ENFORCEMENT OF CORPORATE CODES OF CONDUCT: FINDING A PRIVATE RIGHT OF ACTION FOR INTERNATIONAL LABORERS AGAINST MNCS FOR LABOR RIGHTS VIOLATIONS

JANE C. HONG

I. INTRODUCTION

Due to economic globalization, many U.S. multinational corporations (MNCs) manufacture products in developing nations, or purchase their products from contractors, subcontractors, and suppliers that utilize lower labor costs and other regulatory benefits of doing business in developing nations.[1] Recently, the apparel and garment industry has come under increased criticism and scrutiny due to allegations of sweatshop practices, unfair and unlivable wages, unreasonable hours, unsafe working conditions, and physical and mental abuse by supervisors.[2] In some Chinese factories that make clothes for major retailers and designers such as Ralph Lauren, Dayton-Hudson, Ann Taylor, Sears and Wal-Mart, laborers are forced to work seventy to eighty hours a week for as little as thirteen cents an hour.[3] Nike has also been the subject of increasing public condemnation due to widespread reports of labor violations.[4] For example, Vietnamese teenage girls were paid twenty cents an hour to make $180 sneakers, worked to exhaustion, humiliated, forced to kneel and stand in the hot sun, and treated like recruits in boot camp.[5]

Because significant U.S. or multilateral legal initiatives to regulate labor in developing nations seem unlikely in the near future, U.S. MNCs are being urged to self-regulate and initiate market-based voluntary measures, or adhere to suggested measures already promulgated.[6] Currently, there are

---

1 Robert J. Liubicic, *Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives*, 30 LAW & POL'Y INT'L BUS. 111, 112-13 (1998) [hereinafter Liubicic].

2 Ryan P. Toftoy, Note, *Corporate Codes of Conduct in the Global Theater. Is Nike Just Doing It?*, 15 ARIZ. J. INT'L & COMP. L. 905 (1998) [hereinafter Toftoy].

3 Sara Jackson-Han, *U.S. Retailers Selling Chinese Sweatshop Clothes: Report*, AGENCE FRANCE-PRESSE, Mar. 19, 1998, at 1, *available in* 1998 WL 2244630. Other retailers that allegedly violated Chinese labor laws and their own corporate codes of conduct include Liz Claiborne, J.C. Penny, K-Mart, the May Co., Federated Department Stores, The Limited, Esprit, and Ellen Tracy. *Id.*

4 Toftoy, *supra* note 2.

5 *Nike Plants' Workers Are Abused, Says Labor Activist*, CHI. TRIB., Mar. 28, 1997, at N16. Other types of mistreatment throughout plants in Asia included supervisors who sexually harassed female employees, forced them to run laps around the factory, and limited bathroom and water breaks. Toftoy, *supra* note 2.

6 Liubicic, *supra* note 1, at 113.

two types of voluntary measures: (1) corporate codes of conduct and (2) product labeling schemes.[7]

MNCs that adopt corporate codes of conduct formulate a voluntary written pledge to respect labor rights enumerated in the code.[8] The basic philosophy behind these codes is that corporations, due to their dominance as global institutions, should address the social and environmental problems affecting humankind.[9] Product labeling requires a corporation's adherence to a code and entails affixing a label to its products certifying that they are made under acceptable working conditions.[10] Whether a corporation adopts a corporate code of conduct or practices product labeling, the most pressing problem is enforcement.[11] Although many MNCs have adopted codes, they have largely been ineffective in meeting the goals they seek to attain, as evidenced by the continued reports of labor violations by companies who claim to follow them.[12]

Part II of this Article discusses the various options available for promoting international labor rights through public initiatives, most notably, multi-lateral trade organizations such as the World Trade Organization (WTO). Part III surveys private initiatives, particularly corporate codes of conduct and labeling schemes, and evaluates their effectiveness in regulating international labor. This section argues that enforcement and compliance have always been and will continue to be the major weakness in these private initiatives to regulate international labor. Part IV explores a viable enforcement mechanism that has emerged through recent class action litigation on behalf of garment laborers in Saipan. The Saipan situation demonstrates that private litigation, or the threat of it, will force MNCs to agree to neutral, third party monitoring of their affiliated factories. Part V examines possible legal actions that can be brought on behalf of laborers against MNCs under the Alien Tort Claims Act (ATCA). Part VI of this Article concludes that because future public initiatives to regulate international labor do not seem imminent, the use of corporate codes of conduct and the development of a workable, effective enforcement mechanism should be encouraged.

---

7 *Id.*

8 *Id.*

9 Lance Compa & Tashia Hinchliffe-Darricarrere, *Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663, 668, 674-75 (1995).

10 Liubicic, *supra* note 1, at 113.

11 Laura Ho et al., *Assembling Rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry*, 31 Harv. C.R.-C.L. L. Rev. 383, 402 (1996). Codes do not generally contain mechanisms for enforcement or provisions regarding monitoring of business partners. *Id.* If codes require or recommend monitoring, it is rarely done by an independent agency. *Id.*

12 *Id.*; *see also supra* notes 3-5 and accompanying text.

II. INTERNATIONAL LABOR RIGHTS THROUGH PUBLIC INITIATIVES

The rapid globalization of the international market and the globalization of human rights concerns have occurred simultaneously, yet apart from one another.[13] The international community has created organizations to address labor issues and has enacted several elaborate charters, covenants, and conventions that addressed labor rights and labor conditions.[14] However, these organizations have been largely ineffective and the documents have generally been statements of intent and goals rather than guides for actual practice.[15] This section examines the use of public international law, multilateral trade agreements, and multilateral investment agreements to address labor rights issues around the world.

A. PUBLIC INTERNATIONAL LAW AND INTERNATIONAL LABOR RIGHTS

In terms of public international law, the United Nations Universal Declaration of Human Rights (Universal Declaration) is one of the fundamental international instruments that addresses labor rights concerns.[16] The two international covenants that emerged from the Universal Declaration were the International Covenant on Civil and Political Rights (ICCPR)[17] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[18] The Universal Declaration and the ICESCR declare that fundamental human rights include fair wages, a decent living, safe and healthy working conditions, rest, leisure, and reasonable limitation on working hours.[19]

Furthermore, the International Labor Organization (ILO) is a specialized agency of the United Nations (UN) that "seeks the promotion of

---

[13] Compa & Darricarrere, *supra* note 9, at 665.

[14] *Id.*

[15] *Id.*

[16] G.A. Res. 217(A), U.N. GAOR, 3d Sess., at 71 (1948) [hereinafter Universal Declaration].

[17] G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52-53, U.N. Doc. A/6316 (1968) [hereinafter ICCPR]. The United States ratified this covenant in 1992. Lena Ayoub, Note, *Nike Just Does It—and Why the United States Shouldn't: The United States' International Obligation to Hold MNCs Accountable for Their Labor Rights Violations Abroad*, 11 DEPAUL BUS. L.J. 395, 398 (1999).

[18] G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1968) [hereinafter ICESCR]. The United States was not a signatory to this covenant. Ayoub, *supra* note 17, at 398.

[19] Toftoy, *supra* note 2.

social justice and internationally recognized human and labour rights."[20] By working with government, employers, and workers, the ILO works to raise basic living standards throughout the world by employing three basic methods: (1) setting international labor and social standards, (2) aiding countries in making their own social gains through technical assistance and (3) disseminating information of social and economic interest.[21] The ILO seeks to establish international labor standards through conventions and recommendations setting minimum standards of basic labor rights such as the freedom of association, the right to organize, collective bargaining, abolition of forced labor and equality of opportunity, and treatment.[22] However, an ILO convention binds only ratifying states and many countries fail or refuse to ratify the conventions.[23] Even for the countries that do ratify the conventions, the ILO does not have the power to enforce them.[24]

B. MULTILATERAL TRADE AGREEMENTS AND INTERNATIONAL LABOR RIGHTS: THE ROLE OF THE WORLD TRADE ORGANIZATION (WTO)

The World Trade Organization (WTO) is another multilateral organization that was created by the Uruguay Round to oversee trade between the parties to the 1994 General Agreement of Tariffs and Trade (GATT).[25] The WTO is also the largest organization for the regulation of international trade.[26] The original GATT, which was signed in 1947, declared that "relations among countries in the field of trade and economic endeavor should be conducted with a view to raising standards of living and ensuring full

---

20 *About the ILO, Who We Are: ILO Mandate*, International Labour Organization, *at* http://www.ilo.org/public/english/overview/mandate.htm (last modified May 31, 1999) [hereinafter *ILO Mandate*].

21 Toftoy, *supra* note 2.

22 *ILO Mandate, supra* note 20.

23 Compa & Darricarrere, *supra* note 9, at 665. The United States has ratified only one of the seven ILO core conventions. Lance Compa, *EXCEPTIONS AND CONDITIONS: The Multilateral Agreement on Investment and International Labor Rights: A Failed Connection*, 31 CORNELL INT'L L.J. 683, 695 & n.59 (1998) [hereinafter Compa]. Bahrain, Cambodia, China, Laos, Qatar, Solomon Islands, United Arab Emirates, and Zimbabwe are the other countries that have ratified only one of the core conventions. *Id.*

24 Compa & Darricarrere, *supra* note 9, at 665.

25 Toftoy, *supra* note 2. *See also* Terry Collingsworth, *U.S. Advocacy For Reform of the WTO—Progress or Posturing?*, International Labor Rights Fund, *at* http://www.laborrights.org/press/WTOSeattle.html (last visited Feb. 29, 2000) [hereinafter Collingsworth].

26 Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U. J. INT'L L. & POL'Y 1, 33 (1996) [hereinafter Stirling].

employment."[27] However, in 1947, many in the international community thought that the International Trade Organization (ITO) would be created to work to meet GATT's stated goals.[28] But hopes for the ITO were never realized when the United States did not ratify the treaty creating the ITO and the world was left without an institution to advocate for policies that would equate success in global commerce with improved living standards for the working poor.[29]

The WTO was created nearly fifty years after the ITO charter's defeat.[30] But the WTO's explicitly stated purpose is to be an institution that benefits MNCs and otherwise promotes "free trade."[31] Although this organization has significant power, it does not offer a platform for people who are adversely impacted by the trading system.[32] The WTO does not provide any means for private individuals to formally complain about particular employers, governments, or other labor violations.[33] Furthermore, if a country unilaterally enacts a law or implements a practice to restrict trade in products made under conditions harmful to the interests of people, the WTO rules would subject the country to trade sanctions.[34]

In December 1996, although WTO ministers conceded the existence of a link between labor rights and trade, the organization rejected any proposals to directly address labor concerns.[35] They reasoned that the ILO was the proper arena for labor rights issues.[36] In the December 1999 meeting of the WTO in Seattle, the organization came close to adopting a narrowly tailored proposal that would set up a WTO working group on worker issues.[37] But the WTO ministers did not agree to the proposal due, in large part, to the United States' suggestion that developing countries, which ignored labor

---

27 *Id.*

28 *Id.*

29 *Id. See also* Stirling, *supra* note 26, at 35.

30 *Id.*

31 *Id.*

32 *Id.* "Whether it is a group of farmers in Burma forced to provide labor to construct a natural gas pipeline for Unocal Corporation or child workers living as slaves in Pakistan making carpets for export to the West, the WTO is explicitly indifferent to whether these people are harmed by the global trading system." *Id.*

33 *Id.*

34 *Id.* For example, the WTO recently ruled that the U.S. effort to protect endangered sea turtles by requiring shrimp fisherman to follow certain steps under the Endangered Species Act restricted trade. *Id.* The United States must change this law or face significant trade sanctions. *Id.*

35 Compa, *supra* note 23, at 695.

36 *Id.*

37 Stephen H. Dunphy, *All Over But the Shouting*, SEATTLE TIMES, Dec. 26, 1999, *available in* 1999 WL 30979676 [hereinafter Dunphy]. A working group is the entry-level forum for the WTO to take up new issues. Collinsworth, *supra* note 25. The creation of a working group would have meant years of discussion before the any concrete measures on labor rights would have been contemplated. *Id.*

standards, would be subject to trade sanctions.[38] Developing nations, most notably China, oppose linking trade and labor rights, and view these initiatives as "imperialist mechanisms" for imposing standards they have not recognized.[39] Consequently, the WTO has been successful in blocking initiatives to connect the fair treatment of workers with trade, despite the view of labor rights advocates and some governments that such a link should be created.[40]

C. MULTILATERAL INVESTMENT AGREEMENTS AND LABOR RIGHTS

Although the connection between multilateral investment agreements and labor rights has historically been unclear or non-existent, the World Bank and the International Monetary Fund (IMF) have begun addressing the issue.[41] The World Bank's 1995 World Development Report was devoted to labor market issues and offered a definition of workers' core rights.[42] The World Bank also created a Structural Adjustment Participatory Review Initiative (SAPRI) in 1997, to engage trade unions and non-governmental organizations (NGOs) in reviewing the effects of the Bank's policies on workers and other social actors.[43]

In light of the Asian financial crisis of the late 1990s, and particularly the recent developments in Indonesia, the IMF has also agreed to take workers' rights into account in its lending programs.[44] Also, the United States has taken measures making U.S. financial support of the IMF conditional upon labor rights considerations.[45]

---

38 Dunphy, *supra* note 37. The Clinton Administration garnered support for the working group idea from the U.S. business community with explicit assurances that the discussions would be a non-binding commitment and that there would be no demand or support for any position linking trade to labor standards at the WTO. Collingsworth, *supra* note 25.

39 R. Michael Gadbaw & Michael T. Medwig, *Multinational Enterprises and International Labor Standards*, *in* HUMAN RIGHTS, LABOR RIGHTS AND INTERNATIONAL TRADE 141, 147 (Lance A. Compa & Stephen Diamond eds., 1996). For the most part, MNCs also oppose international agreements and linkages between trade and labor rights because this approach creates uncertainty in the market and the threat of retaliation and counter-retaliation between countries in the international trade arena. *Id.*

40 Toftoy, *supra* note 2. *See also* Daniel S. Ehrenberg, *The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor*, 20 YALE J. INT'L L. 361 (1995); Stirling, *supra* note 26, at 33-34; Compa, *supra* note 23, at 695.

41 Compa, *supra* note 23, at 695.

42 *Id.*

43 *Id.* at 695-96.

44 *Id.* at 696.

45 *Id.*

D. SUMMARY OF INTERNATIONAL LABOR RIGHTS THROUGH PUBLIC INITIATIVES

This brief survey of public initiatives to address international labor rights concerns demonstrates their ineffectiveness in substantively addressing workers' rights and working conditions. Although public international law and its institutions such as the ILO have established labor standards and recommended basic labor rights, they are not binding on countries. Also, initiatives to link trade and labor rights through multilateral trade agreements such as the WTO have been unsuccessful because many developing nations and MNCs are reluctant to agree to measures that could hinder commerce and profits. Finally, although the World Bank and the IMF have started to link multilateral investment agreements with labor considerations, these measures are far from ensuring fairness in the global labor market.

III. INTERNATIONAL LABOR RIGHTS THROUGH PRIVATE INITIATIVES

Multinational corporations have adopted private initiatives to promote international labor rights by implementing corporate codes of conduct and product labeling schemes as a result of pressure from consumers, investors, media, and NGOs.[46] A MNC's decision to self-regulate through a code of conduct or labeling scheme is a "combination of altruism and enlightened self-interest" because the MNCs fear the effects of negative public pressure on profitability.[47] U.S. MNCs subject themselves to these measures when doing so will be relevant to a significant number of consumers and their decisions about whether to purchase the MNC's products.[48] Although the initiatives are not without their flaws and weaknesses, some have been praised as "historic and significant beginning[s]"[49] and some have been credited with removing some children from the garment sector.[50]

---

[46] Liubicic, *supra* note 1, at 114.

[47] *Id. See also* Dominic Bencivenga, *Corporations Weigh Benefits of Voluntary Plans*, N.Y.L.J., July 13, 1995, at 5.

[48] Liubicic, *supra* note 1, at 114.

[49] Bob Herbert, *In America; A Good Start*, N.Y. TIMES, Apr. 14, 1997, at A17. Recently, President Clinton's task force, the Apparel Industry Partnership (AIP) voluntarily agreed to an industry-wide agreement known as the Workplace Code of Conduct. Toftoy, *supra* note 2, at 913. The Code seeks to prohibit forced and child labor, require minimum wage, allow free association and collective bargaining, as well as freedom from physical, sexual and psychological and verbal abuse or harassment. *Id.*

[50] Ayoub, *supra* note 17, at 404. The 1996 ILO reports seem to indicate that fewer children are working on garment exports for the U.S. market. *Id.*

However, the mechanism whereby MNCs police themselves have failed to eliminate the problem of thousands of labor rights violations that occur without punishment.[51] Despite the fact that the publicized codes of conduct impress consumers and the media, they have been largely ineffective at realizing the goals they purport to represent.[52] Much of this ineffectiveness is due to the lack of legal enforcement mechanisms in the codes.[53] This section explores the two general categories of codes of conduct: (1) external codes and (2) internal codes of conduct that are self-initiated and self-regulated by MNCs.[54] This section also evaluates the effectiveness of these initiatives.

A. EXTERNAL CODES

External codes of conduct fall in two general categories: (1) those created in multilateral government settings, and (2) those created by either single governments or by NGOs.[55] The codes in the first category are usually initiatives created by organizations such as the UN, the Organization for Economic Cooperation and Development (OECD), and the ILO.[56] But as discussed in Part II.A above, these initiatives are generally ineffective due to difficulties in ratification, consensus, and enforcement.[57] The codes in the second category are privately initiated and offered to MNCs through a voluntary adoption or a pledge to comply with the terms.[58] These codes encompass both principles for workplace conduct, as well as product labeling schemes.[59] The following section surveys a few of these external codes and assesses their effectiveness.

1. The Sullivan Principles

The Sullivan Statement of Principles was a code of conduct for U.S. businesses operating in South Africa in the 1970s and 1980s.[60] The companies that adopted this code generally committed themselves to desegregated workplaces, non-discriminatory employment practices, blacks

---

[51] *Id.* at 405.
[52] *Id.*
[53] *Id.*
[54] Toftoy, *supra* note 2.
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] Liubicic, *supra* note 1, at 122, 129-30.
[60] *Id.* at 122-23. *See also* Heidi S. Bloomfield, Note, *"Sweating" the International Garment Industry: A Critique of the Presidential Task Force's Workplace Codes of Conduct and Monitoring System*, 22 Hastings Int'l & Comp. L. Rev. 567, 587 (1999) [hereinafter Bloomfield].

and non-whites in managerial positions, improvements in schooling, and recreational and health facilities for employees.[61] Significantly, the signatories paid annual dues to support a consulting firm's outside audits of their compliance with the code.[62] Although there were no monetary penalties or sanctions for non-compliance, the auditor publicized the results so that consumers and investors could pressure companies into compliance.[63] Although only twelve companies signed the code in 1977, there were 147 by 1982.[64] Although the Sullivan Principles had limited influence in bringing an end to apartheid, this code had significant positive effects for non-white South Africans and set a new standard for investment decisions by institutional investors.[65]

2. The MacBride Principles

The MacBride Principles was issued in 1984 and was a code of conduct for U.S MNCs doing business in Northern Ireland.[66] This code was initiated because of the systematic discriminatory practices of the forty-seven U.S.-owned companies operating in that country.[67] Modeled on the Sullivan Principles, this code consists of provisions that promote increasing the numbers of individuals from underrepresented religious groups in the labor force, protecting minority employees at the workplace and while traveling to and from work, and banning provocative religious and political emblems from the workplace.[68] As of February 1995, forty percent of the publicly traded U.S. MNCs operating in Northern Ireland had subscribed to these Principles.[69]

3. RUGMARK®

To combat the problem of child labor in the South Asian rug and carpet industry, a coalition of Indian human rights and industry groups and the United Nations Children's Fund (UNICEF), created the RUGMARK

---

[61] Liubicic, *supra* note 1, at 122-23.
[62] *Id.* at 123.
[63] *Id.*
[64] *Id.*
[65] *Id.* Among other improvements, the code "resulted in the desegregation of hundreds of enterprises, education and job training for approximately 50,000 workers a year, and significant investment in the infrastructure of black and desegregated education in South Africa." *Id.*
[66] *Id.* at 124; Bloomfield, *supra* note 60, at 588.
[67] *Id.*
[68] *Id.*
[69] Liubicic, *supra* note 1, at 124.

Foundation in 1994.[70] In this product labeling scheme, retailers and manufacturers agree to the Foundation's code of conduct, which includes replacing child labor with adult labor and providing educational resources for former child workers.[71] To ensure compliance with the code, signatories pay licensing fees to the Foundation, which then employs monitors to conduct inspections.[72] Significantly, the monitors are agents of the Foundation and not the signatories.[73] The retailers and manufacturers who pass the inspections may affix the RUGMARK Foundation label, a smiling carpet, to their products.[74] While the RUGMARK campaign has proven to be successful in Germany, the data regarding its success in the United States is not presently available.[75]

4. The Apparel Industry Partnership (AIP) Workplace Code of Conduct

The Apparel Industry Partnership (AIP), formed in 1996, is a coalition of the footwear and apparel industry, labor unions, NGOs, religious groups, and consumer groups that formulates common labor standards and a common monitoring and enforcement mechanism for MNCs' subsidiaries and subcontractors.[76] In April 1997, AIP members announced a voluntary, industry-wide agreement prohibiting forced and child labor, requiring minimum wages, allowing free association and collective bargaining, as well as freedom from physical, sexual, psychological, and verbal abuse or harassment.[77] The AIP Workplace Code requires compliance with the AIP Principles of Monitoring, which provides for monitoring of contractors, subcontractors, and suppliers by both the Code signatories and independent external monitors.[78] These "independent external monitors" may include local human rights, labor, and religious institutions, as well as for-profit firms that specialize in auditing and compliance.[79] A signatory may select an independent external monitor from a list that is approved by the AIP.[80]

---

[70] *Id.* at 129-30.
[71] *Id.* at 130.
[72] *Id.*
[73] *Id.*
[74] *Id.* The RUGMARK label is modeled after the Woolmark label, which is a trademark thought to connote quality to consumer. *Id.* Each label bears a computerized code number indicating the exporter, manufacturer, and registration number of the loom used to produce the rug or carpet. *Id.*
[75] *Id.*
[76] Liubicic, *supra* note 1, at 124-25. *See also* Bloomfield, *supra* note 60, at 576-77.
[77] *Id.*
[78] Liubicic, *supra* note 1, at 125-26.
[79] *Id.* at 126.
[80] *Id.* The AIP also created the Fair Labor Association (FLA), which will certify the independent

Although the AIP eventually seeks to develop a label to be placed on signatories' products, neither the Code nor the Principles seem to provide for public disclosure of violations.[81]

Although labor rights experts have generally criticized the AIP Code for its substantive terms and the "lack of linguistic muscle needed to improve working conditions in the garment industry,"[82] critics have been most disapproving of the Principles of Monitoring.[83] According to Sweatshop Watch, an organization dedicated to improving the working conditions of garment workers, the Principles "fail . . . to provide effective monitoring practices and offer little hope for increased compliance."[84] The Principles actually add little to rules already imposed upon the garment industry's largest firms by the U.S. Department of Labor, and since there is no neutral party to "blow the whistle on human rights violations," there are no safeguards to ensure that the independent monitors will avoid corporate influence on the inspection reports.[85] Groups such as Sweatshop Watch suggest that there is a self-serving, corporate motive to sign on to the AIP Code because the ineffective monitoring provisions reveal "a desire not to eliminate exploitation, but to mask it."[86]

5. Summary of External Codes

This survey of external codes demonstrates that a particular code's effectiveness depends, in large part, on effective, neutral monitoring for compliance. Although the various codes establish laudable goals and principles to protect workers in the global labor market, unless there is a threat of publicity for violations and neutral, third-party monitoring, it is difficult to guarantee that the codes will truly be observed. Otherwise, these codes that purportedly protect workers' rights can potentially serve as a curtain to disguise labor abuses from the consuming public, which is interested in knowing how garments and other products are made.

---

external monitors and implement the AIP Code. *Id.*

[81] *Id.*

[82] *See generally* Bloomfield, *supra* note 60, at 578-79.

[83] *Id.* at 584-85.

[84] *Id.*

[85] *Id.*

B. INTERNAL CODES

MNCs are often reluctant to adopt the broad and generalized approaches to workers' rights set out in external codes.[87] Consequently, individual corporations "seek a proactive route to counter human and labor rights criticism, issuing their own self-initiated and self regulated codes of conduct" for their foreign manufacturers and subsidiary suppliers.[88] Individual corporate codes of conduct vary from brief, value policy statements to comprehensive guidelines.[89] But the uniform policy behind them is to show the MNCs' support for the labor rights of workers.[90] Usually, under these codes, a corporation will refuse do to business with subcontractors or suppliers that violate the code's standards.[91] The following section explains different types of corporate codes[92] and assesses their effectiveness.

1. Levis-Strauss

Levis-Strauss's "Business Partner Terms of Engagement and Guidelines for Country Selection" is a comprehensive code of conduct that includes requirements for the working conditions and employment practices of Levis-Strauss's contractors and subcontractors.[93] The code, adopted in 1991, addresses six aspects of employment: wages and benefits, working hours, child labor, forced labor, health and safety, discrimination, and disciplinary practices.[94] However, the code does not recognize rights to free association and collective bargaining.[95] Levis-Strauss personnel monitor

---

[86] *Id.* The AIP Code allows manufacturers to attach the "No Sweat" labels to garments even if the MNC merely agrees to adopt the Code, thereby "exploiting the good will of consumers." *Id.*

[87] Toftoy, *supra* note 2, at 915.

[88] *Id.*

[89] Liubicic, *supra* note 1, at 128.

[90] Ayoub, *supra* note 17, at 403. For many of these MNCs, a significant portion of their corporate value is in name recognition. *Id.* at 404 & n.19. Consumers will attribute positive and negative characteristics to a name and it is highly significant that "[t]oday the average shopper is more conscientious about how and where the product was made and is not likely to shrug off accusations of child labor, below minimum wage standards, and maximum hour work conditions." *Id.*

[91] *Id.* at 403.

[92] Although only a few corporate codes are examined here, other companies such as Sears, Roebuck and Co.; JCPenny Company, Inc.; the Home Depot, Gillette, Polaroid, Hallmark, Honeywell, and hilips Van-Heusen have adopted similar codes of conduct for their international operations. Toftoy, *supra* note 2, at 915-17; Liubicic, *supra* note 1, at 128.

[93] Compa & Darricarrere, *supra* note 9, at 677.

[94] Bureau of Int'l Labor Affairs, U.S. Dep't of Labor, the Apparel Industry and Codes of Conduct: A Solution to the International Child Labor Problem? 13 (1996) [hereinafter The AIP and Codes of Conduct].

[95] Lance A. Compa & Tashia Hinchliffe-Darricarrere, *Private Labor Rights Enforcement Through*

compliance through the use of questionnaires, audits, and surprise visits to subcontractor worksites.[96] As a result of this detailed self-monitoring mechanism, Levis-Strauss has discontinued contracts with thirty-five of approximately 700 subcontractors because of continued code violations.[97] Levis-Strauss has been praised for being the first to adopt a code and for accomplishing more in less time with corporate responsibility than many other firms manufacturing overseas.[98]

2. Wal-Mart

Although the Wal-Mart code addresses the same issues as the Levis-Strauss code, Wal-Mart provides for third-party agents such as accounting firms in addition to monitoring conducted by Wal-Mart personnel.[99] Wal-Mart's code also does not recognize the right to form unions and bargain collectively.[100]

3. The Gap

The Gap's code of conduct for its operations in certain countries, like El Salvador, differs from those of Levi-Strauss and Wal-Mart in two important respects.[101] First, the Gap's code recognizes free association and collective bargaining rights of workers in developing nations.[102] Second, the code requires independent monitoring of suppliers by NGOs.[103]

4. Reebok

Reebok's code of conduct, titled the "Reebok Human Rights Production Standards," addresses seven areas of labor rights: (1) working hours/overtime, (2) forced or compulsory labor, (3) fair wages, (4) child

---

Corporate Codes of Conduct, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 181 (Lance A. Compa & Stephen F. Diamond eds., 1996) [hereinafter Compa & Darricarrere, Human Rights].

96 Compa & Darricarrere, *supra* note 9, at 677.

97 John Cavanagh, *The Global Resistance to Sweatshops, in* NO SWEAT: FASHION, FREE TRADE, AND THE RIGHTS OF GARMENT WORKERS 39, 41 (Andrew Ross ed., 1997).

98 Compa & Darricarrere, Human Rights, *supra* note 95, at 187.

99 *Id.* at 203.

100 *Id.* at 200-03.

101 Kitty Krupat, *From War Zone to Free Trade Zone: A History of the National Labor Committee, in* NO SWEAT: FASHION, FREE TRADE, AND THE RIGHTS OF GARMENT WORKERS 51, 58-60 (Andrew Ross ed., 1997).

102 *Id.*

103 *Id.*

labor, (5) freedom of association, (6) safety in the workplace and (7) a healthy work environment.[104] The Reebok codes differ from Levis-Strauss in that Reebok recognizes the right of workers to organize and bargain collectively, whereas Levis Strauss does not recognize the right of its foreign workers to form trade unions or bargain collectively.[105]

Also, rather than contracting with a government or a third-party investor-owned facility like Levi-Strauss or Nike, Reebok uses joint venture factories, which are owned jointly between Reebok and local business entities.[106] This scheme apparently enables Reebok to manage the workplace environment more effectively, implement and enforce its code of conduct, and maintain quality control.[107] Finally, perhaps as a result of its joint ownership in the factories, the Reebok code contains less defined provisions for auditing, evaluating, and enforcing the terms of the code.[108]

5. Nike

Nike claims to have established the sporting good industry's first code of conduct that was binding an all business partners and partner subsidiaries around the world.[109] Nike's code of conduct, established in 1992, pledged to promote the "best practice and continuous improvement" in hours of work and benefits.[110] The plan also purports to promote "management practices that recognize the dignity of the individual, the right to a workplace free of harassment, abuse or corporal punishment, and the principle that decisions on hiring, salary, benefits, advancement, termination or retirement are based solely on the ability of an individual to do the job."[111]

In practice, Nike prohibits the use of prison labor, indentured or bonded servitude, the production of footwear by any person below the age of eighteen, the production of apparel, accessories, or equipment by any person below the age of sixteen, and the employment of any person under the legal minimum age where local standards are higher.[112] The code also prescribes

---

[104] Toftoy, *supra* note 2.
[105] Compa & Darricarrere, Human Rights, *supra* note 95, at 191.
[106] *Id.* at 192.
[107] *Id.*
[108] *Id.* The fact that Reebok has not canceled any contracts or withdrawn from countries for severe code violations is considered to be a result of these vaguely designed mechanisms for auditing, evaluating and enforcing. Toftoy, *supra* note 2. However, the lack of cancellations and withdrawal by Reebok may have more to do with the fact that the company owns these factories. *Id.* Logically, it is difficult to cancel contracts with one's own factories. *Id.*
[109] Ayoub, *supra* note 17, at 410.
[110] *Id.*
[111] *Id.*
[112] *Nike Standards: Code of Conduct*, NikeBiz, at http://nikebiz.com/labor/code/shtml (last visited Nov.

that contractors pay at least the minimum wage or the prevailing industry wage, whichever is higher.[113] The contractors must also comply with legally mandated work hours and impose overtime only when employees are fully compensated according to local law.[114] Furthermore, employers must inform employees, at the time of hiring, if mandatory overtime is a condition of employment, provide one day off in seven on a regularly scheduled basis, and require no more than sixty hours of work per week, or comply with local limits if they are lower.[115]

Nike also established a Labor Practices Department in 1996.[116] The Labor Practices Department establishes and refines standards by which Nike judges the performance of its contractors and provides tools for Nike employees to assure that contractors meet those standards.[117] Nike claims adhere to the standards because the company has "people on the ground in key source countries, and people with a global scope to develop the standards and tools."[118] The Labor Practices Department has a director for Asia-Pacific and labor practice managers in the four key source countries of Vietnam, Indonesia, China, and the Philippines.[119] The department also has a global director who is responsible for "overall compliance issues, setting corporate and labor policy," and outreach to NGOs and other interested organizations.[120]

In addition to enforcement by its production management staff and the Labor Practices Department, Nike claims to employ "independent monitoring."[121] According to the company, every Nike contractor knows that enforcement of the Code will include "systematic, unannounced evaluations by independent auditors."[122] Nike employed the accounting firm of Ernst and Young to monitor issues such as checking pay records against wage standards and overtime compensation requirements, checking documents to assure against underage workers, checking overtime periods to assure none were in violation of local law, and surveying health and safety provisions.[123]

20, 1999).

113 *Id.*

114 *Id.*

115 *Id.*

116 Toftoy, *supra* note 2.

117 *Id.*

118 *Id.*

119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.*

123 *Id.*

6. Internal Codes and Problems with Monitoring and Compliance

First and foremost, monitoring and compliance are the most significant hurdles to effective corporate codes of conduct.[124] The most significant obstacle to effective monitoring and compliance is the conflict in interest that MNCs face when they have the task of monitoring themselves.[125] Because effective monitoring entails financial costs, MNCs have a strong incentive to monitor minimally.[126] Without external or third party monitoring, MNCs will be slow to acknowledge gaps in their codes and labeling schemes.[127] The experiences of some of the MNCs, which have adopted their own codes, demonstrate that violations of the codes are often not made public by corporate monitoring systems and that MNCs are also reluctant to strain relationships with subcontractors who do not live up to code requirements.[128]

The Nike experience best exemplifies the kinds of problems that a MNC can experience under this self-monitoring code of conduct.[129] Perhaps the most problematic aspect of Nike's code was its claim of independent monitoring.[130] Nike asserted that this component of its code was a "new level of independent monitoring."[131] However, these independent monitors were really auditors from Ernst and Young, who were employed by Nike.[132] It is reasonable to presume that whether a Nike employee or the accounting firm hired by Nike did the monitoring, it would probably be difficult to take a completely removed, neutral view of the circumstances at the factories.[133] Moreover, there has also been criticism and discussion about whether an accounting firm, such as Ernst and Young, is competent to monitor the shoe and garment industry.[134]

---

[124] Liubicic, *supra* note 1, at 136.

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] Toftoy, *supra* note 2. *See also* Dara O'Rourke, *Smoke From a Hired Gun: A Critique of Nike's Labor and Environmental Auditing in Vietnam as Performed by Ernst & Young*, Corporate Watch, *at* http://www.corpwatch.org/trac/nike/ernst/trac.html (last visited Nov. 20, 1999) [herinafter O'Rourke].

[130] Toftoy, *supra* note 2.

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] O'Rourke, *supra* note 129. Furthermore, Nike retained the services of Price Waterhouse Coopers to perform essentially similar duties to that of Ernst & Young. *Id.* Nike also hired former UN Ambassador Andrew Young's consulting firm, GoodWorks International, LLC, to review the company's Code of Conduct and subcontractor compliance. *Id.* Whether Nike hired an independent consulting firm or accounting firm, it does not change the fact that these monitors were employed by Nike to oversee compliance with the Codes. *Id.*

Although the Ernst and Young audit was to remain confidential, an audit of the labor and environmental conditions inside a Nike factory in Vietnam was leaked to the Transnational Resource and Action Center (TRAC).[135] The audit revealed that even when the code was followed, dangerous working conditions persisted at the Tae Kwang Vina plant.[136] Although TRAC claimed that the audit was flawed in a number of ways, it still pointed out a variety of abuses such as violations of labor laws on maximum working hours, unprotected chemical exposures, poor treatment of workers, and management control of the trade union.[137] The audit also reported that even though the subcontractor violated Vietnamese labor and environmental laws, it was nevertheless in compliance with Nike's Code of Conduct.[138]

TRAC also found a number of infractions of Nike's Code that were not discovered by the Ernst and Young audit, such as violations of Vietnamese labor laws on pay, violations of Vietnamese labor laws on maximum overtime hours, forced overtime, strike breaking, and physical and verbal abuse of workers.[139] Moreover, TRAC found a number of shortcomings with the Ernst and Young audit.[140] First, it was missing information regarding occupational health and safety, the environment, and general working conditions.[141] Second, the methodology ignored most accepted standards of labor and environmental auditing.[142] For example, the audit involved no monitoring or sampling of air quality in the factory.[143] Third, most of the data used came directly from management sources.[144] Finally, the audit overlooked many of the key issues of concern in Nike plants around Asia, including physical and verbal abuse of workers, sexual harassment, repercussions for attempts to organize, and contract violations.[145]

Because corporate codes of conduct, whether externally or internally initiated, have been largely unsuccessful in curbing labor abuses by MNCs and their subsidiary suppliers, advocates in the anti-sweatshop movement searched for other possible legal action. Consequently, recent private class

---

[135] *Id.*
[136] *Id.*
[137] *Id.* Despite the fact that Tae Kwang Vina is supposedly the most technically advanced of Nike's subcontractors in Vietnam, the audit still reported that among the factory's 9,200 workers who produce 400,000 pairs of mid- to high-end Nike shoes per month, there were high levels of respiratory illnesses in sections with high chemical use. *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.*

action suits brought on behalf of laborers against MNCs have shown that the threat of litigation will compel MNC compliance and created a model for monitoring and code enforcement.[146]

IV. VIABLE ENFORCEMENT THROUGH PRIVATE LITIGATION

A. HISTORY AND BACKGROUND OF THE CASE

In January 1999, three class action suits[147] were filed against eighteen high-profile clothing manufacturers[148] on behalf of alien workers in the Northern Mariana Islands (NMI), otherwise known as Saipan. The complaints alleged racketeering and violations of labor, human rights, and business laws.[149] Although Saipan, an island in the Northern Marianas in the Western Pacific, is considered American soil due to its Commonwealth relationship with the United States,[150] the local government has retained control of immigration, customs, and minimum wages.[151] Because of the commonwealth relationship, manufacturers have been able to affix the "Made

---

146 *See Monitoring Program: A Plan for Implementing Settlement on Apparel Production in Saipan*, Sweatshop Watch, *at* http://www.sweatshopwatch.com/marianas/monitoring.html (last visited Nov. 10, 1999) [hereinafter *Monitoring Program*]. *See also* Robert S. Florke, Note & Comments, *Castaways on Gilligan's Island: The Plight of the Alien Worker in the Northern Mariana Islands*, 13 TEMP. INT'L & COMP. L.J. 381, 382-83 (1999) [hereinafter Florke].

147 Two federal class actions lawsuits were filed in California and Saipan on behalf of more than 50,000 workers from China, the Philippines, Bangladesh and Thailand. *Saipan: Lawsuit Charges Gap, Wal-Mart, Others for Sweatshops*, Corporate Watch, *at* http://www.igc.org/trac/corner/worldnews/other/283.html (last visited Nov. 10, 1999) [hereinafter *Saipan Lawsuit*]. A third lawsuit was filed in California state court by four labor and human rights groups: Sweatshop Watch, Global Exchange, Asian Law Caucus, and UNITE. *Id.* This suit charges retailers and manufacturers of using misleading advertising and trafficking in "hot goods" manufactured in violation of U.S. labor laws. *Id.*

148 The defendants named in the suit include The Gap (including Banana Republic, Old Navy), Levi-Strauss, Liz Claiborne, Dayton Hudson (including Target, Mervyn's, Marshall Fields), Sears Roebuck & Company, Tommy Hilfiger U.S.A., The Limited, OshKosh B'Gosh, Jones Apparel Group, The Associated Merchandising Corp., J.C. Penny, May Department Stores (including Famous-Barr, Filene's, Foley's, Hecht's, The Jones Store, Kaufmann's, Lord & Taylor, L.S. Ayres, Meier & Frank, Robinson's May, Strawbridges), Lane Bryant, Wal-Mart and Warnaco Group. *Made in U.S.A.: Stop Saipan Sweatshops*, Sweatshop Watch, *at* http://www.sweatshopwatch.org/swatch/marianas/ (last visited Nov. 10, 1999).

149 William Carlsen, *Sweatshop Conditions Alleged on U.S. Island*, SAN FRAN. CHRON., Jan. 14, 1999, at A1 [hereinafter Carlsen].

150 Florke, *supra* note 146, at 382. The "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America," signed in 1976, is a negotiated settlement between the United States and NMI, whereby Islanders consent to give up most sovereignty and the United States controls most NMI affairs but allows the NMI to maintain sovereign authority over both its local immigration policy and wage control. *Id.*

151 *Saipan Lawsuits Allege U.S. Firms Are Tied to Sweatshops*, 'BOSTON GLOBE, Jan. 14, 1999, at A10 [hereinafter *Saipan Lawsuits*].

in the USA" label on the products made in Saipan.[152] At the same time, this relationship mandates that employers abide by federal labor laws.[153]

The class action suits seek $1 billion in lost wages and damages.[154] The lawyers[155] who filed these lawsuits described inhumane working and living conditions on the island, including long hours of work at sub-minimum wages, poor ventilation at "hotbox" factories, physical abuse including forced abortions, and concentration camp-like, rat-infested living conditions with guarded barb-wire compounds.[156] Many of the workers, mostly women from China, the Philippines, Bangladesh, and Thailand, are lured to Saipan with the promise of high wages and U.S. working conditions.[157] Instead, these women work and live like indentured servants[158] and are often forced to work seven-day weeks, 12 hours a day, with no overtime, sometimes without pay or at pay below the U.S. minimum wage.[159]

Since the lawsuits were filed, several defendants have agreed to settle their cases out of court.[160] At the time of publication, the plaintiffs had reached settlements with 17 U.S. mainland retailers for an amount totaling

---

[152] *Id.* The Federal Trade Commission (FTC) and truth-in-labeling laws regulate the issue of whether the label is misleading. *Id.* Also as a result of the "Made in the USA" label, retailers have avoided over $200 million dollars in tariffs. Carlsen, *supra* note 150.

[153] Florke, *supra* note 146, at 382

[154] *Id.*

[155] The law firm that brought these suits, Milberg Weiss Bershad Hynes & Lerach of Los Angeles, recently negotiated a $1.2 billion settlement with Swiss banks to reimburse Holocaust victims. Steven Greenhouse, *18 Major Retailers and Apparel Makers Are Accused of Using Sweatshops*, N.Y TIMES, Jan. 14, 1999, at A9.

[156] Carlsen, *supra* note 150. "They call the place a 'sweatshop,' with its 12-to-16 hour days, an 11:30 p.m. curfew and loudspeakers blaring Chinese nursery rhymes. Says a local cabby: If one of them were to write a book, it'd be called 'Two Years in Hell.'" Florke, *supra* note 146, at 381.

[157] *Id.*

[158] Workers are promised a good job and a new life and agree to repay recruitment fees from $2,000 to $7,000. They often must sign "shadow contracts" waiving basic human rights including the freedom to date and marry. *Saipan Lawsuits*, *supra* note 152.

[159] Robert Collier, *Saipan Workers Describe Slavery of Sweatshops; They Say American Dream Turned Into Nightmare*, SAN FRAN. CHRON., Jan. 22, 1999, at A1. At one company, the dormitory where 120 workers lived, eight to a room, the conditions were primitive. *Id.* The food was unsanitary and there were three working toilets and five showers. *Id.* Employees were under total control of their employers and if they were fired, for any reason, they would most likely be deported to their home countries, where they face heavy debts to the corrupt government officials who gave them the jobs. *Id.* Often, an alien worker's sovereign government will assume the role of an employment broker by recruiting workers for NMI industries, receiving direct payments from NMI businesses for placing its citizens in the factories, and paying for the worker's travel. Florke, *supra* note 146, at 399-400. "We must consider the realities of modern economic life: yesterday's slave may be today's migrant worker or domestic servant . . . The methods of subjugating people's wills have changed from blatant slavery to more subtle, if equally effective, forms of coercion." *Id.*

[160] *Additional U.S. Retailers Agree to Join Settlement of Class Action Lawsuit Requiring Independent Monitoring of Factory Conditions*, Sweatshop Watch, *at* http://www.sweatshopwatch.org/marianas/settlement.html (last visited Nov. 10, 1999) [hereinafter *Settlement of Class Action*].

almost $8 million.[161] Most significantly, as these defendants agree to settle, they have agreed to require independent monitoring of their Saipan contractors.[162] The monitoring program to be implemented as a result of this case provides a valuable model for export to other developing nations around the world to resolve the monitoring and enforcement problems with codes of conduct.

B. PRACTICAL RESULTS OF LITIGATION AND A MONITORING PLAN FOR SAIPAN

Under the settlement, U.S. retailers will be subject to independent monitoring by a neutral third-party.[163] The monitoring will be performed by the Verification in Trade and Export (Verite), a non-profit international human rights monitoring firm based in Amherst, Massachusetts.[164] Verite's on-site monitoring will "put teeth into the Code of Conduct."[165] Verite staff will conduct initial pre-contract audits with contractors that want to work for settling retailers, conduct regular monitoring that would include physical inspections, contractors' document review, and interviews of garment workers conducted in their language.[166]

All the companies that have agreed to settle will contribute to a fund that will finance the independent monitoring program.[167] The Monitoring Program specifically states, "All persons used by [Verite] under this program

---

[161] *Summary of the Saipan Sweatshop Litigation*, Sweatshop Watch, *at* http://www.sweatshopwatch.org/swatch/marianas/summary5_00.html (last visited Oct. 10, 2000) [hereinafter *Summary*]. The defendants that have agreed to settlement include Brylane, L.P., Calvin Klein, Inc., Cutter & Buck, Inc., Donna Karan International, Inc., The Dress Barn, Inc., The Gymboree Corp., J.Crew Group, Inc., Jones Apparel Group, Inc., Liz Claiborne, Inc., The May Department Stores Company, Nordstrom, Inc., Oshkosh B'Gosh, Inc., Phillips-Van Heusen Corp., Polo Ralph Lauren Corp., Sears Roebuck and Company, Tommy Hilfiger U.S.A., Inc., and Warnaco Group, Inc. *Id.* The finalization of the settlements was contingent upon federal judge's approval. *Id.*

[162] *Id.* The settlements include prospective relief, which would prohibit Saipan-based contractors from violating the law in the future, and include strict and effective monitoring systems to ensure compliance; and retroactive relief, which would provide payments to garment worker class members whose rights were violated in the past. *Id.* In terms of prospective relief, all settling defendants agreed to a comprehensive Saipan Code of Conduct. *Id.* Under the code's terms, all future contracts with Saipán-based contractors will include a series of provisions requiring the contractors' strict adherence to a set of detailed standards governing working and living conditions. *Id.* "These standards build on existing legal standards and previously-negotiated codes of conduct in other contexts, and results in a tough and clearly-stated list of conditions that each contractor must satisfy in the future." *Id.*

[163] *Monitoring Program*, *supra* note 146.

[164] *Id. See also Settlement of Class Action*, *supra* note 161.

[165] *Summary*, *supra* note 162.

[166] *Id.*

[167] *Settlement of Class Action*, *supra* note 161.

shall work directly for, and under the supervision of [Verite] and shall have no direct financial ties to Plaintiffs, Company or any CNMI ("Commonwealth of the Northern Mariana Islands") Contractor, and no other conflicts of interest. Nor shall [Verite] have any such financial ties or conflicts of interest."[168]

As for the substantive terms of the code, the overriding principle is that contractors must comply with all health, safety, labor and employment laws applicable to their workers.[169] The standards lay out specific criteria by which contractors will be monitored and evaluated.[170] For example, employees must be paid at least the minimum CNMI legal wage for all hours worked, employees cannot be asked, required or permitted to work "off the clock" or to perform "volunteer" work for contractors, employees must be permitted to keep their passports with them at all times during their employment,[171] employees may not be prohibited from attending church or practicing their religions, and employees must be permitted to come and go as they choose.[172]

Although the actual effects of this monitoring program remains to be seen, this litigation and settlement have significant consequences for the future of code of conduct regulation and enforcement. This situation demonstrates that the threat of private litigation and serious monetary damages will compel MNCs to agree to neutral, third-party monitoring of their manufacturers and contractors. The question remains as to how exportable this model of legal action will be for other parts of the world and whether this type of monitoring and enforcement will truly be effective in curbing labor rights abuses. The Saipan situation is unique because of NMI's relationship to the United States and the applicability of federal labor laws on the island. Therefore, when looking to export the Saipan model to other parts of the world and give a private right of action to laborers against MNCs, the most difficult obstacle to overcome is finding an applicable body of law that would give American courts jurisdiction over the MNCs. Although the Alien Tort Claims Act (ATCA) has not been used often to successfully sue MNCs, it may provide American courts with the necessary extra-territorial reach so that workers in the global market can bring legal actions against employers for labor rights abuses.

---

[168] *Id.* Under the Program, it would not be considered a "direct financial tie or other conflict of interest for Company to contract with [Verite] to conduct monitoring outside of Saipan." *Id.*

[169] *Id.*

[170] *Id.*

[171] Employers regularly confiscated workers' passports upon arrival, did not allow workers to leave the factory compound and strictly monitored social activities. *Saipan Lawsuits, supra* note 152.

[172] *Id.*

V. POSSIBLE ACTIONS UNDER THE ALIEN TORTS CLAIMS ACT (ATCA)

The ATCA is a body of law that could offer a cause of action for laborers against MNCs liable for human rights violations in the countries where MNCs operate.[173] The ATCA provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[174] This statute basically provides "subject matter jurisdiction over claims based on rights already recognized under international law."[175] To invoke the ATCA, (1) an alien must make a claim, (2) alleging a tort, (3) that violates international law.[176] In past actions that plaintiffs have pursued under ATCA, the first two requirements were not difficult to find considering that the actions were usually brought by non-U.S. citizens and alleged torts, such as torture, which caused injury to the plaintiffs.[177] However, the third requirement that that the action violates the law of nations has proved to be more problematic.[178] Consequently, this element raises the following questions: (1) whether the alleged tort violates international law and, (2) if so, who are the tortfeasors to be held responsible for the action?[179]

Although these issues are not minor and have proven fatal to certain actions, they are not insurmountable considering recent expansions in ATCA jurisprudence.[180] Given a particular set of circumstances, workers in developing nations may have a cause of action against MNCs for labor rights abuses. This section examines the expansions in ATCA and its applicability to the international labor context.

---

[173] Ariadne K. Sacharoff, Note, *Multinationals in Host Countries: Can They Be Held Liable Under the Alien Tort Claims Act for Human Rights Violations?*, 23 BROOK. J. INT'L L. 927 (1998) [hereinafter Sacharoff]; Leslie Wells, Article, *A Wolf in Sheep's Clothing: Why Unocal Should be Liable Under U.S. Law for Human Rights Abuses in Burma*, 32 COLUM. J.L. & SOC. PROBS. 35, 41 (1998) [hereinafter Wells].

[174] 28 U.S.C. § 1350 (1994).

[175] Wells, *supra* note 174, at 44.

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.* The statute requires state actor involvement, as well as a violation of international law. Gregory G.A. Tzeutschler, *Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad*, 30 COLUM. HUM. RTS. L. REV. 359, 363-64 (1999) [hereinafter Tzeutschler].

[180] Sacharoff, *supra* note 174.

A. THE EXPANSION OF ATCA

The ATCA was originally enacted as a part of the First Judiciary Act of 1789, but there is little evidence of Congress's intent in passing this statute.[181] Legal scholars have speculated that Congress's purpose might have been to ensure that the new nation enjoyed full membership in the international community by guaranteeing that foreign ambassadors or ships protected by international law would have a cause of action in federal court for violations of their rights under international law.[182] Another purpose might have been to provide a remedy for aliens who were mistreated on U.S. soil.[183] But the statute was to be applied only when foreign affairs were implicated and U.S. interests were at stake.[184] Although the ATCA was largely ignored for almost 200 years, courts have recently demonstrated a willingness to entertain actions under the statute.[185]

1. Applicable International Law

In *Forti v. Suarez-Mason*,[186] a federal district court recognized that international torts, "violations of current customary international law, are characterized by universal consensus in the international community as to their binding status and their content. That is, they are universal, definable, and obligatory international norms."[187] "Universal" does not necessarily require an absolute agreement among all nations, but rather a general recognition that a certain practice is prohibited.[188] "Definable" is an agreement that a certain action violates international norms.[189] "Obligatory" means that the conduct in question must be prohibited.[190] Generally, "customary international law" is formulated by examining treaties, the general practice of nations, executive and legislative acts, judicial decisions, and judicial writings

---

[181] Tzeutschler, *supra* note 180, at 364.

[182] *Id.* at 365.

[183] In the early years of ATCA jurisprudence, it was assumed that the tortious conduct would occur within the United States in order to implicate foreign affairs. *Id.*

[184] *Id.*

[185] *Id.* at 362-63, 365.

[186] 672 F. Supp. 1531, 1540 (N.D. Cal. 1987).

[187] *Id.*

[188] Wells, *supra* note 174, at 45.

[189] *Id.*

[190] *Id.* Generally, torture, prolonged arbitrary detention, summary execution, cruel, inhuman or degrading treatment, genocide, war crimes, disappearance, and wrongful death are torts that are sufficient to invoke the ATCA. *Id.* at 53.

on the public law.[191] The way in which "customary international law" is defined will determine ATCA's applicability.

In *Filartiga v. Pena-Irala*,[192] ATCA's seminal case, the Second Circuit held that an alien may bring a tort claim against a foreign defendant for a violation of customary law that did not occur on U.S. soil and did not implicate U.S. foreign affairs, but actually involved another country's treatment of its own citizens.[193] The court reasoned that international law should be interpreted "as it has evolved and exists among the nations of the world today" and not as they existed in 1789.[194] Therefore, the Second Circuit determined that torture, the act complained of in the case, was a violation of customary law in 1980 based on numerous international declarations against torture committed under color of law.[195] The *Filartiga* case permitted U.S. federal courts to adjudicate rights already recognized by international law.[196]

Furthermore, in *Doe v. Unocal Corp.*, the Central District of California seemed to indicate that forced labor,[197] as well as torture, constitutes violations of international law.[198] In that case, Burmese citizens sued Unocal alleging human rights abuses, including forced labor and torture, in furtherance of gas pipeline construction in Burma.[199] The court granted jurisdiction over Unocal thus marking the first time that a U.S. based MNC was held liable under U.S. law for the tortious conduct of a foreign government committed within a foreign territory against citizens of a foreign land and in furtherance of a joint venture project.[200]

The *Unocal* court concluded that the evidence of forced labor was sufficient to constitute an allegation of slave trading and that the defendants were involved in "forced labor trading."[201] However, it is not clear whether this action constitutes an explicit violation of the International Convention to

---

191 *Id.* at 45.

192 630 F.2d 876 (2d Cir. 1980).

193 *Id.* at 878, 885.

194 *Id.* at 884.

195 *Id.* at 881-82. Generally, ATCA precedent, treaties, and the Restatement (Third) of Foreign Relations Law of the United States demonstrate the international and domestic norm prohibiting torture. Wells, *supra* note 174, at 47.

196 *Id.* at 887.

197 Forced labor is defined as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily." Convention Concerning Forced or Compulsory Labor, adopted June 28, 1930, art. 2, § 1, 39 U.N.T.S. 55, 58. Although there seems some international consensus that forced labor should be prohibited, the Restatement does not contemplate it as a violation of customary international law. Wells, *supra* note 174, at 48..

198 963 F. Supp. 880 (C.D. Cal. 1997).

199 *Id.*

200 Wells, *supra* note 174, at 36.

201 *Id.* at 48-49.

Suppress the Slave Trade and Slavery.[202] Nevertheless, the court found that the elements of internationally condemned practices were sufficient to grant subject matter jurisdiction under the ATCA.

2. The Proper Tortfeasor or the State Actor Requirement

ATCA precedent demonstrates three types of tortfeasors are subject to liability.[203] First, a sovereign state or its agent can be a potential tortfeasor.[204] Second, a private party acting in concert, as in a joint venture, with the sovereign state can be a tortfeasor because the party's association with the state would make it a state actor.[205] Finally, in limited circumstances, a private party can be a tortfeasor when international law violations are alleged.[206]

The state actor requirement resulted from the *Filartiga* case because the court concluded that customary international law condemned torture when the actor was acting under the color of law.[207] Subsequently, the court held in *Tel-Oren v. Libyan Arab Republic*[208] that a general state actor requirement barred the plaintiffs from recovering, concluding that established international law was statist and had not been extended to hold non-state actors liable as of 1984.[209] But it should also be noted that the circuit court could only reach a per curiam decision and the panel produced three separate opinions.[210] Furthermore, no court has since followed the opinions of Judges Robb and Bork in *Tel-Oren* that read the jurisdiction under ATCA narrowly. Similarly, since this case, no other court has dismissed an ATCA claim on the grounds that section 1350 did not provide subject matter jurisdiction.[211]

In light of the federal courts' willingness to read jurisdiction under ATCA expansively, there are ways of bypassing or satisfying the state actor

---

[202] *Id.* Slave trading is considered "all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery." *Id.*

[203] *Id.* at 50-51.

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] Doe, 963 F. Supp. at 880.

[208] Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

[209] *Id.* at 792-95. The plaintiffs in this case were survivors and representatives of decedents who were killed during a PLO terrorist attack on a civilian bus in Israel. *Id.* at 776. The court held that it had no jurisdiction over the PLO based on ATCA. *Id.* at 775.

[210] Tzeutschler, *supra* note 180, at 367.

[211] *Id.* Most notably, the Second Circuit held the Bosnian Serb leader, Radovan Karadzic, liable for genocide and war crimes under ATCA. Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995), *reh'g denied*, 74 F.3d 377 (2d Cir. 1996). This court recognized that in certain violations of international law, such as genocide, private actors, a non-state individual actor could be held liable. *Id.* at 241-43.

requirement when the defendant is a MNC.[212] First, a defendant could qualify as a state, or agent of an agent of the state, according to definitions of international law.[213] International law defines a state as "an entity which has a defined territory and a permanent population, under the control of its own government, and which engages in, or has the capacity to engage in, formal relations with other entities."[214]

Second, and more relevant in this case, a defendant who acts in concert with a foreign state may qualify as a state actor because he is deemed to be acting under the color of law.[215] A court recently explained that the "color of law" jurisprudence, under 42 U.S.C. § 1983,[216] could be used in international law.[217] This reasoning is highly significant because it provides a connection between international law and municipal law.[218] A MNC, which is not liable under a treaty or customary international law, could be found liable under a general principle of law with origins in municipal law.[219]

The plaintiffs in *Unocal* employed a similar reasoning.[220] The court held that the primary claims were against the company itself, and the fact that the host government might be protected under the Foreign Sovereign Immunities Act,[221] did not shield the corporate defendant from joint liability or from a suit under Federal Rule of Civil Procedure 19(b).[222] Therefore, private actors, particularly MNCs, should be liable for their activities in a host nation if they are acting under the color of law and working with some cooperation of the host government.[223]

---

212 Sacharoff, *supra* note 174.

213 *Id.*

214 Restatement (Third) of the Foreign Relations Law of the United States § 201 (1986).

215 Sacharoff, *supra* note 174. This reasoning is similar to the one used by the Second Circuit in *Kadic*, 70 F.3d at 241-42, *supra* note 181.

216 42 U.S.C. § 1983 (1994) states: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . ."

217 *Kadic*, 70 F.3d at 245.

218 Sacharoff, *supra* note 174.

219 *Id.*

220 *Doe*, 963 F. Supp. at 893-94.

221 28 U.S.C. § 1605(a)(2) (1994).

222 *See Doe*, 963 F. Supp. at 889. Furthermore, a joint tortfeasor is not a necessary and indispensable party within the meaning of Rule 19. *Id.*

223 Sacharoff, *supra* note 174.

3. Types of Recognized Violations

Once a plaintiff has overcome the state actor requirement, the plaintiff must find a violation of international law, customary law, or internationally accepted "norms," to give rise to ATCA liability.[224] Actions such as torture, extrajudicial executions and disappearances, arbitrary detention, genocide, and war crimes are violations of the law of nations for the purposes of ATCA.[225] Although no ATCA case has yet been decided on the basis of these alleged abuses, cruel, inhuman and degrading treatment and a systematic pattern of violations are also recognized as violations of human rights.[226] Environmental harms and the cultural destruction of peoples, also known as cultural genocide or ethnocide, have not yet been recognized as binding international law, but are emerging as widely accepted international norms and becoming recognized for ATCA purposes in the future.[227] In the present situation, it is significant that private actors using forced labor may also be in violation of universal norms, namely the prohibitions on slavery and slave-trading.[228]

B. THE ATCA'S APPLICABILITY TO THE LABOR CONTEXT

First, although the state actor requirement is an obstacle when international workers seek to sue their MNC employers, it is not an insurmountable one. In light of the *Unocal* decision and a court's willingness to use the color of law analysis under 42 U.S.C. § 1983, it appears that when a garment manufacturer works in cooperation with a host government, the manufacturer may qualify as operating as a state actor. Often in the garment industry, a host government and a MNC will work together, particularly when the developing nation has an incentive to attract companies and jobs to its country. It should not be difficult to find circumstances in which the MNC contracts with the government for its labor force, or the government provides benefits, in the form of relaxed local labor standards or tax incentives, to meet the state actor requirement.

A more difficult obstacle, but not an impossible one, is finding a violation of the internationally recognized norm or international law that gives rise to a claim under ATCA. Manufacturing firms are less likely to be sued

---

[224] Tzeutschler, *supra* note 180, at 364.
[225] *Id.*
[226] *Id.* American courts are divided on whether cruel, inhuman, or degrading treatment, short of torture, violates international law. *Id.* at 410.
[227] *Id.* at 364.
[228] *Id.* at 393.

because no U.S. court has recognized international labor standards as binding international law.[229] However, if employers treat their workers violently, fail to pay them, coerce them into working, or restrain them, then these human rights abuses would be subject to ATCA jurisdiction.[230] Moreover, with the promulgation of various declarations, covenants, standards, and codes of conduct, there emerges a "core" set of labor rights that seem to be gaining general recognition and acceptance throughout the world.[231] Given the trend to read the ATCA more expansively, it is not unreasonable to imagine that courts may be willing to consider these core labor rights as a binding international norm.

Although bringing an action under ATCA for labor rights abuses is not a simple task, given the interactions between issues in international law, jurisdiction, judicial forum, and judicial competence, it provides a realistic possibility for a private right of action for workers exploited by MNCs. As the Saipan situation illustrates, giving workers a private right of action will compel employers to agree to more stringent labor standards and neutral monitoring. Moreover, in labor rights cases, more than monetary damages, plaintiffs seek a change in working conditions.[232] Therefore, the threat of litigation and serious monetary damages could be the weapon that can be utilized to force MNCs to observe workers' rights, and even their own corporate codes of conduct.

VI. CONCLUSION: USING CORPORATE CODES OF CONDUCT WITH EFFECTIVE ENFORCEMENT MECHANISMS

The problem of international labor rights abuses is complex and multi-faceted. Public law, multilateral agreements, and corporate codes, both externally and internally initiated, have failed to effectively address the inhumane conditions under which a great proportion of the global population works. Although corporate codes sound admirable, they often fail because of ineffective monitoring and enforcement. The Saipan example has demonstrated that the threat of litigation will force employers to agree to neutral, and hopefully effective, enforcement and monitoring. The ATCA is not a cure-all for the problem, but it can provide a strong incentive to curb MNC labor rights abuses in developing nations. "Although it may be difficult

---

229 *Id.* at 378.

230 *Id.* at 378-79

231 Compa, *supra* note 23, at 697-700. "Core" rights embrace social and economic standards such related to wages, hours, and working conditions. *Id.* Most corporate codes of conduct contain more than core rights and concerns. *Id.*

232 Tzeutschler, *supra* note 180, at 384.

for a U.S. court effectively to enjoin a corporation from continuing harmful employment or environmental practices in the situs country, the threat of an award of damages for past judgments may provide the incentive for the defendant corporation to enter into a settlement agreement providing for remediation or changes in its practices."[233]

[233] *Id.* at 363.