56</sup> For more context on China’s increasing desire to influence foreign businesses, see Alexandra Stevenson, *China’s Communists Rewrite the Rules for Foreign Businesses*, N.Y. TIMES (Apr. 13, 2018), <https://www.nytimes.com/2018/04/13/business/china-communist-party-foreign-businesses.html> (describing China’s trend toward gaining direct decision-making power over international firms doing business in China).

China has had a surge in labor shortage on its coasts.<sup>57</sup> Policy changes in agriculture, such as cuts to taxes paid by farmers, increases in funding for rural infrastructure, and continued enforcement of the *hukou* (户口) system on economic migrants,<sup>58</sup> seem to be playing a part in reducing migration to the cities.<sup>59</sup> With fewer workers coming to cities, labor is in higher demand, and workers have more leverage to use in negotiations with their employers. The shortage has also served to increase labor militancy, reflected particularly in increasingly organized demands for higher wages.<sup>60</sup>

#### b. Rhetoric Shift: Framing Protests in Nationalist Language

In response to changes in scheduling protocol and mass layoffs, Walmart employees have taken to the streets in cities across China. Shouting “Workers, stand up!,” they cloaked their appeals in the language of the Cultural Revolution.<sup>61</sup> Taking advantage of the party’s hesitance to back an American super-corporation over the Chinese working class, the Walmart workers have framed their struggle in patriotic language. When talking to local officials, labor organizers compared their mistreatment at the hands of Walmart to the struggles of Mao Zedong against foreign imperialists.<sup>62</sup>

In publicly drawing these allusions to China’s history, Walmart workers are also pitting the party’s core Marxist commitment to protect the working class against its hatred and fear of genuine worker solidarity. This creates tension at a time when the Party is politically vulnerable.

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<sup>57</sup> See Kenneth Rapoza, *In Coastal China: A Labor Shortage*, FORBES (Dec. 20, 2011), <https://www.forbes.com/sites/kenrapoza/2011/12/20/in-coastal-china-a-labor-shortage/#18f22a848fc9> (discussing China’s labor shortage, which is most pronounced in coastal cities).

<sup>58</sup> The term “*hukou* system” refers to China’s governmental household registration system which limits where people are allowed to move. For more information, see generally FEI-LING WANG, ORGANIZING THROUGH DIVISION AND EXCLUSION: CHINA’S HUKOU SYSTEM 304 (2005) (describing the *hukou* system in China).

<sup>59</sup> Cf. Lincoln Davidson, *Guest Post: China’s “Back to the Countryside” Policy: A Step Toward Reducing Rural-Urban Disparity*, COUNCIL ON FOREIGN REL. (June 24, 2015), <https://www.cfr.org/blog/guest-post-chinas-back-countryside-policy-step-toward-reducing-rural-urban-disparity> (discussing some of the policies the government enacted to encourage migrants from rural areas to return home).

<sup>60</sup> See Gabriel Wildau, *China Migration: At the Turning Point*, FIN. TIMES (May 4, 2015), <https://www.ft.com/content/767495a0-e99b-11e4-b863-00144feab7de>.

<sup>61</sup> See Javier C. Hernández, *Across China, Walmart Faces Labor Unrest as Authorities Stand Aside*, N.Y. TIMES (Nov. 16, 2016), <https://www.nytimes.com/2016/11/17/world/asia/across-china-walmart-faces-labor-unrest-as-authorities-stand-aside.html>.

<sup>62</sup> *Id.*

### c. Political Ambition

In the post-Mao era, the Party has encouraged peaceful transfers of power by picking the next president and prime minister long before the previous leaders finish their terms.<sup>63</sup> Though this may seem strange, the practice has become an established part of Chinese politics. For example, Deng Xiaoping picked Hu Jintao to be his successor ten years before his term expired, and Xi was chosen five years before Hu ended his term.<sup>64</sup> If Xi were going to continue this tradition, he would have already named a successor. Instead, he is consolidating power.<sup>65</sup> At the recent Nineteenth Party Congress, he named new leadership for the Chinese Standing Committee but made no mention of his own impending term end.<sup>66</sup> Speculation about his intent to become a “Leader for Life” increased even further when Xi eliminated presidential term limits.<sup>67</sup>

This behavior has led many to suspect that he aims to extend his own tenure as head of China.<sup>68</sup> As a political choice, this seems risky. Xi’s campaign to curb corruption in the Chinese government is foundational to his popularity in China.<sup>69</sup> Though his anti-corruption campaign won him support from the Chinese working-class, that popularity is not unshakable, and Xi’s pushing to remain in power may raise questions about his own corruption.

To protect the legitimacy of his leadership and the Party’s rule from domestic scrutiny, Xi has made moves to support moderate labor

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<sup>63</sup> See, e.g., Minxin Pei, *This Could Be Xi Jinping’s Year of Living Dangerously*, HUFF. POST (Jan. 24, 2017, 11:56 AM), [https://www.huffingtonpost.com/entry/xi-jinping-donald-trump\\_us\\_58877791e4b0e3a7356bdb61](https://www.huffingtonpost.com/entry/xi-jinping-donald-trump_us_58877791e4b0e3a7356bdb61) (discussing how early political appointments are used to prevent destabilizing, violent power struggles in China).

<sup>64</sup> *Id.*

<sup>65</sup> See Jeremy Page & Lingling Wei, *Xi’s Power Play Foreshadows Historic Transformation of How China Is Ruled*, WALL ST. J. (Dec. 26, 2016), <https://www.wsj.com/articles/xis-power-play-foreshadows-radical-transformation-of-how-china-is-ruled-1482778917> (documenting Xi’s recent consolidation of political and economic power).

<sup>66</sup> Chris Buckley, *Xi Jinping Unveils China’s New Leaders but No Clear Successor*, N.Y. TIMES (Oct. 24, 2017), [https://www.nytimes.com/2017/10/24/world/asia/xi-jinping-china.html?\\_r=0](https://www.nytimes.com/2017/10/24/world/asia/xi-jinping-china.html?_r=0).

<sup>67</sup> See, e.g., Jeremy Wallace, *Is Xi Jinping Now a “Leader for Life,” Like Mao? Here’s Why This Is Dangerous*, WASH. POST (Feb. 27, 2018), [https://www.washingtonpost.com/news/monkey-cage/wp/2018/02/27/is-xi-jinping-now-a-leader-for-life-like-mao-heres-why-this-is-dangerous/?noredirect=on&utm\\_term=.bd3b7ebddd00](https://www.washingtonpost.com/news/monkey-cage/wp/2018/02/27/is-xi-jinping-now-a-leader-for-life-like-mao-heres-why-this-is-dangerous/?noredirect=on&utm_term=.bd3b7ebddd00).

<sup>68</sup> See *id.*; James Doubek, *China Removes Presidential Term Limits, Enabling Xi Jinping to Rule Indefinitely*, NPR (Mar. 11, 2018), <https://www.npr.org/sections/thetwo-way/2018/03/11/592694991/china-removes-presidential-term-limits-enabling-xi-jinping-to-rule-indefinitely>.

<sup>69</sup> See David Skidmore, *Understanding Chinese President Xi’s Anti-Corruption Campaign*, CONVERSATION (Oct. 27, 2017), <http://theconversation.com/understanding-chinese-president-xis-anti-corruption-campaign-86396> (describing President Xi’s strategy of making fighting corruption central to his campaign).

reform. In 2015, Xi publicly called upon the ACFTU to devise a plan to improve workplace representation.<sup>70</sup> Then, in 2017, Xi's speech at the Nineteenth Party Congress echoed these concerns. Standing before the Congress, Xi emphasized the need for the ACFTU to stop avoiding workers' concerns and, instead "[c]onsolidate the tripartite system of government, trade union and enterprise negotiations so as to build harmonious labour relations and ensure that workers get a fair and decent income for their endeavors."<sup>71</sup>

In the larger context of Xi's regime, it seems that Xi's intention is specifically to hold foreign—not domestic—companies more accountable for their actions towards employees in China.<sup>72</sup> Increasingly coordinated and effective labor groups have taken advantage of these sentiments and capitalized on worker power through the use of digital organizing tools.

#### d. Coordinated Labor Activism

According to Eli Friedman, a scholar at the Cornell University School of Industrial Labor Relations, the worker organizing going on at Walmart is groundbreaking.<sup>73</sup> Compared to other organizing campaigns in China, he says that the Walmart movement has been "probably the most substantive example of sustained, cross-workplace, independent worker organizing we've ever seen in China's private sector."<sup>74</sup> When questioning why this has been the case, a good place to look is at the organizing strategy of labor activists like Wang Shishu who deeply believe in the need for a national movement and are using online organizing to achieve it.

As social media spreads from China's urban centers to more rural areas, Wang's plan centers around WeChat, a popular messaging

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<sup>70</sup> Han Dongfang, *Sack Them for Striking. Arrest Them for Protesting. Imprison Them for Organising—Chinese Workers Are Not Going to Give Up*, CHINA LAB. BULL. (Jan. 23, 2017), <https://www.clb.org.hk/content/sack-them-striking-arrest-them-protesting-imprison-them-organising-%E2%80%93chinese-workers-are-not>.

<sup>71</sup> *China's Trade Unions Need to Stop Making Excuses and Start Looking for Solutions*, CHINA LAB. BULL. (Oct. 23, 2017), <http://www.clb.org.hk/content/china%E2%80%99s-trade-unions-need-stop-making-excuses-and-start-looking-solutions>.

<sup>72</sup> See generally Simon Denyer, *Command and Control: China's Communist Party Extends Reach into Foreign Companies*, WASH. POST (Jan. 28, 2018), [https://www.washingtonpost.com/world/asia\\_pacific/command-and-control-chinas-communist-party-extends-reach-into-foreign-companies/2018/01/28/cd49ffa6-fc57-11e7-9b5d-bbf0da31214d\\_story.html?utm\\_term=.ea890b58e7cc](https://www.washingtonpost.com/world/asia_pacific/command-and-control-chinas-communist-party-extends-reach-into-foreign-companies/2018/01/28/cd49ffa6-fc57-11e7-9b5d-bbf0da31214d_story.html?utm_term=.ea890b58e7cc) (reporting that Chinese firms were being asked to give internal Communist Party cells an explicit role in decision-making).

<sup>73</sup> State responses to worker unrest in China are one of Friedman's primary academic interests, and he has written about the topic extensively. For more of his thoughts on this subject, see ELI FRIEDMAN, *INSURGENCY TRAP: LABOR POLITICS IN POSTSOCIALIST CHINA* 39–41 (2014) (discussing the relationship between the ACFTU and the Party).

<sup>74</sup> See Hernández, *supra* note 61.

app.<sup>75</sup> By using the app to build a community of past and present Walmart workers, he has been able to coordinate strikes.<sup>76</sup> This is important for the movement because, as China Labour Bulletin Director, Han Dongfang,<sup>77</sup> has stated:

No matter if you are in a store in Harbin or Chengdu, thousands of miles away, Walmart managers are playing the same game and exploiting workers in the same ways. If a Walmart worker has been forced to sign up to the CWS in Shenzhen, then Walmart workers in Nanchang need to know about it. And through social media, they can.<sup>78</sup>

By uniting workers across Walmart stores, WeChat organizing is being used with success in the Walmart campaign and has been the primary tool which is giving Chinese workers the power to take advantage of the political conditions, economic slowdown, and rhetoric shifting discussed above. Beyond the conditions mentioned above, however, improvements in Chinese labor law have also aided Walmart workers in their fight for better conditions.

## 2. *Changes in Chinese Labor Law that Created Organizing Opportunities for Labor Groups*

In 2007, after decades of operating under a lifetime employment system, China enacted laws that allow for private contracts to regulate domestic labor relations.<sup>79</sup> While it may seem odd to change the employment system so drastically, many have seen this move as highly political, given that it came on the heels of notable forced labor scandals and growing unrest amongst migrant workers.<sup>80</sup> Though these new laws are still far from perfect, they represent an improvement on prior Chinese labor laws and have played a role in encouraging greater numbers of workers to challenge unjust or illegal employment practices. From 2015 to 2017, two of these new laws—namely, the

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<sup>75</sup> See *id.* (noting that as many as 20,000 people had joined messaging groups set up by Wang and other activists on WeChat).

<sup>76</sup> See *id.*

<sup>77</sup> For a brief background on Han Dongfang and his career as a labor activist in China, see Meyerson, *supra* note 23.

<sup>78</sup> See PRINGLE & CROTHALL, *supra* note 3, at 27.

<sup>79</sup> See Kinglun Ngok, *The Changes of Chinese Labor Policy and Labor Legislation in the Context of Market Transition*, 73 INT'L LAB. & WORKING-CLASS HIST. 46, 59 (2008), <http://japanfocus.org/data/ngok.pdf> (discussing the enactment of the Labour Contract Law of 2007).

<sup>80</sup> See Joseph Kahn & David Barboza, *As Unrest Rises, China Broadens Workers' Rights*, N.Y. TIMES (June 30, 2007), <https://www.nytimes.com/2007/06/30/world/asia/30china.html> (stating that the passage of the Labour Contract Law came on the heels of media reports about the widespread use of slave labor in thousands of brick kilns and small coal mines).

Labour Mediation and Arbitration Law (LMAL)<sup>81</sup> and the Labour Contract Law (LCL)<sup>82</sup>—have played significant roles in improving the ability of Walmart workers to engage in strategic litigation campaigns against the superstore.

a. The Labour Mediation and Arbitration Law

Arbitration is a central part of the labor dispute resolution system in China. The Party values it so highly that it is a mandatory prerequisite to litigation.<sup>83</sup> Prior to 2007, however, this was a very onerous requirement for many workers. Research suggests that arbitration fees played a significant role in preventing workers from pursuing claims.<sup>84</sup> Further, the old laws required workers to expend additional time and energy to fulfill litigation prerequisites, as filing a lawsuit required exhausting their workplace's mediation system *and* attending a state arbitration.<sup>85</sup> Finally, the timeline for filing for dispute arbitration was very short, and experts predicted that extending it would ultimately “significantly increase the number of unpaid wages cases that are eligible for arbitration.”<sup>86</sup>

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<sup>81</sup> Laodong Zhengyi Tiaojie Zhongcai Fa (劳动争议调解仲裁法) [Law of the People's Republic of China on Labour Dispute Mediation and Arbitration] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2007, effective May 1, 2008) (China) [hereinafter Labour Mediation and Arbitration Law], [http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content\\_1471614.htm](http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471614.htm); see also Yin Lily Zheng, *It's Not What Is on Paper, but What Is in Practice: China's New Labor Contract Law and the Enforcement Problem*, 8 WASH U. GLOBAL STUD. L. REV. 595, 595 n.2 (2009) (noting that “[The Labour Mediation and Arbitration Law] is one of the trilogy of labor laws adopted by China in 2007” and “sets forth the administrative procedures used to determine judicial resolution of labor disputes”).

<sup>82</sup> Laodong Hetong Fa (劳动合同法) [Labor Contract Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2007, effective Jan. 1, 2008) (China), [http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content\\_1471106.htm](http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471106.htm).

<sup>83</sup> See Jim H. Young & Lin Zhu, *Overview of China's New Labor Dispute Mediation and Arbitration Law*, DAVIS WRIGHT TREMAINE LLP (2012), [https://www.dwt.com/advisories/Overview\\_of\\_Chinas\\_New\\_Labor\\_Dispute\\_Mediation\\_and\\_Arbitration\\_Law\\_01\\_29\\_2008/](https://www.dwt.com/advisories/Overview_of_Chinas_New_Labor_Dispute_Mediation_and_Arbitration_Law_01_29_2008/) (noting that parties may pursue litigation after waiting fifteen days following the arbitration result).

<sup>84</sup> See Aaron Halegua, *Getting Paid: Processing the Labor Disputes of China's Migrant Workers*, 26 BERKELEY J. INT'L L. 254, 270–72 (2008), <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?httpsredir=1&article=1353&context=bjil> (discussing the reasons why labor arbitration is prohibitively costly).

<sup>85</sup> Qiye Laodong Zhengyi Chuli Tiaoli (企业劳动争议处理条例) [Regulation of the People's Republic of China on Settlement of Labour Disputes in Enterprises] (promulgated by the State Council, July 6, 1993, effective Aug. 1, 1993), MOFCOM, July 6, 1993, at art. 6 (China) <http://english.mofcom.gov.cn/aarticle/lawsdata/chineselaw/200211/20021100050542.html>.

<sup>86</sup> Halegua, *supra* note 84, at 317.



In 2007, the LMAL was passed to streamline the process of arbitration and improve the efficiency of labor dispute mediation. It did this in several ways. First, it eliminated arbitration fees by stating that expenses of labor dispute arbitration commissions will be covered by government funds.<sup>87</sup> Then, it extended the statute of limitations period to one year and clarified that it does not start tolling until the party who incurred the loss knew or should have known that his or her labor rights were infringed upon.<sup>88</sup> Finally, it lessened the burden of litigation prerequisites by stating that workers are only required to undergo state arbitration, not both state arbitration and workplace mediation as was previously required.<sup>89</sup> The option to additionally go through workplace mediation, however, is still available to workers.

For workers who wish to use the mediation process in addition to the arbitration process, the LMAL attempted to strengthen the likelihood that employees were being genuinely represented. For example, it not only provided that any Internal Mediation Committee must have both management and employee representatives,<sup>90</sup> but also specified that the employee representative must be either a member of the labor union or an elected representative.<sup>91</sup> Additionally, the LMAL played a critical role in formalizing the mediation process. Before the LMAL, mediation decisions were often unwritten, and thus difficult to challenge.<sup>92</sup> Because of the LMAL, however, it is now the case that “any agreement[s] reached as a result of mediation must be documented in writing and signed (or stamped with official seal) by the employer, the corresponding employee and the mediator” and “is legally binding upon the parties.”<sup>93</sup> This allows employees who are unsatisfied with the result of mediation to seek legal remedies in court. In some cases, the LMAL also gives employees remedies to enforce their mediation decision short of going to court.<sup>94</sup>

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<sup>87</sup> Linda Liang, *New Developments in the Mediation and Arbitration of Labor Disputes in China*, CHINA LAW INSIGHT (Aug. 3, 2011), <https://www.chinalawinsight.com/2011/08/articles/corporate/labor-employment/new-developments-in-the-mediation-and-arbitration-of-labor-disputes-in-china/>.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* (describing how “[t]he Mediation and Arbitration Law reduces . . . procedural complexity by establishing the rule of ‘One Arbitration, Final Ruling’”).

<sup>90</sup> Young & Zhu, *supra* note 83.

<sup>91</sup> *See id.*

<sup>92</sup> *See* Li Jing, *China’s New Labor Contract Law and Protection of Workers*, FORDHAM INT’L L.J. 1083, 1111 (2008) (“In absence of a written labor contract, the employer is able to impose harsh conditions on the worker after employment starts and can terminate employment at any time for whatever reason without any legal consequences.”).

<sup>93</sup> Young & Zhu, *supra* note 83.

<sup>94</sup> For labor disputes in connection with failure to pay workers’ compensation, or damages for work-related injuries, employees can get a Payment Warrant from the People’s Court if their employer failed to honor or perform their obligations. *Id.* While this

Partly as a result of the LMAL's changes to labor law, arbitration case filings are steadily increasing. In the LMAL's first year, 520,000 new cases were brought to China's labor dispute arbitration committees, a 50 percent increase from the year before.<sup>95</sup> By 2015, the most recent year where national statistics were released, there were over 750,000 cases filed.<sup>96</sup> Since filing for labor dispute arbitration is the prerequisite for filing civil lawsuits, these numbers indicate that greater numbers of workers have gained the opportunity to pursue litigation.

#### b. The Labour Contract Law

The Labour Contract Law (LCL) was highly contentious when it was first proposed.<sup>97</sup> Though workers tended to be supportive of the law, foreign and domestic business interests, including Walmart, were vehemently against it.<sup>98</sup> In a highly public campaign, these interests fought labor reforms by threatening to withdraw from the Chinese market.<sup>99</sup> Although the law was significantly watered down in response to these corporate influences, it has been widely hailed as a victory for workers.

Prior to the LCL, many Chinese workers did not receive written employment contracts.<sup>100</sup> The LCL aimed to change this by requiring written contracts.<sup>101</sup> Under the LCL, the employment relationship begins when the employee starts work.<sup>102</sup> If the employment relation-

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warrant is a fairly weak remedy, combined with the possibility of other legal remedies, it may encourage workers to be more vocal about their workplace problems.

<sup>95</sup> *Government Proposals to Speed Up Labour Dispute Arbitration Lack Clout*, CHINA LAB. BULL. (Jan. 12, 2009), <http://clb.org.hk/content/government-proposals-speed-labour-dispute-arbitration-lack-clout>.

<sup>96</sup> *Labour Disputes at Historic Highs, Official Statistics Reveal*, CHINA LAB. BULL. (June 16, 2017), <http://www.clb.org.hk/content/labour-disputes-historic-highs-official-statistics-reveal>.

<sup>97</sup> See Aaron Halegua, *The Debate over Raising Chinese Labor Standards Goes International*, 1 HARV. L. & POL'Y REV. ONLINE (2007) (describing the LCL as "hotly contested").

<sup>98</sup> See *id.*

<sup>99</sup> See *id.*

<sup>100</sup> See *id.* (describing how many workers "often work without written contracts in dangerous conditions for up to eighteen hours per day and under \$100 per month").

<sup>101</sup> Josephine Kwok, *China's Labor Contract Law and Its Effect on Chinese Labour Relations*, W. AUSTRALIAN STUDENT L. REV. 98, 101-02 (2017) ("The main difference between the LCL and the LL is the requirement in the LCL of a written labor contract at the commencement of an employment relationship. . . . [T]he LCL places emphasis on formalizing the employment relationship by signing written contracts with explicit and costly penalties for non-compliance.").

<sup>102</sup> See Ron Cai, *The New Labor Contract Law of China: Its Impact on Business*, DAVIS WRIGHT TREMAINE LLP (Aug. 16, 2007), [https://www.dwt.com/advisories/The\\_New\\_Labor\\_Contract\\_Law\\_of\\_China\\_Its\\_Impact\\_on\\_Business\\_08\\_16\\_2007/](https://www.dwt.com/advisories/The_New_Labor_Contract_Law_of_China_Its_Impact_on_Business_08_16_2007/) ("Article 10 of the

ship is established before a written contract is signed, then the parties have one month to work on an employment agreement.<sup>103</sup> If no written contract is signed by the deadline, there are financial consequences for the employer.<sup>104</sup> After one month without a written contract, the employer is required to pay the employee double their salary.<sup>105</sup> After a year without a written contract, the employer must pay the “employee double his/her monthly salary for each month, up to one year . . . .”<sup>106</sup> In that situation, the contract is also deemed to be indefinite and interminable starting the first day of the second year.<sup>107</sup> By incentivizing employers to give workers written contracts, the LCL both creates a record of evidence for court and makes it more likely that employees are aware of what they are owed. In this way, the LCL empowers people to fight for better labor conditions.

As a result of these legal and societal factors, groups like the WCWA formed and had space to organize largely free from Party interference.

## II

### THE WALMART CHINESE WORKERS’ ASSOCIATION AND LITIGATION FUNDING

As contingency fee arrangements have been declared illegal for labor-related litigation, the WCWA has relied on litigation grants from Hong Kong-based NGOs to fund labor advocacy efforts. With the passage of the FNGO Law, which construes Hong Kong as a “foreign NGO,” this avenue of obtaining financial support has been effectively closed.

#### A. *Funding Prior to the FNGO Law*

The WCWA’s most high-profile organizing work has focused on the Comprehensive Working Hours System (CWHS). In the spring of 2016, Walmart told its employees in China that they would no longer be working the regular eight hours a day, five days a week schedule.<sup>108</sup> Instead, they would be subject to a new flexible working hours

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New Law provides a grace period of one month, commencing on the date an employee starts to work for an employer . . . .”).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* (“Upon expiration of the one-month grace period, (an employer will be subject to a penalty of paying the employee double his/her monthly salary for each month, up to one year, during which a written labor contract is not in place.”).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> PRINGLE & CROTHALL, *supra* note 3, at 5.

regime.<sup>109</sup> Long-time employees, who had already seen working conditions deteriorate over the last decade, were upset about the prospect of even lower wages and greater management power.<sup>110</sup> The WCWA's response showed Walmart that they had not picked an easy fight.

Walmart workers from across China rushed to online platforms hosted by the WCWA. There, workers brainstormed potential avenues of collective action and discussed problems in their stores and the implications of the new flexible hours systems.<sup>111</sup> By allowing workers to connect, these online meeting places played a pivotal role in inspiring them to coordinate strikes.<sup>112</sup> There were at least four strikes in just four days at the beginning of July 2016, which brought international media attention to the long struggle of Walmart workers in China.<sup>113</sup> Anita Chan, a professor of sociology at Australian National University and scholar on Chinese labor issues, noted that the strikes which followed were special while speaking with the *Financial Times*. "It is unprecedented for workers to organise this way," she said.<sup>114</sup> "Most strikes are in one workplace. This is different—Walmart has many stores in China and uses the same management methods in all the stores. So these workers understand everyone's situation: they are all the same."<sup>115</sup>

Importantly, the WCWA also pursued workplace justice by seeking legal remedies in conjunction with organizing. With the famed Lao Wei Law Firm as their counsel, more than 100 workers have been represented and supported in Walmart-related arbitration and court cases.<sup>116</sup> By bringing these cases in a strategic way, the WCWA has been able to use the law as a complement to its campaigns against Walmart.

Though there have been several strategic lawsuits filed to fight Walmart's CWHS system, much of the litigation has focused on the firing of workers' rights activists, on the theory that firing activists

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *See id.*

<sup>112</sup> *See* Yuan Yang, *Walmart Workers Launch Wildcat Strikes Across China*, *FIN. TIMES* (July 7, 2016), <https://www.ft.com/content/d1dd7376-4408-11e6-9b66-0712b3873ae1>.

<sup>113</sup> One of these news organizations was the *Financial Times*, which covered the strike activity closely. *See id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Lao Wei was the law firm that represented Wang Shishu, a very influential WCWA labor activist, in his case against Walmart. This case was supported by the China Labour Bulletin, and is listed in the section of their website describing important cases that were adopted and funded by the LRL program. *A Thorn in the Side of Walmart*, *supra* note 7.

intimidates other workers and smothers solidarity.<sup>117</sup> A notable case of this sort is *Wang Shishu v. Walmart Shenzhen*, where an activist dishwasher was fired for organizing against Walmart.<sup>118</sup> In his case, lawyers were able to get Wang reinstated initially.<sup>119</sup> Though he was ultimately fired again, the lawyers followed up with his case, took it back to mediation, and won a ruling for fair compensation.<sup>120</sup> In another case of this kind, Yu Zhiming, “a democratically elected member of the union committee at Walmart Store No. 5722,” sued Walmart in arbitration court after he was illegally dismissed from his job in Walmart’s seafood department as a result of organizing activity.<sup>121</sup> With the help of the Lao Wei Law Firm and the WCWA, Yu took Walmart to arbitration and won.<sup>122</sup>

Because contingency fee arrangements for workers’ rights advocacy are illegal in China,<sup>123</sup> the WCWA—like many Chinese workers’ rights organizations—funded litigation through NGO grants. For some of WCWA’s cases, funding for lawyers and assorted litigation fees has come from the China Labour Bulletin’s Labour Rights Litigation (LRL) program, located in Hong Kong.<sup>124</sup>

The LRL program’s stated goal is “to level the playing field by providing workers who have a legitimate grievance but who cannot afford a lawyer with the help they need to navigate China’s legal system and arrive at a just settlement.”<sup>125</sup> The LRL program pursues this goal on both an individual level and a systemic level.

In terms of individual representation, the LRL program is most concerned with issues surrounding activist terminations. In workers’

<sup>117</sup> *Cf. id.* (reporting that some eighty percent of Lao Wei Law Firm’s Walmart-related cases involve illegal or improper dismissals).

<sup>118</sup> See PRINGLE & CROTHALL, *supra* note 3, at 20–21 (discussing the background and outcome of this case).

<sup>119</sup> *Id.* at 21.

<sup>120</sup> *Id.*

<sup>121</sup> *Pressure Builds on Walmart in Shenzhen as Trade Union Activists Fight Back*, CHINA LAB. BULL. (Sept. 9, 2015), <http://www.clb.org.hk/en/content/pressure-builds-walmart-shenzhen-trade-union-activists-fight-back>.

<sup>122</sup> *Id.* (describing the Yu Zhiming case, in which Zhiming collaborated with WCWA labor activist Wang Shishu for litigation and a publicity campaign against working conditions in Walmart).

<sup>123</sup> Lawyers in China are prohibited from charging contingency fees for certain labor lawsuits, including any action seeking payment of labor remuneration. See Lushi Fuwu Shoufei Guanli Banfa (律师服务收费管理实施办法) [Notice of the National Development and Reform Commission and the Ministry of Justice on Issuing the Measures for the Administration of Lawyers’ Fees] (promulgated by the Ministry of Justice, St. Dev. & Reform Comm’n, Apr. 13, 2006, effective Dec. 1, 2006), art. 11 (China), [http://www.gov.cn/zwjk/2006-04/19/content\\_257940.htm](http://www.gov.cn/zwjk/2006-04/19/content_257940.htm).

<sup>124</sup> See *supra* note 7 and accompanying text.

<sup>125</sup> *Labour Rights Litigation*, *supra* note 7.

rights advocacy, unlike other areas of activism, the thing you are fighting against is also the thing that gives you a livelihood—your employer. Thus, when activists are fired, they need solutions that help them as they face job insecurity, financial struggles, and damage to the movements they lead. For this reason, the LRL program seeks a remedy larger than merely compensation for termination, with its mission statement noting that:

One of the most pressing problems holding back the development of the workers' movement in China is the widespread targeting of workers' leaders and representatives by employers and local authorities. Worker representatives in strikes and protests are often sacked by their employer and some are even arrested by local police for public order offences. The LRL program has provided steadfast support to workers who have been sacked for organizing collective action in defence of their legal rights and economic interests. A key aim in these cases has been not merely to get compensation for illegal dismissal but to demand reinstatement . . . .<sup>126</sup>

On a systemic level, the LRL program pursues labor litigation in a highly strategic way. Essentially, the project acts “as a public interest litigation initiative.”<sup>127</sup> Moreover, “[i]n selecting cases to adopt, [the program] take[s] into account not only the merits of the case itself but also its potential to highlight problems in China’s labour relations and labour law.”<sup>128</sup>

Though the program is based in Hong Kong, its efforts in China involved collaborating with grassroots organizations and relying on “a well-established network of law firms, non-governmental organizations, activists and individual lawyers to represent the worker plaintiffs.”<sup>129</sup> The program helped groups like the WCWA use strategic litigation as a part of their larger advocacy campaigns.

This was short lived.

### B. *The FNGO Law and Its Effects*

The Foreign Non-Governmental Organization Law (FNGO) purports to regulate “foreign” NGOs whose activities are “threat[ening] China’s national reunification . . . security or ethnic unity” or “harm[ing] China’s national and social interests.”<sup>130</sup> The law has been widely criticized by human rights experts, who allege that its overly

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> FNGO Law, *supra* note 8, art. 5.

broad language is open to arbitrary interpretations and lends itself to corrupt and political enforcement.<sup>131</sup>

When the FNGO Law was first announced, groups feared that “[c]ertain types of nongovernment organizations—like groups that work with Chinese human rights activists or lawyers—[would] have little chance of finding an official partner or registering with the police.”<sup>132</sup> After implementation, the law has created an environment where groups are directing advocacy toward “officially-sanctioned areas and away from more sensitive areas working with grassroots NGOs working on rights protection, advocacy, religion, etc.”<sup>133</sup> Workers’ rights advocacy, as a “sensitive and contentious” topic,<sup>134</sup> makes labor NGOs an easy target for harassment.

Since going into effect on January 1, 2017, the FNGO Law requires foreign NGOs and groups receiving money from foreign NGOs to register, secure government sponsorship, and submit themselves to greater Party control if they want to continue working in China.<sup>135</sup> This control includes supervision by Party security organs, which can exercise their authority in ways that include “summoning NGO representatives for questioning, conducting on-site inspections and seizing documents, making inquiries into, and possibly requesting the freezing of, bank accounts, [and] ordering the suspension of activities . . . .”<sup>136</sup> Should the security organs suspect the NGOs of carrying out illegal activities, they are further authorized in “withdrawing the registration certificate, and listing them as ‘unwelcome.’”<sup>137</sup> The FNGO Law does not allow NGOs to appeal the public security organs’ decisions before an independent body.<sup>138</sup>

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<sup>131</sup> See Elizabeth Redden, *A Chill for Chinese Exchanges?*, INSIDE HIGHER ED (July 31, 2015), <https://www.insidehighered.com/news/2015/07/31/draft-law-regulate-foreign-ngos-china-could-have-serious-effects-educational> (noting concerns of selective enforcement by the Chinese government); U.N. Human Rights Office High Comm’r, *China: Newly Adopted Foreign NGO Law Should Be Repealed*, UN Experts Urge (May 3, 2016), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=19921&LangID=E> (“We fear that the excessively broad and vague provisions, and administrative discretion given to the authorities in regulating the work of foreign NGOs can be wielded as tools to intimidate, and even suppress, dissenting views and opinions in the country . . . .”).

<sup>132</sup> Edward Wong, *Clampdown in China Restricts 7,000 Foreign Organizations*, N.Y. TIMES (Apr. 28, 2016), [https://www.nytimes.com/2016/04/29/world/asia/china-foreign-ngo-law.html?\\_r=0](https://www.nytimes.com/2016/04/29/world/asia/china-foreign-ngo-law.html?_r=0).

<sup>133</sup> Shawn Shieh, *The Origins of China’s New Law on Foreign NGOs*, CHINAFILE (Jan. 31, 2017), <http://www.chinafile.com/reporting-opinion/viewpoint/origins-of-chinas-new-law-foreign-ngos>.

<sup>134</sup> See Josephs, *supra* note 12, at 560.

<sup>135</sup> FNGO Law, *supra* note 8, arts. 9–17.

<sup>136</sup> U.N. Human Rights Office High Comm’r, *supra* note 131.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

It might initially seem strange that Hong Kong NGOs would be regulated by a law purporting to apply to foreign entities, given that they are technically in China.<sup>139</sup> In light of the Party's fraught relationship with human rights activists, however, it is less surprising—"[c]ontributions by Hong Kong NGOs account for the bulk of [foreign] donations to the mainland,"<sup>140</sup> and by construing "foreign" to include Hong Kong, the FNGO Law gives the Party additional authority to restrict the NGOs that have the most impact on the mainland. Because of this characterization, Hong Kong nonprofits—including those that had once been funding Western-facing labor organizers—are being forced to comply with the harsher restrictions of the FNGO Law. As a result, labor organizations like the WCWA have become unable to find the funding needed to continue strategic litigation campaigns.

### III

#### THIRD-PARTY LITIGATION FUNDING: AN IMPERFECT BUT INTRIGUING POTENTIAL FUNDING AVENUE

The FNGO Law does not distinguish between advocacy directed at domestic companies and advocacy directed at foreign companies, even though the Chinese government has treated these categories very differently.<sup>141</sup> Because of this, groups like the WCWA face a dilemma. Since it can no longer receive funding from Hong Kong NGOs, the WCWA has been drained of financial resources needed to continue strategic litigation campaigns. If it could somehow get funding, however, past treatment and current market research suggest that the government would continue to tolerate and ignore its strategic litigation campaign against Walmart.<sup>142</sup>

Western-facing workers' rights organizations like the WCWA need to find new sources of litigation funding. As WCWA activists continue organizing and fighting backlash for their advocacy, the new-found lack of legal resources has made them vulnerable by allowing

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<sup>139</sup> See Zhuang Pinghui, *Hong Kong's NGOs Isolated and Confused by Mainland China's New Law Restricting Activities, Research Finds*, S. CHINA MORNING POST (Oct. 21, 2016), <http://www.scmp.com/news/hong-kong/article/2038791/hong-kongs-ngos-isolated-and-confused-mainland-chinas-new-law>.

<sup>140</sup> *Id.*

<sup>141</sup> See FNGO Law, *supra* note 8; *supra* note 72 and accompanying text.

<sup>142</sup> See *China Tells Global Companies to Start Taking Care of Workers*, BLOOMBERG (Oct. 26, 2017), <https://www.bloomberg.com/news/articles/2017-10-26/from-starbucks-to-tesla-global-business-faces-xi-s-new-reality> (quoting a managing director of a China-based market research company as stating that "[t]here's a feeling among the government that foreign companies have made a lot of money on the back of poor Chinese" and that "[n]ow the government feels foreign companies need to give back").



Walmart to increasingly fire them without repercussion. The stakes for continuing litigation are high: The longer the WCWA goes without legal resources, the greater the toll will be on the movement as a whole. Chinese labor NGOs need a strategy to fight back against legislative restrictions on their ability to provide funding for workers' rights advocacy. Litigation is an important way to support innovative organizing, and the FNGO Law severely curtails NGOs' ability to play an active role in promoting independent labor groups like the WCWA. Third-party litigation funding could potentially solve this problem.

Third-party litigation funding is the process through which parties not otherwise involved in lawsuits nonetheless pay for those lawsuits.<sup>143</sup> Though litigation funding is already used in many areas of the law, it has been used less frequently to further the public interest.<sup>144</sup> Recently, this has begun to change—at least in the United States—as interest grows in socially motivated investing.<sup>145</sup> Could this model of investment flourish in other countries? Specifically, could it be used as a tool to continue labor litigation in China?

In many jurisdictions, the doctrine of champerty bars third-party litigation funding, with an eye toward preventing a litigation market.<sup>146</sup> Mainland China, however, has no laws or regulations specifically banning third-party funding.<sup>147</sup> While the Party has not

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<sup>143</sup> Lawrence S. Schaner & Thomas G. Appleman, *The Rise of 3rd-Party Litigation Funding*, LAW360 (Jan. 21, 2011), <https://www.law360.com/articles/218954/the-rise-of-3rd-party-litigation-funding> (defining third-party litigation funding and explaining its use in the United States). Many stories about third-party litigation financing focus on its use in corporate settings, but some coverage also focuses on its use in individual cases. For example, third-party litigation was recently used in the successful invasion of privacy lawsuit by Hulk Hogan against the Gawker website. Funded by billionaire investor Peter Thiel, Hogan's lawsuit ultimately resulted in a \$31 million settlement and drove Gawker into bankruptcy. For more information, see Sydney Ember, *Gawker and Hulk Hogan Reach \$31 Million Settlement*, N.Y. TIMES (Nov. 2, 2016), <https://www.nytimes.com/2016/11/03/business/media/gawker-hulk-hogan-settlement.html>.

<sup>144</sup> See Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 603, 649 (2009) (asserting that nearly all public interest organizations have challenges in raising funds).

<sup>145</sup> See Joanna M. Shepherd & Judd E. Stone II, *Economic Conundrums in Search of a Solution: The Functions of Third-Party Litigation Finance*, 47 ARIZ. ST. L.J. 919, 955–56 (2015) (explaining the ways third-party litigation financing occurs to fund cases brought on behalf of a public right or a class of private rights).

<sup>146</sup> For a discussion describing the doctrine of champerty and its relation to third-party litigation funding, see John Beisner & Jordan Schwartz, *How Litigation Funding Is Bringing Champerty Back to Life*, LAW360 (Jan. 20, 2017), <https://www.law360.com/articles/882069/how-litigation-funding-is-bringing-champerty-back-to-life>.

<sup>147</sup> See Lovells, LLP, *China, in AT WHAT COST? A LOVELLS MULTI JURISDICTIONAL GUIDE TO LITIGATION COSTS* 53 (Peter Taylor et al. eds., 2010) (noting that third-party litigation funding, though uncommon, is not prohibited in China).

explicitly addressed the issue, some evidence exists that third-party funding is seen as legal on the mainland. For example, in a recent Hong Kong case, *Re Po Yuen (To's) Machine Factory Limited*,<sup>148</sup> the Court of First Instance of the High Court permitted a Hong Kong company to enter into a third-party funding arrangement on the basis that it was permitted under PRC law.<sup>149</sup> However, third-party funding, whether in litigation or arbitration, appears to be unheard of or extremely rare.<sup>150</sup> Though such transactions are not commonly used in mainland China—and legal commentators have noted that there do not appear to be any professional funders active in the market<sup>151</sup>—the Party might soon be more open to allowing third-party funding.

Though there is a case to be made that third-party litigation funding could flourish in China, there remain questions about who would fund it for labor litigation or arbitration. This area of law is highly sensitive, and the Party has a long history of fearing collective action of the type that strategic labor litigation would bring.<sup>152</sup> Because of these complication factors, it seems plausible to doubt whether any funders would be brave enough to invest in labor litigation, as the potential for Party backlash may initially seem strong.

Amongst these fears, however, springs a well of hope and potential. In brainstorming third-party funding options, the conversation must return to the political and societal factors discussed in Part I of this Note.<sup>153</sup> The Party has in recent years been willing to let labor organizing continue against foreign corporations, especially Western corporations like Walmart.<sup>154</sup> Here, it seems like the trend would continue if Western-facing labor organizations could find funding. Further, nationalist trends in China have exacerbated this anti-Western nationalism and made it politically difficult for the Party to crack down on groups like the WCWA.<sup>155</sup> Allowing labor litigation would be a good way for the Party to permit workers to let off steam while furthering the “us against capitalism” message the Party relied

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<sup>148</sup> [2012] 2 H.K.L.R.D. 752, 752, 758 (C.F.I.).

<sup>149</sup> *Id.*

<sup>150</sup> See Xu Guojian, *China*, in INTERNATIONAL ARBITRATION 2017 § 13.5 (2017), <https://iclg.com/practice-areas/international-arbitration/international-arbitration-2017/china> (stating that “[t]here are no typical ‘professional funders’ active in the market, either for litigation or arbitration”); Nicholas Song & John G. Zadkovich, *Arbitration in China—Lexology Navigator Q&A*, LEXOLOGY (Oct. 16, 2014), <http://www.lexology.com/library/detail.aspx?g=3b643fc4-dcfc-4558-bf04-6a47cbad4228> (describing third-party litigation as “non-existent” in China).

<sup>151</sup> Guojian, *supra* note 150, § 13.5.

<sup>152</sup> See *supra* Section I.B.

<sup>153</sup> See *supra* Part I.

<sup>154</sup> See *supra* Section I.B.1.

<sup>155</sup> See *supra* Section I.B.1.b.

on during the recent economic downturn. Finally, the Party has little to lose from allowing workers to challenge Walmart in this way. If lawsuits force Walmart to improve conditions, it will still almost certainly stay because it has already invested significant resources in China, and the market is too large and important for it to flee.<sup>156</sup>

Beyond fears that the party would not allow third-party funding, there are additional concerns that such litigation would be unprofitable. In traditional cases of third-party litigation, the aim of the investor is profit—a cut of the winnings.<sup>157</sup> In WCWA cases and labor mediation and arbitration cases more generally, the payout is not huge. Many workers are reinstated and given no financial remuneration.<sup>158</sup> Even when compensation happens—as in cases like *Wang Shishu v. Walmart Shenzhen*, discussed above<sup>159</sup>—the dollar amount is usually small, given that compensation is likely in the form of backpay, and these workers typically earn very little.<sup>160</sup> Without the monetary element, or with a much smaller monetary element, what would attract investors to these cases?

Some organizations might be interested in helping the WCWA because they believe in workers' rights and want to further their vision of justice. Though this might initially seem like a bleeding-heart rationale that runs contrary to economic self-interest, it would not be the first time that Walmart was sued as a result of such morally-driven funding arrangements. For example, in *Wal-Mart Stores, Inc. v.*

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<sup>156</sup> See generally *Wal-Mart Needs to Grow Overseas, and China's the Big Prize*, CHI. TRIB. (June 1, 2016), <http://www.chicagotribune.com/business/ct-walmart-china-20160601-story.html> (addressing Walmart's growth strategy in China).

<sup>157</sup> For more information about concerns pertaining to third-party litigation profit incentives, see, for example, AM. BAR ASS'N, COMM'N ON ETHICS 20/20, WHITE PAPER ON ALTERNATIVE LITIGATION FINANCING (draft, 2011), [https://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20111019\\_draft\\_alf\\_white\\_paper\\_posting\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111019_draft_alf_white_paper_posting_authcheckdam.pdf); NAT'L ASS'N OF MUT. INS. COS., THIRD-PARTY LITIGATION FUNDING: TIPPING THE SCALES OF JUSTICE FOR PROFIT 8 (May 2011) (discussing public policy issues surrounding litigation funding and warning against it because it creates litigation that is "strategically directed by investors for the sole purpose of maximizing their profit."); Susan Lorde Martin, *Litigation Financing: Another Subprime Industry That Has a Place in the United States Market*, 53 VILL. L. REV. 83 (2008); U.S. CHAMBER INST. FOR LEGAL REFORM, A PROPOSAL TO REGULATE THIRD-PARTY INVESTMENTS IN LITIGATION (Oct. 2012) (discussing concerns about profit incentives in third-party funding).

<sup>158</sup> Often, the fee to pay a lawyer is larger than the amount of money that can be collected. This creates disincentives for enforcement. See HALEGUA, *supra* note 6 ("[W]orkers often cannot afford to pay the fees that lawyers charge. . . . A survey of migrant workers in Chengdu involved in labor disputes found that the legal fee paid in the vast majority of work injury cases exceeded RMB 5,000 and often exceed RMB 10,000.").

<sup>159</sup> See *supra* text accompanying notes 118–22.

<sup>160</sup> See, e.g., *supra* note 126 and accompanying text (noting that workers have commonly received compensation for illegal dismissal, but not reinstatement).

*Dukes*,<sup>161</sup> three workers brought a discrimination lawsuit on behalf of a class of 1.5 million Walmart employees. The claim was brought under Title VII of the Civil Rights Act, and the workers were seeking injunctive and declaratory relief, and damages for back pay.<sup>162</sup> Throughout the case, the plaintiffs were represented by two stellar public interest organizations—the Impact Fund and Equal Rights Advocates—as well as several private law firms.<sup>163</sup> Because the case was very expensive for the public interest organizations, the Rosenberg Foundation, a nonprofit organization that strategically supports public interest organizations, took an interest in the case and ultimately provided \$500,000 to help Equal Rights Advocates “continue its role as lawyer and public interest voice in the case.”<sup>164</sup> Notably, the foundation did not merely give the organizations money as a grant—it also provided a program-related investment (PRI)<sup>165</sup> by agreeing to guarantee a loan that the Sisters of Mercy of the Americas, a “socially responsible invest[or],” made to the Impact Fund.<sup>166</sup> Under this arrangement, if the plaintiffs were successful, the loan would be repaid, and if not, the Foundation would cover the loan’s cost.<sup>167</sup> In this way, the Rosenberg Foundation and Sisters of Mercy of the Americas made an investment—as opposed to a mere a grant—that depended on the success of an impact litigation effort. Though courts ultimately ruled against the workers in *Dukes*,<sup>168</sup> the financial arrangement behind the litigation reveals the potential for a socially motivated entity to finance an ongoing impact litigation effort to achieve social goals. Further, as is relevant to this case, the case also pushed Walmart to change its behavior. Because of negative press

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<sup>161</sup> 564 U.S. 338 (2011).

<sup>162</sup> *Id.* at 342.

<sup>163</sup> *The Rosenberg Foundation—Supporting a Class Action Against Wal-Mart*, ALLIANCE, Dec. 1, 2008, at 48.

<sup>164</sup> *See id.* (promoting the public interest organization’s role in the *Dukes* litigation and detailing the Rosenberg Foundation’s investment in the case).

<sup>165</sup> Program-related investments are “investments made by foundations to support charitable activities that involve the potential return of capital within an established time frame.” *Knowledge Base: What Is a Program-Related Investment?*, GRANTSPACE, <https://grantSPACE.org/resources/knowledge-base/pris/> (last visited July 22, 2018). “[They] include financing methods commonly associated with banks or other private investors, such as loans, loan guarantees, linked deposits, and even equity investments in charitable organizations or in commercial ventures for charitable purposes.” *Id.*

<sup>166</sup> *The Rosenberg Foundation—Supporting a Class Action Against Wal-Mart*, *supra* note 163, at 48.

<sup>167</sup> *Id.*

<sup>168</sup> *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011).

from the lawsuit, Walmart made changes to its corporate policy by raising pay for female workers and providing healthcare benefits.<sup>169</sup>

Though philanthropic organizations are probably the most likely to make morally driven donations, cases like Hulk Hogan's lawsuit against Gawker suggest that individual funders might be attracted to this type of arrangement for a range of idiosyncratic reasons.<sup>170</sup> Beyond individuals, it also is conceivable that some companies would be willing to fund strategic labor litigation in order to make themselves more competitive. For example, Chinese stores like Wumart are already keen to dominate the market by agitating Walmart and reducing its customer base.<sup>171</sup> This agitation would be unlikely to force Walmart out of China, but higher labor costs could raise prices and give Wumart a competitive edge. If litigation like this was pursued by Wumart or similar Chinese Walmart competitors, chances of at least some success seem favorable. This is because, as some have noted, there is a "good chance of prevailing against [employers] in a labor arbitration proceeding. This is especially true when the employer is a [wholly foreign-owned enterprise] because let's face it, China is always going to favor a Chinese [employer] over a foreign-owned entity."<sup>172</sup>

## CONCLUSION

While third-party litigation funding is a flawed response to a complicated problem, it is nonetheless an avenue worth brainstorming. When governments crack down on civil society, imperfect solutions become better than remaining complicit. Even if there is only a slim chance that philanthropic groups, individuals, or competitors would fund this kind of litigation against Walmart, discussing and exploring

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<sup>169</sup> See *The Rosenberg Foundation—Supporting a Class Action Against Wal-Mart*, *supra* note 163, at 48 (noting that Walmart reworked its pay system, increased health benefits, raised compensation for female employees by \$400 million per year, and adopted a new job posting process, all of which encouraged other competitors to alter their policies).

<sup>170</sup> The Hogan case is a good example of how eccentric, wealthy individuals could want to invest in litigation to pursue idiosyncratic moral goals, ideological goals, or vendettas. In that example, media has stated that Thiel funded the case because he wanted revenge against Gawker. See Ember, *supra* note 143 (noting that Thiel suggested that he "was financing cases against Gawker because it published articles that 'ruined people's lives for no reason.' Mr. Thiel was outed as gay by Valleywag, one of Gawker's now-defunct blogs, nearly a decade ago").

<sup>171</sup> See generally *Walmart v Wumart*, *ECONOMIST* (May 18, 2011), <https://www.economist.com/schumpeter/2011/05/18/walmart-v-wumart> (describing the competitive landscape between Walmart and Wumart).

<sup>172</sup> Grace Yang, *China Employee Probation: All Is NOT What It Seems*, *CHINA LAW BLOG* (May 23, 2017), <https://www.chinalawblog.com/2017/05/china-employee-probation-all-is-not-what-it-seems.html>.

its potential is important because it showcases a desire to fight back. As the FNGO Law continues to present obstacles for Chinese NGOs and worker organizations, creative legal thinking is more important than ever before. To allow Walmart to win is to lose so much more than a paycheck or position of employment. Failing to rise to this occasion sacrifices the legacy of generations of Chinese legal activists, labor academics, and worker leaders.

As laws like the FNGO Law continue to spread, this Note highlights the logistical and legislative challenges that labor organizations and NGOs must face in order to survive in an era of repression. While this Note does not provide an ideal answer to circumventing laws that restrict NGO funding, it is at the beginning of an important conversation about resistance.