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LABOR RIGHTS ARE HUMAN RIGHTS: DIRECT ACTION IS CRITICAL IN SUPPLY CHAINS AND TRADE POLICY

*Marisa Anne Pagnattaro**

It's time for the world to shift. . . . Never has business had a more crucial call to innovate — not just for the health and growth opportunities for our companies, but for the good of the world. . . . Today, we're evolving beyond the words corporate responsibility to a “sustainable business and innovation team.” We see sustainability, both social and environmental, as a powerful path to innovation, and crucial to our growth strategies.

- Mark Parker, President and CEO, NIKE, Inc.¹

INTRODUCTION

In the movement toward accountability in global business practices, corporate leaders need to recognize the important premise that labor rights are human rights. International organizations, nongovernmental organizations, and consumers are calling on companies to take affirmative steps to promote fair treatment of workers. Since companies are struggling to remain competitive and viable in a tight economy, they may be resistant to insist on better conditions for their global workforce, especially when viewing changes as taking away from the bottom line. As Mark Parker of NIKE, Inc. realized a number of years ago, however, corporate responsibility is tied to sustainability and innovation. Therefore, a long-term strategic vision should take into account the need for a consistent workforce—a team that shares a sense of common purpose.

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¹ Mark Parker, *Letter from the CEO* in NIKE, INC. CORPORATE RESPONSIBILITY REPORT FY07–09, 5 (n.d.), (last visited Jan. 18, 2014).

Despite this fact, immediate economic realities drive many companies to seek out the cheapest possible labor, who often work under the worst possible working conditions. Likewise, many countries' governments either lack the resources to enforce their labor and employment laws or merely look the other way. This combination can create an intolerable situation for many workers who lack the bargaining power to change their circumstances. This situation has led the United Nations to champion and advance the idea that business and human rights must be considered together to effectuate any meaningful change for millions of workers. This proposition is not a simple one to see to fruition. As John Ruggie observes, "The idea of human rights is both simple and powerful. The operation of the global human rights regime is neither."²

This paper begins with the central premise that labor rights are human rights, then discusses how and why business should advance this cause, and explores ways in which trade laws can be used to further reinforce this message. Part I presents the backdrop of global initiatives designed to promote labor rights as human rights. This section explains how a voluntary international movement seeks to hold corporations to workplace standards that may be higher than those established by national laws. Part II establishes a variety of reasons why corporations should adopt and enforce voluntary labor standards as a long-term sustainability strategy. Inasmuch as corporate labor sustainability initiatives are essential to establish company policies and goals to promote worker protections for an international workforce, Part III analyzes the on-going challenges for the garment industry in Bangladesh. This section also discusses the worker-related problems confronted by Apple, Inc. in China and its subsequent labor initiatives to protect workers. Part IV then reviews how the current labor protections required by U.S. trade agreements and section 301 of the Trade Act of 1974 can be used to reinforce the call for higher labor standards and block goods from being imported into the United States. This section also recommends enhanced provisions that parties should include in future trade agreements as incentive for corporations to protect their workers. Lastly, this paper concludes that the challenges faced by responsible companies in competing with corporate entities are outweighed by the importance

² JOHN GERARD RUGGIE, *JUST BUSINESS MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS*, at xxviii (2013) (Kwame Anthony Appiah, ed., 2013) [hereinafter *JUST BUSINESS*].

of corporate labor-related initiatives as strategies to maintain a sustainable and productive global workforce. Inasmuch as this is of strategic importance, it becomes critical to establish clear rules for the protection of workers, to enforce those rules and to correct any violations. Moreover, trade agreements and laws can be used to further incentivize corporate responsibility toward workers for both domestic and foreign companies importing goods into the United States. Ultimately, stakeholders must act directly and collectively to ensure global recognition and meaningful enforcement of labor rights as human rights.³

I. GLOBAL INITIATIVES TO PROMOTE LABOR RIGHTS AS HUMAN RIGHTS

Proponents of human rights believe that international agreements recognize, as opposed to create, these rights.⁴ Based on this mindset, following World War II, the United Nations set out to “reaffirm faith in fundamental human rights.”⁵ As an outgrowth of that general goal, the United Nations developed a range of global initiatives to establish and promote labor rights as human rights. The foundation for this movement rests on the *Universal Declaration of Human Rights (Universal Declaration)* adopted by the U.N. General Assembly in 1948.⁶ Fundamental to the *Universal Declaration* is Article 25, which states that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family.”⁷ Two additional articles specifically articulate certain conditions of work as fundamental human rights:

³ See generally Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, J. ECON. PERSP., Summer 2000, at 137 (discussing how multiple types of individuals, with varying degrees of willingness to initiate reciprocity, can achieve the benefits of collective action).

⁴ See JUST BUSINESS, *supra* note 2.

⁵ U.N. Charter, pmb., available at <http://www.un.org/en/documents/charter/preamble.shtml>.

⁶ See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter Universal Declaration], available at <http://www.un.org/en/documents/udhr/>.

⁷ *Id.* at art. 25(1).

Article 23

- (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
- (2) Everyone, without any discrimination, has the right to equal pay for equal work.
- (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
- (4) Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.⁸

The *Universal Declaration* is unequivocal in its linkage of human dignity and the importance of just working conditions.⁹ Accordingly, it calls on all Member States to honor their pledge to realize these fundamental human rights.¹⁰ The *U.N. International Covenant on Economic, Social and Cultural Rights (ICESCR)* further reinforced the significance of human rights in the labor context in 1966.¹¹ Like the *Universal Declaration*, Part III of the *ICESCR* provides for the “right of everyone to the enjoyment of just and favourable conditions of work,” including fair wages and equal

⁸ *Id.* at art. 23–24.

⁹ *See id.*

¹⁰ *See id.* at pmb1.

¹¹ *See* International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICESCR], available at http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/2200%28XXI%29. The ICESCR has been signed, but not ratified, by the United States. *See id.* *See generally* Sigrun I. Skogly & Mark Gibney, *Economic Rights and Extraterritorial Obligations*, in *ECONOMIC RIGHTS: CONCEPTUAL, MEASUREMENT, AND POLICY ISSUES* 267, 272–73 (Shareen Hertel & Lanse Minkler, eds., 2007) (discussing the extraterritorial obligations pursuant to article 2, paragraph 1 of the ICESCR).

remuneration for equal work; “safe and healthy working conditions”; equal opportunity; and “reasonable limitation of working hours.”¹² Additionally, the States Parties to the *ICESCR* must ensure that everyone has the right to form and join trade unions, as well as to strike.¹³

The obligations set forth in both the *Universal Declaration* and the *ICESCR*, however, are intended to be binding on governments, not corporations. It was not until the 1970s that the United Nations attempted to establish binding rules to regulate the activities of global businesses.¹⁴ Unsuccessful, the movement languished until it was reinvigorated by voluntary initiatives.¹⁵ The so-called “soft law” approach garnered more appeal in the 1970s¹⁶ as many businesses expanded their international reach, generating concerns about the potential negative effect of corporations on developing nations.¹⁷ The subsequent international movement seeks to hold corporations to labor and employment standards that may be more rigorous than those established by national laws.¹⁸ Both the Organisation for Economic Co-operation and Development (OECD) and the International Labour Organization (ILO) adopted measures aimed at greater accountability for business during the 1970s, then revised the documents in 2000.¹⁹ First, the OECD adopted the Guidelines for Multinational Enterprises, which specifically sets forth a framework for how business should address employment and industrial relations issues.²⁰ Significantly, the OECD calls on businesses to respect the

¹² *ICESCR*, *supra* note 11, at pt. III, art. 7.

¹³ *See id.* at pt. III, art. 8.

¹⁴ *See* John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 *AM. J. INT’L L.* 819, 819 (2007) [hereinafter *Evolving International Agenda*].

¹⁵ *See id.*

¹⁶ *See id.*

¹⁷ *See id.* at 820; *see also* Organisation for Economic Co-operation and Development [OECD], *OECD Guidelines for Multinational Enterprises*, at 3 (2011) [hereinafter *OECD 2011 Guidelines*] (stating that the “*Guidelines* aim to promote positive contributions by enterprises to economic, environmental and social progress worldwide”) available at <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

¹⁸ *See, e.g., OECD 2011 Guidelines, supra* note 17, paras. 38–40.

¹⁹ *See* Ruggie, *Evolving, supra* note 14 (footnote omitted).

²⁰ *See* OECD, *The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications*, at 19–27, OECD Doc.

employees' rights to be represented by unions,²¹ to be protected from discrimination,²² to work in a safe environment,²³ and to negotiate fairly with employees.²⁴ In the commentary to the guidelines, the OECD specifically identifies the ILO as the competent body to articulate and promote fundamental labor standards and worker rights.²⁵

Shortly thereafter, the ILO adopted the *Tripartite Declaration of Principles Concerning Multinational Enterprises (Tripartite Declaration)*, which sets forth key principles designed to protect workers at the most fundamental level.²⁶ The *Tripartite Declaration* invites a range of stakeholders, most notably multinational enterprises, to observe its principles regarding: employment, including equal opportunity and security; training; conditions of work and life; and industrial relations, specifically freedom of association, which is the right to organize and to engage in collective bargaining.²⁷ These goals are consistent with the ILO's *Declaration of Fundamental Principles and Rights at Work (Fundamental Principles Declaration)*, which sets forth the four core conventions:

- (1) freedom of association and the effective recognition of the right to collective bargaining;
- (2) the elimination of all forms of forced or compulsory labour;
- (3) the effective abolition of child labour; and

DAFFE/IME/WPG (2000)15/FINAL (Oct. 31, 2001) [hereinafter *OECD Text, Commentary, and Clarifications*], available at [http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=D/AFFE/IME/WPG\(2000\)15/REV4&docLanguage=En](http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=D/AFFE/IME/WPG(2000)15/REV4&docLanguage=En).

²¹*Id.* para. 1(a), at 19.

²²*Id.* para. 1(d).

²³*Id.* para. 4(b).

²⁴*Id.* para. 8, at 20.

²⁵*Id.* para. 20.

²⁶ See International Labour Organization [ILO], *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, ILO GB 279/12, Gov. Bod. 279th Sess. (3rd ed. 2001) [hereinafter *Tripartite Declaration*], available at http://www.ilo.org/dyn/normlex/en/f?p=1000:62:3061440463449594::NO:62:P62_LIST_ENTRIE_ID:2453910:NO.

²⁷*Id.* at 4–10.

(4) the elimination of discrimination in respect of employment and occupation.²⁸

Also in 2000, the United Nations introduced the Global Compact, a voluntary initiative created to help develop, implement, and disclose responsible corporate policies,²⁹ which now has over 10,000 participants, including over 7,000 businesses in 145 countries.³⁰ The first two principles of the Global Compact clearly ask businesses to “support and respect the protection of . . . human rights,” and ensure “that they are not complicit in human rights abuses.”³¹ The next four principles deal specifically with labor, tracking the ILO core principles:

Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;

Principle 4: the elimination of all forms of forced and compulsory labour;

Principle 5: the effective abolition of child labour; and

²⁸ ILO, *Declaration of Fundamental Principles and Rights at Work*, 86th Sess. Official Bulletin (June 18, 1998) [hereinafter *Fundamental Principles Declaration*], available at <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>.

²⁹ United Nations Global Compact, *Corporate Sustainability in the World Economy* (Sept. 2013), http://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf.

³⁰ *Participants & Stakeholders*, U.N. GLOBAL COMPACT, <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html> (last updated May 29, 2013). In light of the discussion, it is interesting to note that although Nike (since 2000) and Huawei Technologies, Co. (since 2004) are members, Apple, Inc., Wal-Mart Stores, Inc., and Samsung Group are not. See *infra* Parts III–IV.

³¹ *The Ten Principles*, UNITED NATIONS GLOBAL IMPACT, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited Jan. 19, 2014) [hereinafter *Ten Principles*]. Principle 2 raises a provocative question about whether political involvement may be required to ensure enterprises are not complicit in human rights abuses. See ARCHIE B. CARROLL ET AL., *CORPORATE RESPONSIBILITY: THE AMERICAN EXPERIENCE* 395 (Kenneth E. Goodpaster ed., 2012) (“Does involvement with political issues in other countries overstep bounds of corporate responsibility in the twenty-first century, and how far can that go without sending out signals of neo-colonialism?”).

Principle 6: the elimination of discrimination in respect to employment and occupation.³²

Additionally, the final principle,³³ addressing proscribed corruption, is also relevant to labor because corruption issues can arise with the enforcement of labor and employment laws, including issues related to workplace inspections.³⁴ In addition to the Global Compact, the United Nations also adopted its *Millennium Declaration* in 2000, again reiterating its commitment to human rights, including its resolution to uphold the *Universal Declaration*.³⁵ Similarly, the ILO stated that its *Declaration on Social Justice for a Fair Globalization* represented “a renewed statement of faith in the . . . principles embodied in the ILO Constitution.”³⁶

Each of these international documents is central to establishing the link between human rights and labor rights.³⁷ This, coupled with concerns about the negative effects of global businesses on human rights, prompted the 2003 United Nations initiative, the *Draft Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*.³⁸ This initiative unsuccessfully sought to create an obligation under international law for businesses to have duties the same as States “to promote, secure

³² *Ten Principles*, *supra* note 31.

³³ *See id.*

³⁴ *See, e.g.*, United Nations Global Compact, Fighting Corruption in the Supply Chain: A Guide for Customers and Suppliers 42 (June 2010), http://www.unglobalcompact.org/docs/issues_doc/Anti-Corruption/Fighting_Corruption_Supply_Chain.pdf.

³⁵ United Nations Millennium Declaration, G.A. Res. 55/22, ¶ 25, U.N. Doc. A/RES/55/2 (Sept. 8, 2000), *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/55/2&Lang=E.

³⁶ ILO Declaration on Social Justice for a Fair Globalization, 97 Sess., at 3 (June 10, 2008), http://www.ilo.org/global/meetings-and-events/campaigns/voices-on-social-justice/WCMS_099766/lang--en/index.htm.

³⁷ *See* Int’l Trade Union Confederation [ITUC], ITUC Congress Resolutions on Decent Work 5–9 (Dec. 11, 2010), http://www.ituc-csi.org/IMG/pdf/WDDW_EN.pdf [hereinafter ITUC Resolutions] (affirming that workers’ rights are human rights and noting that the ITUC should target global business to ensure respect for labor).

³⁸ U.N. Sub-Commission on the Promotion and Protection of Human Rights, Draft Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003, *available at* <http://www1.umn.edu/humanrts/links/NormsApril2003.html>.

the fulfillment of, respect, ensure respect of, and protect human rights recognised in international as well as national law.”³⁹ The draft was not embraced by the business community and also lacked any significant government support.⁴⁰

Against this backdrop, in 2005, the U.N. Secretary-General appointed John Ruggie as a U.N. Special Representative on the issue of human rights and business.⁴¹ Part of his mandate was to “identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights.”⁴² One of the drivers behind this inquiry was the belief that “some companies have made themselves and even their entire industries targets by committing serious harm to human rights [and] labour standards,” which in turn “generated increased demands for greater corporate responsibility and accountability.”⁴³ Ruggie undertook this task with what he calls “principled pragmatism” defined as “an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most—in the daily lives of people.”⁴⁴

From 2005 to 2011, Ruggie undertook his responsibilities, ultimately culminating with the *Guiding Principles on Business and Human Rights (Guiding Principles)*.⁴⁵ Three pillars form the

³⁹ *Id.* at (A)(1).

⁴⁰ See Special Representative on the Issue of Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, para. 3, at 3, Human Rights Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) [hereinafter Special Representative Report], available at <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf>.

⁴¹ Special Representative on the Issue of Human Rights, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, para. 2, Comm’n on Human Rights, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006), available at <http://www1.umn.edu/humanrts/business/RuggieReport2006.html>.

⁴² *Id.* para. 1(a).

⁴³ *Id.* para. 15.

⁴⁴ *Id.* para. 81.

⁴⁵ See Special Representative Report, *supra* note 41, at annex.

foundation for the *Guiding Principles*: “states must protect; companies must respect; and those who are harmed must have redress.”⁴⁶ Regarding corporate responsibility for human rights, the report is unequivocal that it is the responsibility of business enterprises to respect internationally recognized human rights, including those related to labor expressed in the *Universal Declaration*, the ICESCR, and the *ILO Fundamental Principles Declaration*.⁴⁷ The Commentary to the *Guiding Principles* states that this responsibility “exists independently” of the any government obligations and “it exists over and above compliance with national laws and regulations protecting human rights.”⁴⁸ According to the United Nations, the *Guiding Principles* do not, however, create any new legal obligations. Instead, they are a “clarification and elaboration of . . . existing standards” under international law.⁴⁹ This seems to be a significant jurisprudential shift, however, because those international obligations historically have been viewed as applying to States, not private entities.⁵⁰ In any event, the *Guiding Principles* calls on business enterprises to take action in three specific ways:

- (1) [to adopt] a policy commitment to meet their responsibility to respect human rights;
- (2) [to have] a human rights due-diligence⁵¹ process to identify, prevent, mitigate and account

⁴⁶ JUST BUSINESS, *supra* note 2, at xxi.

⁴⁷ Special Representative Report, *supra* note 41, para. 12, at 13.

⁴⁸ *Id.* para 11.

⁴⁹ U.N. Secretary-General, *Contribution of the United Nations System as a Whole to the Advancement of the Business and Human Rights Agenda and the Dissemination and Implementation of the Guiding Principles on Business and Human Rights*, Human Rights Council, para. 11, at 4, U.N. Doc. A/HRC/21/21 (July 2, 2012) [hereinafter Secretary-General Report], available at http://www.ohchr.org/Documents/Issues/Business/A.HRC.21.21_AEV.pdf.

⁵⁰ Although somewhat controversial, this argument is not new. See Virginia A. Leary, *The Paradox of Workers' Rights as Human Rights*, in HUMAN RIGHTS, LABOR RIGHTS AND INTERNATIONAL TRADE 22 (Lance A. Compa & Stephen F. Diamond, eds., Univ. of Pa. Press 1996) (discussing how certain core ILO labor rights should be considered part of customary international law).

⁵¹ “Due diligence” is a term of art used to describe a business’s obligation to use reasonable care in preventing human rights abuses. See, e.g., Special Representative Report, *supra* note 41, para. 6, at 4.

for how they address their impacts on human rights; and

(3) [to have] processes in place to enable the remediation of any adverse human rights impacts they cause or to which they contribute.⁵²

The operational principles of the report stipulate that all business enterprises should have in place publically available policies and processes expressing their commitment to respect human rights.⁵³ In the labor context, this means that enterprises should have clear labor and employment policies in place regarding the terms and conditions of employment, as well as the treatment of workers consistent with ILO principles and other international obligations. Moreover, business enterprises should carry out due diligence, including, to the extent possible in supply chains, taking “every reasonable step to avoid involvement with an alleged human rights abuse.”⁵⁴ Accordingly, an enterprise would need to take steps to uncover and avoid any worker-related abuse situations taking place within their supply chains. With regard to remediation, business enterprises are not only asked to take steps to stop or prevent any abuse, they are asked to use “leverage to mitigate any remaining impact to the greatest extent possible.”⁵⁵ In practical terms, this requires businesses to use leverage over vendors and suppliers, possibly including termination of the relationship. Since supply chains involve multiple parties, they can be a particularly vexing challenge and may require “collective action” to achieve remediation.⁵⁶ Lastly, business enterprises should have tracking procedures in place to demonstrate that policies are being implemented and enforced.⁵⁷ To ensure transparency and accountability, businesses should communicate the collected data to relevant stakeholders and should be prepared to publish the information externally.⁵⁸

⁵² *Id.* para. 15, at 15.

⁵³ *Id.* para. 16.

⁵⁴ *Id.* para. 17, at 17.

⁵⁵ *Id.* para. 19, at 18.

⁵⁶ *Evolving International Agenda*, *supra* note 14, at 839 (citing Iris Marion Young, *Responsibility and Global Labor Action*, 12 J. POL. PHIL. 365, 387 (2004)).

⁵⁷ Special Representative Report, *supra* note 41, para. 20, at 19.

⁵⁸ *See id.* para. 21, at 20.

The *Guiding Principles* are central to the resolution adopted by the United Nations Human Rights Council in July 2011, which emphasizes that transnational corporations and other business entities have a responsibility to protect human rights.⁵⁹ The Council's unanimous endorsement established the *Guiding Principles* as the international touchstone for all considerations of the nexus between business and human rights.⁶⁰ A year later, the Human Rights Council revisited the *Guiding Principles* in its report on the status of its business and human rights agenda.⁶¹ One major concern is the risk that there may be problems with the implementation of the *Guiding Principles* due to a lack of a coordinated effort to ensure consistency.⁶² Given the scale and complexity of the issue, one recommendation is that the United Nations should engage in a coordinated strategic effort to support implementation.⁶³ The actual logistics of such a plan, however, are not articulated.⁶⁴ Because of the lack of any enforcement mechanism, progress on implementation of the *Guiding Principles* is, at best, tentative.⁶⁵ Moreover, there is criticism that there are no real incentives for businesses to integrate the required due diligence into their core activities.⁶⁶

Similar concerns were raised at the first Annual Forum on Business and Human Rights in December 2012.⁶⁷ One particular challenge identified is addressing violations in global supply chains,

⁵⁹ See Human Rights Council Res. 17/4, 17th Sess., May 30–June 17, 2011, U.N. Doc. A/HRC/RES/17/4 (June 16, 2011), available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement>.

⁶⁰ Secretary-General Report, *supra* note 49, para. 2.

⁶¹ See generally U.N. Chairperson, *Summary of Discussions of the Forum on Business and Human Rights*, Human Rights Council, U.N. Doc. A/HRC/FBHR/2012/4 (Jan. 23, 2013) (by John Ruggie) [hereinafter *Forum on Business and Human Rights Summary*], available at http://www.ohchr.org/Documents/Issues/Business/ForumSession1/A_HRC_FBHR_2012_4_en.pdf (Jan. 23, 2013).

⁶² See Secretary-General Report, *supra* note 49, para. 32, at 8.

⁶³ See *id.* paras. 31–37, at 8–9.

⁶⁴ See *id.*

⁶⁵ See Mark Taylor, *A Glass Filling Up – Reflections on the First Year Anniversary of the UN Guiding Principles on Business and Human Rights*, INST. FOR HUM. RTS. & BUS. (June 18, 2012), <http://www.ihrb.org/commentary/guest/a-glass-filling-up.html>.

⁶⁶ *Id.*

⁶⁷ See *Forum on Business and Human Rights Summary*, *supra* note 61.

especially because most companies do not have full control, which makes monitoring difficult.⁶⁸ According to the head of the Fair Labor Association, who participated in the discussion, he was attempting to discuss the problems and devise practical solutions in a “safe space” for stakeholders to avoid “naming and shaming” exposure.⁶⁹ Other practical issues raised included: the fact that “human rights implementation may be outside of the comfort zone of some companies,” the need for training and risk assessment with companies, and the “challenge of ‘translation’ of human rights to various cultural contexts.”⁷⁰ Although the *Guiding Principles* represented a groundbreaking attempt to require business enterprises to promote and protect human rights, especially global labor rights, much work is needed to fully integrate these concerns into business operations.

The *Guiding Principles* are at the mercy of governments and corporations to implement them. Although the first pillar of the *Guiding Principles* requires States to “respect, protect[,] and fulfill the human rights of individuals within their territory [or] jurisdiction” by exercising due diligence,⁷¹ it is the exception, not the rule, for States to require companies to report problems they uncover through such due diligence.⁷² In fact, four of the largest trading countries in the world—Canada, China, India, and the United States—have not made “non-judicial remedies a real option for victims of business-related human rights abuse.”⁷³ On the other hand, one of the explicit goals of European Union trade policy is promoting human rights.⁷⁴

⁶⁸ See, e.g., *id.* paras. 59, 67, at 10, 11.

⁶⁹ *Id.* para. 30, at 7.

⁷⁰ *Id.* para. 31.

⁷¹ Special Representative Report, *supra* note 41, para. 1, at 6.

⁷² See Taylor, *supra* note 65.

⁷³ *Id.*

⁷⁴ See ARMIN PAASCH, AN ECOFAIR TRADE DIALOGUE DISCUSSION PAPER: HUMAN RIGHTS IN EU TRADE POLICY – BETWEEN AMBITION AND REALITY (John Cochrane trans., 2011), available at http://www.ecofair-trade.org/sites/ecofair-trade.org/files/downloads/11/12/disk.papier_eu_en_fuer_web.pdf (discussing the European Union’s promotion of human rights). See also *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, COM (2011) 681 final (Oct. 25, 2011) [hereinafter *Commission Communication*], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF>.

Interestingly, at least one study concludes that mandatory reporting on corporate social responsibility does affect management practices by leading to more sustainable development and employee training as well as a decrease in corruption issues and an increase in managerial credibility.⁷⁵

Especially in light of the precarious financial state of the global economy since 2008, however, many governments have not made it a priority to introduce any additional laws and requirements that could fetter already fragile economies. Even worse, enforcement is often lacking because resources are used for more pressing concerns or as the result of corruption. For reasons such as these, the movement is now focusing on the sensibilities of investors, calling on them to undertake the cause to “diminish their risks and enhance the rights of others.”⁷⁶ The hope is that investor pressure can help bridge the problematic gap between the *Guiding Principles* and the need for effective enforcement.

II. WHY? STRATEGY OF SUSTAINABILITY

Although there is an international framework clearly establishing labor rights as human rights, the ability of the United Nations, the International Labour Organization (ILO), or any other international nongovernmental entity to require business to promote and enforce those rights is, at best, aspirational. Thus, despite an emerging international consensus that workers should enjoy core labor protections, there remains no framework for any meaningful enforcement. Why then would any business enterprise adopt and enforce voluntary labor standards that exceed those required by national laws? The answer is because business enterprises should incorporate fair labor and employment practices as part of a long-term sustainability strategy.

⁷⁵ See Ioannis Ioannou & George Serafeim, *The Consequences of Mandatory Corporate Sustainability Reporting* (Harvard Bus. Sch. Research, Working Paper Series, No. 11-100, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1799589.

⁷⁶ MARGARET WACHENFELD, *INVESTING THE RIGHTS WAY: A GUIDE FOR INVESTORS ON BUSINESS AND HUMAN RIGHTS* 57 (Inst. for Human Rights & Bus. 2013), available at <http://www.ihrb.org/pdf/Investing-the-Rights-Way/Investing-the-Rights-Way.pdf>.

This argument is contrary to some dominant twentieth-century economists who argued that social (and environmental) policies could undermine the profitability of a company.⁷⁷ This position was epitomized by Milton Friedman who proclaimed that “there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.”⁷⁸ In Friedman’s view, any concept of corporate social responsibility is an anathema—he does not acknowledge the concept that social responsibility can lead to increased profits. Similarly, other commentators have argued that companies will not “grant workers basic rights to organize or change the sweatshop structure” of industry because there is a limited ability to raise prices for goods manufactured under better, and usually more costly, working conditions.⁷⁹ Moreover, despite the fact that an overwhelming number of global chief executives believe that corporate social responsibility creates shareholder value, one study observes that the connection between virtuous firms and profitability is, at best, inconclusive.⁸⁰ All of this, however, fails to take into account that “cheap and compliant . . . workers [may] not remain [that way] for very long,” and such workers are less stable

⁷⁷ E.g., Robert G. Eccles et al., *The Impact of Corporate Sustainability on Organizational Processes and Performance* 2–3, (Harvard Bus. Sch. Research, Working Paper Series, No. 12-035, 2011) [hereinafter *Impact of Corporate Sustainability*] (citations omitted), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1964011 (reviewing several scholars who argue that social and environmental policies “can destroy shareholder wealth”).

⁷⁸ Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES, Sept. 13, 1970 at SM17 (citing MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962)). But see Ronald Paul Hill et. al., *Corporate Social Responsibility and Socially Responsible Investing: A Global Perspective*, 70 J. OF BUS. ETHICS 165 (2007) (arguing against Friedman’s position).

⁷⁹ Mark Levinson, *Wishful Thinking*, in CAN WE PUT AN END TO SWEATSHOPS? 54, 55 (Archon Fung et. al. eds., 2001). Cf. David Vogel, *CSR Doesn’t Pay*, FORBES (Oct. 16, 2008, 6:00 PM), http://www.forbes.com/2008/10/16/csr-doesnt-pay-lead-corprespons08-cx_dv_1016vogel.html (“Ethical products are a niche market”).

⁸⁰ See DAVID VOGEL, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY 1–5 (2005).

and may not be as productive as workers who enjoy basic labor rights.⁸¹

Current wisdom is that a strategic approach is “increasingly important to the competitiveness of enterprises.”⁸² Businesses are stepping up and respecting labor rights because it is in their long-term interest on many fronts, including: “risk management, . . . customer relationships, human resource management, and innovation capacity.”⁸³ Research is currently underway to shed more light on the relationship between social responsibility, including labor rights and profitability.⁸⁴ The belief is that addressing social responsibility can develop “long-term employee, consumer[,] and citizen trust as a basis for sustainable business models” that will ultimately foster the kind of productive “environment in which enterprises can innovate and grow.”⁸⁵ In other words, “corporate success and social welfare” are not a “zero-sum game.”⁸⁶

To the contrary, the concept of “shared value” is emerging as a way to conceptualize this issue.⁸⁷ Shared value, may be defined as “policies and operating practices that enhance the competitiveness of a company while simultaneously advancing the economic and social conditions in the communities in which it operates,” and the creation of shared value “focuses on identifying and expanding the connections between societal and economic progress.”⁸⁸

⁸¹ *Nowhere Left to Run for Factory Owners in Asia*, CHINA LAB. BULL. (Kowloon, H.K.) (Jan. 15, 2013), <http://www.clb.org.hk/en/content/nowhere-left-run-factory-owners-asia-0>.

⁸² *Commission Communication*, *supra* note 74, para. 1.1, at 3.

⁸³ *Id.* (citing European Commission, *European Competitiveness Report*, COM (2008) 774 final, and accompanying *Commission Staff Working Document*, SEC (2008)2 2853 (2009), available at http://ec.europa.eu/enterprise/newsroom/cf/_getdocument.cfm?doc_id=4058).

⁸⁴ See e.g., RICHARD M. LOCKE, *THE PROMISE AND LIMITS OF PRIVATE POWER: PROMOTING LABOR STANDARDS IN A GLOBAL ECONOMY* (2013) [hereinafter LOCKE, *PRIVATE POWER*] (examining and evaluating private initiatives to enforce fair labor standards within global supply chains).

⁸⁵ *Commission Communication*, *supra* note 74, para. 1.1, at 3.

⁸⁶ Michael E. Porter & Mark R. Kramer, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, HARV. BUS. REV. 78, 80 (Dec. 2006).

⁸⁷ See Michael E. Porter & Mark R. Kramer, *Creating Shared Value*, HARV. BUS. REV. 62, 64 (Jan.–Feb. 2011).

⁸⁸ *Id.* at 66.

Approaching societal issues from a value perspective, as opposed to peripheral matters, is an important re-conceptualization of the debate.⁸⁹ This is particularly important as “trust, job satisfaction[,] and commitment,” which are integral to long-term stability, “are all [at] higher levels in companies with sustainable [human resource management] policies.”⁹⁰

This fact was demonstrated by a recent study comparing ninety companies that adopted a substantial number of social and environmental policies (High Sustainability Companies) with ninety comparable companies that adopted virtually none of these policies (Low Sustainability Companies).⁹¹ Researchers found that, over an eighteen-year period, the High Sustainability Companies substantially outperformed the Low Sustainability Companies “both in [the] stock market as well as [in] accounting performance.”⁹² The authors are championing the study as “convincing evidence that sustainability pays off,” debunking the critics who argue that sustainability destroys shareholder value.⁹³ This study marks an important milestone in research being conducted to determine the value of social policies, such as the protection of worker rights. There still is work to be done to determine the cost of mistreating workers, how this affects the bottom line, how the lack of worker protections affects consumer choices and perceptions of the company.

⁸⁹ *See Id.*

⁹⁰ Elaine Cohen et al., *HR's Role in Corporate Social Responsibility and Sustainability*, SHRM FOUNDATION, <http://www.shrm.org/about/foundation/products/documents/csr%20exec%20briefing-%20final.pdf> (last visited Jan. 31, 2014). See ELAINE COHEN ET. AL., *HRM'S ROLE IN CORPORATE SOCIAL AND ENVIRONMENTAL SUSTAINABILITY* (Jennifer Schramm ed., 2012), available at <http://www.wfpma.com/sites/wfpma.com/files/CSR%20Report%20FINAL%202012.pdf>, for more elaboration on corporate responsibility and employee wellbeing.

⁹¹ *Impact of Corporate Sustainability*, *supra* note 77, at 3.

⁹² *Id.* at 4.

⁹³ Robert G. Eccles et al., *Is Sustainability Now the Key to Corporate Success?* THE GUARDIAN (Jan. 6, 2012, 11:52 AM), available at <http://www.guardian.co.uk/sustainable-business/sustainability-key-corporate-success>.

A more positive course of inquiry is to determine what are “profitable business strategies that deliver tangible social benefits.”⁹⁴ Companies need data to determine what they need to do to “link social progress directly to business success.”⁹⁵ To determine how to track the impact of social policies, or to ascertain the “shared value measurement,” companies need to take four steps: “(1) identify the social issues to target”; (2) “make the business case [for how the] social improvement will directly improve business performance”; (3) track the progress of business performance relative to the targets identified in the business case, and (4) measure the results and use the insights gained to unlock new value.⁹⁶ The hope is that this kind of shared value measurement will also make the business attractive to investors, who will be able to see direct evidence of the economic value resulting from the company’s social policies.⁹⁷

Investors who are interested in “responsible investment” are those who favor an approach that is “founded on the view that the effective management of environmental, social[,] and governance (ESG) issues is not only the right thing to do, but is also fundamental to creating value.”⁹⁸ Social issues are defined to include human rights and labor conditions, which encompass treatment of employees, health and safety, and supply chains.⁹⁹ A recent PwC survey of its clients in the private equity (PE) industry revealed that “94% . . . believe that ESG activities can create value” yet only about 40% attempt to measure the value of these activities with formal processes.¹⁰⁰ Interestingly, PwC found geographic differences: U.S.-headquartered PE firms are focusing solely on environmental concerns, whereas European-headquartered PE firms take into account a wide range of concerns, including both environmental and

⁹⁴ Michael E. Porter et al., *Measuring Shared Value: How to Unlock Value by Linking Social and Business Results*, FSG 1 (June 2011), http://www.fsg.org/Portals/0/Uploads/Documents/PDF/Measuring_Shared_Value.pdf.

⁹⁵ *Id.* at 2.

⁹⁶ *Id.* at 4–5.

⁹⁷ *See id.* at 18.

⁹⁸ *Responsible Investment: Creating Value from Environmental, Social and Governance Issues*, PwC, at 1 (Mar. 2012), http://www.pwc.com/en_GX/gx/sustainability/research-insights/assets/private-equity-survey-sustainability.pdf.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 3, 11.

social issues.¹⁰¹ In fact, several European firms “described how they’re working with their portfolio companies to improve the way they manage ‘social’ issues like labour issues in supply chains, health and safety, and employee management.”¹⁰² Better practices regarding labor issues in supply chains, as well as health and safety improvements are leading to a range of benefits that may be difficult to quantify, but are significant, such as “decreasing turnover and attrition, boosting morale to increase productivity and retention, attracting new customers, and enhancing reputation and brand.”¹⁰³

The question is how best to assess the economic value of these social and labor policies. During the mid-1990s, there was a movement to use what became known as the “triple bottom line” (TBL) to measure performance in terms of sustainability.¹⁰⁴ The TBL is defined as “an accounting framework that incorporates three dimensions of performance: social, environmental and financial.”¹⁰⁵ Although this is not a new concept, there is no real consensus on the best way to determine the TBL value of sustainability practices.¹⁰⁶ It

¹⁰¹ *Id.* at 14.

¹⁰² *Id.*

¹⁰³ *A Geographic Perspective: Contrasting Approaches Between U.S. and European-Headquartered Private Equity Houses*, PwC, <http://www.pwc.com/gx/en/sustainability/research-insights/us-europe-private-equity-contrasts.jhtml> (last visited Jan. 29, 2014). See *2013 CSR RepTrak® 100 Study*, REPUTATION INST., <http://www.reputationinstitute.com/thought-leadership/csr-reptrak-100> (last visited Jan. 28, 2014), for more information on brand and reputation, detailing CSR perception in the world for specific companies; see also Carlos J. Torelli et al., *Doing Poorly by Doing Good: Corporate Social Responsibility and Brand Concepts*, 38 J. CONSUMER RES. 948 (2012) (discussing four case studies on the influential role brand concepts have on consumer perceptions to CSR activities); Bruce Rogers, *Is CSR Dead? Or Just Mismanaged?*, FORBES (Dec. 11, 2012, 9:05AM), <http://www.forbes.com/sites/forbesinsights/2012/12/11/is-csr-dead-or-just-mismanaged/> (discussing the role CSR initiatives play in building a company’s reputation).

¹⁰⁴ See generally Wayne Norman & Chris MacDonald, *Getting to the Bottom of the “Triple Bottom Line,”* 14 BUS. ETHICS Q. 243 (2004); Timothy F. Slaper & Tanya J. Hall, *The Triple Bottom Line: What Is It and How Does It Work?* IND. BUS. REV., Spring 2011, at 4, available at <http://www.ibrc.indiana.edu/ibr/2011/spring/pdfs/article2.pdf>.

¹⁰⁵ Slaper & Hall, *supra* note 104, at 4.

¹⁰⁶ See *id.* at 4–5. In an attempt to determine the TBL value of sustainability practices, some more progressive companies are producing sustainability reports. See, e.g., CASCADE ENG’G, TRIPLE BOTTOM LINE

is expected that more companies will learn how to produce “an integrated view of economic, environmental, and social performance,” and that there will be increased interest from investors in “different forms of corporate reporting that combine ESG and financial metrics.”¹⁰⁷ Moreover, to the extent that financial institutions are forming sustainability research departments and a number of companies are creating tools making it easier for investors to analyze sustainability data, there should be new research forthcoming about the long-term strategic benefits of sustainability strategies.¹⁰⁸ In any event, it is clear that consumers are becoming more conscious about the origins of what they buy and how the products are produced.¹⁰⁹ Responding to this demand, the Sustainable Apparel Coalition has been testing a measure called the “Higg Index” to “[u]nderstand and quantify sustainability impacts of apparel and footwear products.”¹¹⁰

III. LEARNING THE HARD WAY

Although it is unclear exactly how much labor-related sustainability measures add value to a company, it is clear that the lack of effective policies has detrimental effects on corporate reputations and makes companies in violation targets for criticism.¹¹¹

REPORT (2010), available at http://www.cascadeng.com/sites/default/files/TBL_2009.pdf (detailing its social and environmental sustainability initiatives).

¹⁰⁷ Steve Lopresti & Pamela Lilak, *Do Investors Care About Sustainability? Seven Trends Provide Clues*, PwC, at 5 (Mar. 2012), http://www.pwc.com/en_US/us/corporate-sustainability-climate-change/assets/investors-and-sustainability.pdf.

¹⁰⁸ See *id.* at 4 (referencing new tools from Thomson Reuters, MSCI, and Bloomberg to apply a financially-based methodology to assess and value ESG).

¹⁰⁹ See Stephanie Clifford, *Some Retailers Reveal Where and How That T-Shirt is Made*, N.Y. TIMES, May 9, 2013, at A1. For an interesting take on how desire for a particular product undercuts concern about how a product is made, see Neeru Paharia et. al., *Sweatshop Labor is Wrong Unless the Shoes are Cute: Cognition Can Both Help and Hurt Moral Motivated Reasoning*, 121 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 81 (2013).

¹¹⁰ *The Higg Index*, SUSTAINABLE APPAREL COALITION, <http://www.apparelcoalition.org/higgindex> (last visited Jan. 26, 2014).

¹¹¹ See, e.g., Julfikar Ali Manik, Steven Greenhouse & Jim Yardley, *Outrage Builds After Collapse in Bangladesh*, N.Y. TIMES, Apr. 26, 2013, at

Over the last ten years, Nike has worked hard to overcome its reputation as the “poster child . . . for the global race to the bottom.”¹¹² Nike has moved from a posture of “risk mitigation” to a strategy of transparency and collaboration with its contract factories in three major areas: (1) “working conditions in factories: environment, safety and health;” (2) “labor rights, freedoms and protections;” and (3) “workers’ lives outside of the factory, and living conditions in their communities.”¹¹³ Nike now boasts that it has a long-term strategic vision, that “[s]ustainability is not merely an addendum” to its core operation; it “can positively impact and improve [its] business and growth potential.”¹¹⁴ Nike’s current approach is consistent with research demonstrating that a “commitment-oriented approach to improving labor standards” aimed at “root-cause” problem solving, coupled with transparency “will induce firms to compete for higher rankings, gradually leading to a ‘ratcheting up’ of labor standards.”¹¹⁵ Codes of conduct and monitoring working conditions are not sufficient to lead to

A1. In the aftermath of a Bangladeshi factory collapse that killed nearly 300 workers, pressure is building on Western companies—including Walmart—to ensure safety. *Id.* “PVH, the parent company of Calvin Klein and Tommy Hilfiger, and Tchibo, a German retailer, have endorsed a plan in which Western retailers would finance fire safety efforts and structural upgrades in Bangladeshi factories,” in which they want other companies to sign onto, but companies like Walmart have refused. *Id.* See generally Pietra Rivoli, *Labor Standards in the Global Economy: Issues for Investors*, 43 J. OF BUS. ETHICS, 223 (2003) (discussing the issues of developing a framework for evaluating a firm’s labor standards); Xiomin Yu, *Impacts of Corporate Code of Conduct on Labor Standards: A Case Study of Reebok’s Athletic Footwear Supplier Factory in China*, 81 J. OF BUS. ETHICS, 513 (2008) (analyzing Reebok’s labor codes and the implementation at a factory in China, concluding Reebok’s labor-related codes have resulted in a “race to ethical and legal minimum” labor standards).

¹¹² JUST BUSINESS, *supra* note 2, at 3.

¹¹³ *FY10/11 Sustainable Business Performance Summary*, NIKE INC., at 9, 49, http://www.nikeresponsibility.com/report/files/report/NIKE_SUSTAINABLE_BUSINESS_REPORT_FY10-11_FINAL.pdf (last visited Jan. 30, 2014).

¹¹⁴ *Id.* at 4.

¹¹⁵ Richard Locke, Matthew Amengual & Akshay Mangla, *Virtue out of Necessity? Compliance, Commitment, and the Improvement of Labor Conditions in Global Supply Chains*, 37 POL. & SOC’Y, 319, 321–24 (2009) (citing ARCHON FUNG ET AL., CAN WE PUT AN END TO SWEATSHOPS? (Joshua Cohen & Joel Rogers, eds., 2001)).

substantial improvements in working conditions.¹¹⁶ Therefore, a much more systemic approach must be taken to lead to the kind of changes and innovative opportunities sought by Nike in its long-term vision.¹¹⁷ Following a very public backlash, Nike has been quite successful not only in addressing and promoting labor rights, but in turning it to its strategic advantage. Nike is a positive model for other companies, yet few have followed in its footsteps.

More often than not, companies wait until a public relations issue arises before they address labor issues. This is particularly evident when assessing both the ongoing challenges for the garment industry in Bangladesh, as well as Apple, Inc.'s labor-related issues over the last few years. In both cases, extreme labor conditions and subsequent deaths caused widespread calls for change, prompting industry action.

*A. ON-GOING CHALLENGES FOR THE GARMENT INDUSTRY IN
BANGLADESH*

Manufacturing in Bangladesh has long been problematic due to corruption issues and a widespread lack of protections for workers.¹¹⁸

¹¹⁶ See e.g., Richard M. Locke & Monica Romis, *The Promise and Perils of Private Voluntary Regulation: Labor Standards and Work Organizations in Two Mexican Factories*, 17 REV. OF INT'L POL. ECON. 45, 46 (2010) (providing that field research on Nike revealed that "workplace conditions and labor standards are shaped by very different patterns of work organization and human resources management policies."); see generally Richard Locke, Fei Qin & Alberto Brause, *Does Monitoring Improve Labor Standards? Lessons from Nike*, 61 INDUS. & LAB. REL. REV. 3 (2007) (describing how Nike's monitoring efforts alone were insufficient, but when combined with other interventions aimed at rectifying the root causes of poor working conditions, considerable improvement is seen).

¹¹⁷ See INT'L TEXTILE, GARMENT & LEATHER WORKERS' FED'N [ITGLWF], *An Overview of Working Conditions in Sportswear Factories in Indonesia, Sri Lanka & the Philippines* 12 (Apr. 2011), <http://forsiden.3f.dk/assets/pdf/SD1934930511.PDF> ("Monitoring cannot happen in a snap-shot way, it has to be worker-led and sustainable. The most effective way of doing this is with the full involvement of trade unions who are elected to act as the collective voice for workers").

¹¹⁸ *Compare Corruption Perceptions Index 2001*, TRANSPARENCY INT'L, http://archive.transparency.org/policy_research/surveys_indices/cpi/2001 (last visited Jan. 29, 2014) (ranking Bangladesh 91st out of the 91 countries surveyed, making it the most corrupt country in its 2001 survey) *with*

In 2007, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) petitioned to remove Bangladesh (GSP Petition) from the list of beneficiary countries under the Generalized System of Preferences (GSP), alleging a variety of violations of workers' rights in the garment industry, including issues related to "(1) the right of association, (2) the right to organize and bargain collectively, (3) freedom from compulsory labor," (4) child labor, and (5) acceptable working conditions with "respect to minimum wages, hours of work and occupational health and safety."¹¹⁹ The Office of the U.S. Trade Representative (USTR) accepted the petition for review, and placed Bangladesh under "continuing review" to monitor the progress of the Bangladesh government towards a set of workers' rights benchmarks in a 2008 demarche.¹²⁰ Bangladesh's ready-made garment (RMG) sector accounts for the vast majority of the imports to the United States from Bangladesh; since 2000, imports from Bangladesh have increased 102 percent.¹²¹ The Department of Labor estimates that there are about 5,000 RMG factories in Bangladesh, employing over four million workers.¹²² Bangladesh has been an attractive venue for manufacturing for Wal-Mart, which buys more than \$1 billion in garments from factories in the country where the minimum wage is \$37 per month—the lowest in the world.¹²³

Transparency Int'l, *Corruption Perceptions Index 2012*, 4–5 (2012), available at http://issuu.com/transparencyinternational/docs/cpi_2012_report/ (ranking Bangladesh 144 out of the 174 countries surveyed, making it still a fairly corrupt country even after 11 years).

¹¹⁹ Am. Fed'n of Labor & Cong. of Indus. Orgs. [AFL-CIO], *Petition to Remove Bangladesh from the List of Eligible Beneficiary Developing Countries Pursuant to 19 U.S.C. 2462(d) of the Generalized System of Preferences*, at 2 (June 22, 2007) [hereinafter *AFL-CIO 2007 Petition*], available at <http://www.aflcio.org/content/download/721/6570/2007+AFL-CIO+petition+on+Worker+Rights+in+Bangladesh.pdf>.

¹²⁰ BUREAU OF INT'L LABOR AFFAIRS, U.S. DEP'T OF LABOR, *IMPROVING FIRE AND GENERAL BUILDING SAFETY IN BALGLADESH 5* (June 13, 2013), available at <http://www.dol.gov/dol/grants/SGA-13-08.pdf>.

¹²¹ *Id.* at 4.

¹²² *Id.* at 4–5.

¹²³ See Steven Greenhouse & Jim Yardley, *As Walmart Makes Safety Vows, It's Seen as Obstacle to Change*, N.Y. TIMES, Dec. 29, 2012, at A1. See generally *Standards for Suppliers Manual*, WAL-MART STORES, INC. (Jan. 2012), <http://corporate.walmart.com/global-responsibility/ethical->

Bangladesh's RMG industry is growing rapidly, yet worker protections are not keeping up with the pace. For this reason, the AFL-CIO filed an update in 2011 of its GSP Petition, alleging that conditions in the RMG sector have gotten progressively worse, citing factory fires, unpaid wages, and harassment of workers' rights advocates.¹²⁴ The AFL-CIO renewed its call for the United States to suspend Bangladesh's GSP trade preferences, unless the government of Bangladesh agreed to a binding plan to improve labor conditions and would take immediate steps toward implementation of that plan.¹²⁵ Unfortunately, no substantial changes were implemented, and the RMG labor situation was marked by tragedy in November 2012, when 112 workers died in a factory fire at Tazreen Fashions.¹²⁶ Horrifyingly, managers blocked exits, ordering workers back to their sewing machines, and iron grilles blocked the windows of this factory, which was manufacturing for a number of well-known global companies, including Wal-Mart.¹²⁷ Public scrutiny was directed immediately towards Wal-Mart because documents found at the Tazreen apparel factory showed that five of the factory's fourteen production lines were devoted to manufacturing apparel for Wal-Mart and its Sam's Club subsidiary.¹²⁸ Wal-Mart attempted to distance itself from the Tazreen factory, yet its statements were problematic in light of the fact that one of its directors for ethical sourcing allegedly opposed a 2011 effort to help Bangladesh factories improve their electrical and fire safety, citing concerns about extensive and costly modifications.¹²⁹ Wal-Mart, in fact, was

sourcing/standards-for-suppliers [hereinafter *Manual*] (follow "Walmart's Standards for Suppliers Manual" hyperlink). Greenhouse & Yardley, *supra* note 133.

¹²⁴ AFL-CIO, *2011 Update of the AFL-CIO's 2007 Petition to Remove Bangladesh from the List of Eligible Beneficiary Developing Countries Under the Generalized System of Preferences*, at 2 (Apr. 2011) [hereinafter *AFL-CIO 2007 Petition Update*], available at <http://www.aflcio.org/content/download/720/6567/2011+upd>.

¹²⁵ *Id.*

¹²⁶ Jim Yardley, *Recalling Fire's Horror and Exposing Global Brands' Safety Gap*, N.Y. TIMES, Dec. 7, 2012, at A1.

¹²⁷ *Id.* Regarding the use of "Wal-Mart" vs. "Walmart," in this manuscript, the author uses the reference to the corporate name, "Wal-Mart." References to the company in citations are the same as used by the source.

¹²⁸ Steven Greenhouse, *Documents Indicate Walmart Blocked Safety Push in Bangladesh*, N.Y. TIMES, Dec. 6, 2012, at A16.

¹²⁹ *Id.*

warned about serious fire safety concerns at Tazreen Fashions in a May 2011 inspection audit report.¹³⁰ Among other things, the inspection found that exits and stairwells were blocked, that workers did not know evacuation routes, and that the factory lacked fire extinguishers.¹³¹ Although Wal-Mart claimed that it no longer allowed Tazreen to produce its clothing, it declined to explain how it alerts suppliers when they are barred from production and why Tazreen was producing clothing for Wal-Mart at the time of the fire.¹³² Moreover, by Wal-Mart's own admission, its ethical sourcing audits did not adequately cover fire and electrical safety issues.¹³³

In the wake of much negative publicity following the Tazreen fire, and facing pressure to take action, Wal-Mart announced a "zero tolerance policy" for violations of its global sourcing standards, and that it was severing ties with any firm who subcontracts work to factories without its knowledge.¹³⁴ The new policy replaced its "three strikes" policy, which gave suppliers three opportunities to rectify violations before termination.¹³⁵ The new policy also requires new facilities to prequalify with an adequate safety rating to enter Wal-Mart's supply chain, and to institute enhanced fire safety standards, including protocols for fire safety in Bangladesh.¹³⁶

¹³⁰ See *id.* Auditors gave the factory an "orange" rating, indicating that there were "higher-risk violations"; a follow-up audit in August 2011 gave the factory a "yellow" rating, indicating an improved situation with "medium-risk violations." *Id.*

¹³¹ Syed Zain Al-Mahmood, *Fire Warnings Went Unheard—Four Suppliers Made Wal-Mart Clothing at Bangladesh Factory After It Failed Safety Inspections*, WALL. ST. J., Dec. 11, 2012, at B1.

¹³² *Id.*

¹³³ Greenhouse & Yardley, *supra* note 123.

¹³⁴ Kim Bhasin, *Wal-Mart Sent a 10-Page Letter to its Suppliers Warning Them of 'Zero-Tolerance,'* BUS. INSIDER (Jan. 22, 2013, 5:15 PM), <http://www.businessinsider.com/walmart-zero-tolerance-suppliers-2013-1>. See also Shelly Banjo, *Wal-Mart Toughens Supplier Policies*, WALL. ST. J., Jan. 21, 2013, at B1.

¹³⁵ Banjo, *supra* note 134.

¹³⁶ Wal-Mart Stores, Inc., *Ethical Sourcing Update, Fact Sheet for Supplier Letter Announcement*, at 1–2 (2013), http://az204679.vo.msecnd.net/media/documents/ethical-sourcing-supplier-letter-fact-sheet-2013_130032855783843527.pdf [hereinafter *Ethical Sourcing Update*]. See also *Manual*, *supra* note 123; *Ethical Sourcing Audit Process*, WAL-MART, <http://corporate.walmart.com/global->

Just as the furor over the Tazreen fire was starting to wane, the Rana Plaza building, a multi-story garment factory, collapsed in Bangladesh in April 2013, killing at least 1,129 workers.¹³⁷ Before the collapse, inspection teams discovered cracks in the building structure. While shops on the lower floors were closed, factory workers employed on the upper floors of the Rana Plaza building were instructed to continue working.¹³⁸ Yet again, Wal-Mart was in the spotlight, along with a number of other American and European companies.¹³⁹ Weeks later, another fire at a Bangladeshi garment factory killed eight workers.¹⁴⁰ Taken together, these tragedies reignited the debate about who should be responsible and how the safety issues should be resolved.¹⁴¹ Importantly, the discussion about labor rights as human rights also gained traction, criticizing companies for seeking out rock-bottom labor standards; consumers for wanting fast, cheap fashion; and the government of Bangladesh for corruption and not protecting its citizens.¹⁴² Some have asked

responsibility/ethical-sourcing/audit-process (last visited Jan. 29, 2013) (describing how suppliers may prequalify with adequate safety ratings by receiving “one of Walmart’s two highest assessment ratings”).

¹³⁷ Jim Yardley, *Justice Elusive in Bangladesh Factory Disaster*, N.Y. TIMES, June 30, 2013, at A1. See also Suzanne Kapner, Biman Mukherji & Shelly Banjo, *Before Dhaka Collapse, Some Firms Fled Risk*, WALL ST. J., May 3, 2013, at A7; Julfikar Ali Manik & Jim Yardley, *Building Collapse in Bangladesh Kills Scores of Garment Workers*, N.Y. TIMES, Apr. 25, 2013, at A1 [hereinafter *Building Collapse*].

¹³⁸ See *Building Collapse*, *supra* note 137.

¹³⁹ *Id.* See also Kapner et al., *supra* note 137.

¹⁴⁰ See Jim Yardley, *Fire at Bangladeshi Factory Kills 8*, N.Y. TIMES, May 9, 2013, <http://www.nytimes.com/2013/05/10/world/asia/fire-at-bangladeshi-factory-kills-8.html?ref=global-home>.

¹⁴¹ See, e.g., *Disaster at Rana Plaza*, ECONOMIST, May 4, 2013, at 12; Editorial Board, *Worker Safety in Bangladesh and Beyond*, N.Y. TIMES, May 5, 2013, at SR10; Fazle Hasan Abed, Op-Ed., *Bangladesh Needs Strong Unions, Not Outside Pressure*, N.Y. TIMES, Apr. 29, 2013, <http://www.nytimes.com/2013/04/30/opinion/bangladesh-needs-strong-unions-not-outside-pressure.html?pagewanted=all>.

¹⁴² See *Disaster at Rana Plaza*, *supra* note 141 (blaming the Bangladeshi government for making lackluster attempts to enforce building codes and companies for exploiting poorly paid workers with a great amount of indifference); Abed, *supra* note 141 (criticizing buyers for squeezing prices and the Bangladeshi government for neglecting worker safety issues). See also Ann Zimmerman & Neil Shah, *American Tastes Fuel Boom in*

consumers to take a hard look at their buying choices. For example, consider how much it would cost to manufacture a denim shirt in the United States versus Bangladesh. The answer? It would cost \$13.22 to make a denim shirt in the United States, while it would only cost \$3.72 in Bangladesh.¹⁴³

Acknowledging that audits alone are insufficient to improve worker safety in Bangladesh (and elsewhere), firms questioned whether they should pull out of Bangladesh or stay and work for effective change.¹⁴⁴ The result was three different, important, and significant actions: a binding agreement entered into by mostly European firms, a separate agreement crafted by American firms, and the decision of the United States to end GSP privileges for Bangladesh.¹⁴⁵

First, on May 15, 2013, European retailers led an initiative resulting in an Accord on Fire and Building Safety in Bangladesh (Accord) in which the parties agreed “to establish a fire and building safety program in Bangladesh for a period of five years.”¹⁴⁶ In addition, the signatories to the Accord also agreed to a number of key provisions including:

- (1) requiring suppliers to accept inspections and to implement remediation measures;
- (2) appointing a Steering Committee with equal representation chosen by the trade union signatories, the company signatories, and a representative chosen from the ILO as a neutral chair;

Bangladesh, WALL. ST. J., May 13, 2013, at B1 (criticizing American shoppers for their “appetite for cheap clothes”).

¹⁴³ *Bangladesh vs. the U.S.: How Much Does It Cost to Make a Denim Shirt?* CNN, (May 3, 2013, 7:30 AM), http://www.cnn.com/2013/05/02/world/asia/bangladesh-us-tshirt/index.html?iid=article_sidebar.

¹⁴⁴ See *Workplace Safety: Avoiding the Fire Next Time*, THE ECONOMIST, May 4, 2013, at 65.

¹⁴⁵ See discussion *infra* pp. 13–15.

¹⁴⁶ Accord on Fire and Building Safety in Bangladesh, Bangladesh Accord Foundation, at 1, May 15, 2013, available at http://www.bangladeshaccord.org/wp-content/uploads/2013/10/the_accord.pdf.

- (3) resolving disputes pursuant to binding arbitration;
- (4) undertaking credible inspections by an independent, qualified Safety Inspector with fire and safety expertise and impeccable credentials;
- (5) taking prompt remedial corrective action where warranted, including taking reasonable efforts to protect workers;
- (6) adopting an extensive fire and building safety training program;
- (7) making information about suppliers and inspection reports publically available to ensure transparency;
- (8) terminating suppliers who do not participate fully in the program; and
- (9) providing financial support to fund the implementation of the program.¹⁴⁷

Subsequent to the Accord, the signatories agreed to a governance plan, detailing the role of the Steering Committee to act as the executive decision-making body for the group and establishing an Advisory Board to ensure that all stakeholders⁷—both local and international—are engaged in constructive dialogue.¹⁴⁸ As promised, in July 2013, the Steering Committee released an Implementation Team Report for the Accord.¹⁴⁹ The Accord is legally binding on all signatory retailers, which are primarily European, except for a few American companies, including Abercrombie & Fitch and PVH (manufacturing for Tommy Hilfiger and Calvin Klein).¹⁵⁰ Major

¹⁴⁷ *See Id.*

¹⁴⁸ Bangl. Accord Found., *Implementation Team Report* (June 28, 2013), <http://www.industrialunion.org/sites/default/files/uploads/documents/reportimplteam-final-en.pdf#overlay-context=users/tom>.

¹⁴⁹ *See Id.*; Press Release, Bangl. Accord Found., *The Accord on Fire and Building Safety in Bangladesh's Garment Industry Announces Its Plan to Implement the Accord Programme* (July 8, 2013) *available at* http://www.bangladeshaccord.org/wp-content/uploads/2013/07/press_release_2013.pdf.

¹⁵⁰ Steven Greenhouse, *Clothiers Act to Inspect Bangladeshi Factories*, N.Y. TIMES, July 8, 2013, at B1.

European companies involved in the Accord include H&M, Carrefour, and Marks & Spencer.¹⁵¹ The Accord has been hailed as a promising approach and an “ambitious initiative to use the buying power of Western companies to improve workplace safety” in Bangladesh.¹⁵² The legally binding nature of the Accord, as well as its involvement from multiple stakeholders, evidences a substantial commitment to workplace safety not previously seen in Bangladesh, or perhaps any other jurisdiction with problematic labor issues in supply chains. Instead of leaving Bangladesh, causing thousands to be unemployed, by signing onto the Accord, these companies are exhibiting true commitment to corporate social responsibility for labor practices. Although there is still much work to be accomplished for Bangladeshi workers to have rights of association, fair wages, and other labor protections, this Accord marks a substantial step in improving human labor rights.

Most major American retailers, including Wal-Mart, opposed the Accord, citing concerns about legal liability.¹⁵³ The binding nature of the Accord does create legal liability, and it is unclear to many U.S. companies how that liability may translate into litigation in the United States.¹⁵⁴ American companies have been criticized for overblowing the legal ramifications, yet, for example, in a situation like the disaster in the Rana Plaza building involving numerous deaths and injuries, it is uncertain the extent to which signatories of the Accord could be held liable for damages.¹⁵⁵ Even with this glimpse of retailer protection, pressure from consumer and labor groups continued to mount,¹⁵⁶ and U.S. retailers worked with the nonprofit

¹⁵¹ *Id.* See also *Signatories*, BANGLADESH ACCORD FOUND., <http://www.bangladeshaccord.org/signatories/> (providing an up to date list of the signatory retailers to the Accord) (last visited Jan. 29, 2014).

¹⁵² Editorial Board, *A Promising Approach to Factory Safety*, N.Y. TIMES, July 12, 2013, at A20.

¹⁵³ See Steven Greenhouse, *U.S. Retailers See Big Risk in Safety Plan for Factories*, N.Y. TIMES, May 23, 2013, at B1.

¹⁵⁴ *See id.*

¹⁵⁵ *See id.* However, this concern is could be lessen in the wake of *Kiobel v. Royal Dutch Petroleum, Co.*, 133 S. Ct. 1659 (2013), which limited liability under the Alien Tort Claims Act.

¹⁵⁶ *See, e.g.*, Joint Statement, ALF-CIO & Change to Win, *The Attempt by Walmart and Gap to Undermine Worker Safety in Bangladesh* (May 30, 2013), available at <http://www.changetowin.org/news/joint-statement-afl-cio-and-change-win-attempt-walmart-and-gap-undermine-worker-safety>

group, Bipartisan Policy Center, to develop the second important action aimed at addressing safety concerns in Bangladesh.¹⁵⁷ In addition to Wal-Mart, this alternative plan includes American companies such as Gap, JC Penney, Sears, Target, the National Retail Federation, and the American Apparel and Footwear Association.¹⁵⁸ In July 2013, shortly after the Implementation Plan for the Accord was issued, the U.S. retailers announced their plan, the Alliance for Bangladesh Worker Safety (Alliance), to inspect an estimated 500 Bangladesh factories that the companies would use within the next 12 months and to “develop plans to fix any substantial safety problems.”¹⁵⁹ Central to the Alliance is the agreement to make a five-year commitment, involving direct funding of at least \$42 million, plus “\$100 million in access to low-cost capital funding for factory improvements.”¹⁶⁰ Additionally, all factories manufacturing for the Alliance retailers should be inspected and all workers should be trained within one year.¹⁶¹ Although the Alliance plan has been criticized as a “fake safety sham,” it also has been recognized as a serious plan with money behind it to support factory improvements.¹⁶² The plan is not as comprehensive as the Accord, and currently lacks participation by unions, yet it is another leading example of an important step towards improving workplace safety in Bangladesh. Between the collective effort of the Accord

(expressing deep concern about the plan to move forward with a “corporate-controlled, nonbinding process for adopting building safety standards in Bangladesh”).

¹⁵⁷ Steven Greenhouse, *U.S. Retailers Announce New Factory Safety Plan*, N.Y. TIMES, May 31, 2013, at B6.

¹⁵⁸ *Id.* A current list of the Alliance members can be found on its website. See *About the Alliance for Bangladesh Worker Safety*, Alliance for Bangladesh Worker Safety, <http://www.bangladeshworkersafety.org/about> (last visited Jan. 29, 2014).

¹⁵⁹ Steven Greenhouse & Stephanie Clifford, *U.S. Retailers Offer Plan for Safety at Factories*, N.Y. TIMES, July 11, 2013, at B10.

¹⁶⁰ George Mitchell & Olympia Snowe, *A Shared Responsibility: North American Alliance of Retailers and Brands Reach Agreement on a Bangladesh Worker Safety Program*, HUFFINGTON POST (July 10, 2013, 12:04 PM), http://www.huffingtonpost.com/george-mitchell/bangladesh-worker-safety-program_b_3573861.html.

¹⁶¹ *Id.*

¹⁶² See Marc Gunther, *Gap Spearheads New Alliance for Bangladeshi Worker Safety*, THE GUARDIAN (July 11, 2013, 10:33 EDT), <http://www.guardian.co.uk/sustainable-business/gap-alliance-bangladeshi-worker-safety#>.

and the Alliance, Western retailers have the potential to effectuate meaningful change for Bangladeshi workers.

Another important aspect of effectuating a change in workplace safety in Bangladesh is the extent to which foreign governments should take action. With continuing pressure from unions, including the AFL-CIO,¹⁶³ the United States moved to suspend benefits to Bangladesh under the GSP.¹⁶⁴ Pursuant to the Trade Act of 1974, “the President shall not designate any country a beneficiary developing country under the [GSP] if [the] country has not taken or is not taking steps to afford internationally recognized worker rights . . . in the country”¹⁶⁵ The suspension of Bangladesh’s GSP benefits would become effective sixty days after publication of the proclamation in the Federal Register.¹⁶⁶ The “review of Bangladesh’s compliance with statutory GSP eligibility criteria related to worker rights” began in 2007,¹⁶⁷ prompted by the AFL-CIO GSP Petition.¹⁶⁸ Since that time, the U.S. Department of Labor has provided “technical assistance to improve the labor” framework in Bangladesh, including building and fire safety standards.¹⁶⁹ The position of the United States Trade Representative (USTR) is that this action is taken in connection with “initiating new discussions with the government of Bangladesh regarding steps to improve the worker rights environment . . . so that GSP benefits can be restored.”¹⁷⁰ The suspension of GSP benefits was largely symbolic, as garments are not covered by that scheme; yet, subsequent action by the U.S. Government illustrates the commitment to worker rights

¹⁶³ See Ian Urbina, *Unions Seek to Revise Bangladesh Trade Status*, N.Y. TIMES, May 31, 2013, at B1.

¹⁶⁴ Press Release, Office of the Press Sec’y, The White House, Technical Trade Proclamation to Congress Regarding Bangladesh (June 27, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/06/27/technical-trade-proclamation-congress-regarding-bangladesh>.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Press Release, Office of the U.S. Trade Rep., U.S. Trade Representative Michael Froman Comments on President’s Decision to Suspend GSP Benefits for Bangladesh (June 27, 2013) [hereinafter U.S.T.R. June 2013 Press Release], *available at* <http://www.ustr.gov/about-us/press-office/press-releases/2013/june/michael-froman-gsp-bangladesh>.

¹⁶⁸ AFL-CIO 2007 *Petition*, *supra* note 119.

¹⁶⁹ U.S.T.R. June 2013 Press Release, *supra* note 167.

¹⁷⁰ *Id.*

and safety in Bangladesh.¹⁷¹ To that end, the Government outlined specific steps to be taken to improve labor rights and worker safety in its *Bangladesh Action Plan 2013 (Action Plan)*.¹⁷² The *Action Plan* sets forth specific steps to be taken, including increasing the number of inspectors and improving their training, and it also contains the threat of increased “fines and other sanctions, including loss of import and export licenses,” if future violations of fire and safety standards occur.¹⁷³ Furthermore, to promote transparency the *Action Plan* requires Bangladesh to “[c]reate a publically accessible [database] of all RMG/knitwear factories as a platform for reporting labor, fire, and building inspections,” such as detailed, specific information about the factories and the names of the lead inspectors.¹⁷⁴ Although critics are concerned that the suspension of benefits will harm labor progress in Bangladesh because it is a punitive measure that benefits American unions,¹⁷⁵ the *Action Plan* should lead to safer working conditions in Bangladesh. The European Union is also considering taking action through its GSP “to incentivize responsible management of supply chains”¹⁷⁶ if Bangladesh does not act “to ensure that factories . . . comply with international labor standards, including [ILO] conventions.”¹⁷⁷

¹⁷¹ See Press Release, U.S. Dep’t of Labor, Statement by the U.S. Gov’t on Labor Rights and Factory Safety in Bangladesh (July 19, 2013), available at <http://www.dol.gov/opa/media/press/ilab/ILAB20131494.htm> [hereinafter U.S. Dep’t of Labor Press Release].

¹⁷² See *Id.*; see also *Action Plan Overview*, THE ALLIANCE FOR BANGL. WORKER SAFETY, <http://www.bangladeshworkersafety.org/initiative> (then follow “Download Action Plan” hyperlink) (last visited Jan. 25, 2014).

¹⁷³ U.S. Dep’t of Labor Press Release, *supra* note 171.

¹⁷⁴ *Id.*

¹⁷⁵ See, e.g., *American Unions vs. Bangladesh’s Workers: A U.S. Threat to Withdraw Trade Preferences Will Harm Labor Progress*, WALL. ST. J. (Feb. 19, 2013), <http://online.wsj.com/article/SB10001424127887323495104578311753149852548.html> (asserting that the AFL-CIO position that Bangladeshi workers would be better served if they were unionized may be counterproductive because “local unions tend to quickly become appendages of the country’s political parties, which they use them as street muscle”).

¹⁷⁶ Peter Spiegel & James Wilson, *E.U. Considers Trade Limits on Bangladesh*, FIN. TIMES, May 1, 2013, <http://www.ft.com/intl/cms/s/0/7f6d9cb0-b24d-11e2-8540-00144feabdc0.html#slide0>.

¹⁷⁷ Press Release, Eur. Union, Joint Statement by HR/VP Catherine Ashton & EU Trade Comm’r Karel De Gucht Following the Recent Building

In the wake of intense international pressure from a wide array of stakeholders, Bangladesh passed the *Bangladesh Labour (Amendment) Act 2013 (Labor Act)*.¹⁷⁸ The *Labor Act* amended “[eighty-seven] sections of the 2006 labor law . . . to ‘make it world class,’” and it removed some of the obstacles workers faced in the freedom to unionize.¹⁷⁹ According to *Human Rights Watch*, however, even though “Bangladesh has ratified most of the core [ILO] labor standards, including Convention No. 87 on freedom of association and Convention No. 98 on the right to organize and bargain collectively[,] . . . important sections of the Labor Act still do not meet those standards.”¹⁸⁰ With regard to factory safety, one key feature of the new law is that all factories that sell products within Bangladesh must set aside 5% of net profits in an employee welfare fund,¹⁸¹ yet, the subjective exemption for export-oriented factories undercuts its effectiveness, as many factories may seek exemption.¹⁸² Moreover, the *Labor Act* requires “prior approval from the [Bangladeshi] Labor and Employment Ministry before either trade unions or employer organizations [can] receive ‘technical, technological, health & safety and financial support’ from international sources.”¹⁸³ *Human Rights Watch* also urges donor countries to “reject this unjustified government interference with worker and employer groups,” as it has a potentially devastating effect on groups attempting to implement changes for workers.¹⁸⁴ Although Bangladesh is touting the new Labor Act as ensuring that labor rights are strengthened, its shortcomings on the face of the law are readily apparent for those who seek meaningful change for Bangladeshi workers, and there is no assurance that there will be effective enforcement of pro-worker provisions.

Collapse in Bangladesh (Apr. 30, 2013), available at http://europa.eu/rapid/press-release_MEMO-13-395_en.htm.

¹⁷⁸ Syed Zain Al-Mahmood, *Bangladesh Passes New Labor Law*, WALL ST. J., July 16, 2013, at B3.

¹⁷⁹ *See id.*

¹⁸⁰ *Bangladesh: Amended Labor Law Falls Short*, HUM. RTS. WATCH (July 15, 2013), <http://www.hrw.org/news/2013/07/15/bangladesh-amended-labor-law-falls-short>.

¹⁸¹ Steven Greenhouse, *Under Pressure, Bangladesh Adopts New Labor Law*, N.Y. TIMES, July 17, 2013, at A6.

¹⁸² *Id.*

¹⁸³ HUM. RTS. WATCH, *supra* note 180.

¹⁸⁴ *See id.*

B. APPLE'S LABOR SUSTAINABILITY INITIATIVES IN CHINA

Similar to the criticism in the ready-made garment industry sector, conditions in electronics factories are now under the spotlight. As one of the fastest growing global industries, with over 15 million employees, sustainability issues are an emerging issue in the electronics sector, including workplace labor practice issues.¹⁸⁵ Apple has been a highly respected company;¹⁸⁶ however, its prominence has been tarnished by revelations about the treatment of the workers who manufacture its products.¹⁸⁷ For example, *China Labor Watch* published an article about the sub-standard working conditions at a Foxconn factory in China, which manufactures electronics for Apple, as well as other major companies, such as Dell and Hewlett-Packard.¹⁸⁸ This article noted the intense pressure under which Foxconn employees must work, and explained that because the monthly base salary does not even cover essential living expenses, workers are compelled to work enormous amounts of overtime.¹⁸⁹ These factors, and more, culminated in some denouncing Foxconn as a “sweatshop,” after ten workers committed suicide in the first five months of 2010 at one specific factory.¹⁹⁰ A few months later, information about the working conditions in Apple’s supply chain hit the mainstream media. In June 2010, Apple’s woes with worker problems at the Foxconn factory in China

¹⁸⁵ See generally *Electronics*, IDH, <http://www.idhsustainabletrade.com/electronics> (last visited Jan. 25, 2014) [hereinafter *IDH Electronics*] (providing an overview of the IDH program to make international supply chains more sustainable).

¹⁸⁶ *2012 Global RepTrak™ 100 The World's Most Reputable Companies*, REPUTATION INST. 9 (2012), http://www.rankingthebrands.com/PDF/2012%20RepTrak%20100-Global_Report.%20Reputation%20Institute.pdf (ranking Apple number five for overall reputability in 2012, number two in 2011, and number six in 2010).

¹⁸⁷ *2013 Most Reputable U.S. Companies*, REPUTATION INST. 13–15 (2013), <http://www.rankingthebrands.com/PDF/Global%20Reputation%20Pulse%20-%20U.S.%20Top%20100%202013.pdf> (showing that Apple dropped out of the top ten companies for overall reputation in 2013; ranking at number twenty-four).

¹⁸⁸ See Li Qiang, *The Tragedy of the Foxconn Sweatshop*, CHINA LAB. WATCH (May 23, 2010), <http://chinalaborwatch.org/pro/show-98.html>; David Barboza, *After Suicides, Scrutiny of China's Grim Factories*, N.Y. TIMES, June 7, 2010, at A1.

¹⁸⁹ See Qiang, *supra* note 188.

¹⁹⁰ See *id.*

became widely known after the *New York Times* published a story filled with graphic details about the first worker to commit suicide at the factory.¹⁹¹ His “paystub [showed] that he worked 286 hours in the month before he died, including 112 hours of overtime, . . . even with extra pay for overtime, he earned the equivalent of \$1 an hour.”¹⁹² The article revealed that the first suicide took place in January 2010, soon followed by twelve more suicides, or attempts, within the next six months at Foxconn.¹⁹³ According to the article, because working and living conditions were so poor, tens of thousands of workers simply quit their jobs and the typical hire lasts “just a few months” before leaving.¹⁹⁴ In addition to the suicide reports, there was another report about a worker who allegedly died as the result of fatigue.¹⁹⁵ The reports were disturbing and startling to Apple’s loyal customers, which likely caused the decrease in Apple’s reputation from 2012 to 2013.

Former Special Representative for the U.N. Secretary General, John Ruggie points out, however, what is most surprising is that Apple managed to avoid close scrutiny for both its apparent failures to address the problems at Foxconn, and for contributing to the problem¹⁹⁶ through its demands for what Apple praised as supply chain “speed and flexibility.”¹⁹⁷ One Apple executive described that capacity as “breathtaking,”¹⁹⁸ but this efficiency comes with an enormous human cost. One of the most telling examples is when Apple demanded that one of its Chinese factories implement an

¹⁹¹ See Barboza, *supra* note 188.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See *Another Foxconn Employee Died of Fatigue*, CHINA LAB. WATCH (June 3, 2010), <http://www.chinalaborwatch.org/pro/proshow-96.html> (last visited Jan. 25, 2014).

¹⁹⁶ JUST BUSINESS, *supra* note 2, at 1. This is despite an early report about conditions in Chinese factories manufacturing Apple products, which did not gain much international traction. See *The Stark Reality of iPod’s Chinese Factories*, MAIL ONLINE (last updated Aug. 18, 2006), <http://www.dailymail.co.uk/news/article-401234/The-stark-reality-iPods-Chinese-factories.html>.

¹⁹⁷ See Charles Duhigg & Keith Bradsher, *How the U.S. Lost Out on iPhone Work*, N.Y. TIMES, Jan. 21, 2012, at A1.

¹⁹⁸ *Id.*

assembly line overhaul to accommodate a new screen for the iPhone within weeks of its release in 2007:

A foreman immediately roused 8,000 workers inside the company's dormitories Each employee was given a biscuit and a cup of tea, guided to a workstation and within half an hour started a 12-hour shift fitting glass screens into beveled frames. Within 96 hours, the plant was producing over 10,000 iPhones a day.¹⁹⁹

This kind of just-in-time manufacturing can push suppliers to drive workers beyond what is reasonable or within the law,²⁰⁰ as well as in violation of a company's own standards.

Apple published its first Supplier Code of Conduct just two years before this iPhone push, and conducted its first audits in 2006.²⁰¹ Apple's detailed Supplier Code of Conduct contains clear provisions specifically captioned "Labor and Human Rights."²⁰² This section contains clear protections for workers to be free from discrimination, to receive fair treatment, to prevent "involuntary labor and human trafficking," to prevent underage labor (workers under fifteen years old), to protect juvenile workers (workers fifteen to eighteen years old), to restrict working hours, to receive wages and benefits required by law, and to be free to associate.²⁰³ Additionally, the Supplier Code of Conduct contains health and safety provisions that apply to the manufacturing facilities, as well as worker dormitories.²⁰⁴

Despite Apple's stated commitment to ensure "that working conditions in [its] supply chain are safe, [and] that workers are treated with respect and dignity as understood by the international community,"²⁰⁵ there is a disconnect between the

¹⁹⁹ *Id.*

²⁰⁰ See LOCKE, PRIVATE POWER, *supra* note 84, at 4–5.

²⁰¹ *Supplier Responsibility*, APPLE INC. (2013), <http://www.apple.com/supplierresponsibility/accountability.html> (last visited Jan. 24, 2014).

²⁰² *Supplier Code of Conduct*, APPLE INC., 1 (2013), http://images.apple.com/supplierresponsibility/pdf/Apple_Supplier_Code_of_Conduct.pdf [hereinafter *Supplier Code of Conduct*].

²⁰³ *Id.* at 1–3.

²⁰⁴ *Id.* at 3–4.

²⁰⁵ *Id.* at 1.

Supplier Code of Conduct and its enforcement. Apple's 2011 Supplier Responsibility Progress Report addressed its audit results for 2010 and compliance program.²⁰⁶ In this report, Apple revealed that it "conducted audits at 127 facilities, including 30 repeat audits and 97 first-time audits," detailing noncompliance.²⁰⁷ The audits uncovered thirty-six core violations, including involuntary labor, underage workers, worker endangerment, falsification of records, bribery, and coaching workers on how to respond to auditor's questions.²⁰⁸ The report also specifically addressed the suicides, noting Apple's subsequent investigation and response commending Foxconn CEO, Terry Gou, and senior executives from Apple "for taking quick action . . . on several grounds simultaneously, including hiring . . . psychological counselors, establishing a 24-hour care center, and even attaching large nets to the factory buildings to prevent impulsive suicides."²⁰⁹ The latter step immediately subjected Apple to ridicule, as photos of the enormous nets around Foxconn circulated.²¹⁰ Instead of addressing the root of the problems—the working and living conditions—leading to the suicides, Foxconn was merely establishing triage measures that appeared to be ineffective. In May, three workers were killed in a combustible aluminum dust explosion in a Foxconn-operated plant in Chengdu, which reportedly "could [have] result[ed] in the loss of production of 500,000 Apple iPad 2 tablets . . . during the second quarter of [2011]."²¹¹

Throughout 2011, Apple continued its monitoring program focusing on the five core areas in its Supplier Code of Conduct (labor and human rights; worker health and safety; environmental impact; ethics; and management systems), ultimately reporting the findings in its Supplier Responsibility 2012 Progress Report (2012 Progress

²⁰⁶ *Apple Supplier Responsibility 2011 Progress Report*, APPLE INC., 19 (2011), http://images.apple.com/supplierresponsibility/pdf/Apple_SR_2011_Progress_Report.pdf (last visited Jan. 24, 2013).

²⁰⁷ *Id.* at 15.

²⁰⁸ *Id.* at 16.

²⁰⁹ *Id.* at 19.

²¹⁰ See, e.g., Ramona Emerson, *John Stewart Argues with Siri over Foxconn*, HUFFINGTON POST (Jan. 17, 2012), http://www.huffingtonpost.com/2012/01/17/jon-stewart-foxconn-siri-the-daily-show-video_n_1210556.html.

²¹¹ David Barboza, *Explosion at Apple Supplier Caused by Dust, China Says*, N.Y. TIMES (May 24, 2011), <http://www.nytimes.com/2011/05/25/technology/25foxconn.html>.

Report).²¹² At the behest of labor rights groups, journalists, and academics who were seeking more transparency, Apple also published a list of its leading suppliers—the 156 companies that manufacture more than 97% of what Apple pays to suppliers to manufacture products—on its Supplier Responsibility website.²¹³ In the 2012 Progress Report, Apple reported that it conducted 229 audits (80% more than the previous year) and that it found fewer core violations: twenty-two core violations, including seventeen for involuntary labor (including two repeat offenders) and five facilities with underage labor.²¹⁴ Problems with excessive working hours continued to persist as well. Pursuant to Apple’s Supplier Code of Conduct, workers may work a maximum of sixty hours per week including overtime, and they must have at least one day of rest per seven days of work (with exceptions for unusual or emergency situations).²¹⁵ Despite this fact, Apple found that “[ninety-three] facilities had records that indicated that more than 50 percent of their workers exceeded weekly working hour limits of sixty [hours] in at least [one] week out of the [twelve-week] sample.”²¹⁶ To address this issue, Apple began “weekly tracking of working hours . . . required facilities to make changes to their work shifts and hiring . . . [and] hired a consultant to provide additional training to facilities on factory planning to avoid excessive work hours.”²¹⁷ Moreover, Apple found multiple violations regarding the payment of wages and benefits pursuant to the law, including 108 facilities that did not pay required overtime.²¹⁸ Apple responded by requiring repayment of all wages and benefits to comply with the law.²¹⁹

Clearly, Apple’s monitoring and compliance was not as effective as it could have been, which caused ongoing criticism about the

²¹² See *Apple Supplier Responsibility 2012 Progress Report*, APPLE INC. (2012), http://www.apple.com/supplierresponsibility/pdf/Apple_SR_2012_Progress_Report.pdf [hereinafter *2012 Progress Report*].

²¹³ See Nick Wingfield & Charles Duhigg, *Apple Lists Suppliers for 1st Time*, N.Y. TIMES, Jan. 14, 2012, at B1; *2012 Progress Report*, *supra* note 212, at 3; *Supplier Responsibility at Apple*, APPLE INC., http://images.apple.com/supplierresponsibility/pdf/Apple_Supplier_List_2013.pdf (last visited Jan. 24, 2013).

²¹⁴ *2012 Progress Report*, *supra* note 212, at 4, 9.

²¹⁵ *Supplier Code of Conduct*, *supra* note 202, at 2.

²¹⁶ *2012 Progress Report*, *supra* note 212, at 8.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

treatment of workers in Apple's supply chain.²²⁰ Undoubtedly, this prompted Apple to join the Fair Labor Association (FLA) in January 2012, which included Apple's agreement to "align its compliance program with FLA obligations" within two years.²²¹ This was a timely, preemptory move, as the *New York Times* published a story about a week later highlighting the egregious working conditions within the Apple supply chain.²²² Unlike the 2012 Progress Report, which presents an overview of the issues in a way that is distanced from any kind of emotion, the *New York Times* article is rich with troublesome details, designed to give readers a sense of how egregious working conditions affect the people who are manufacturing sleek Apple products.²²³ A few examples from the article offer a glimpse into the human toll: workers standing "so long that their legs swell until they can hardly walk"; workers injured after being ordered to use a poisonous chemical to clean iPhone screens; and two combustible dust explosions in 2012, which killed four people and injured seventy-seven after Apple failed to heed a warning about hazardous working conditions.²²⁴ While Apple did take a positive step by releasing the names of some of its suppliers and by attempting a monitoring program, the company's lack of transparency makes it difficult for labor and human rights advocates to help improve working conditions.

Despite Apple's meager efforts at transparency and supply chain management, labor protesters descended on Apple stores worldwide, including stores in Washington, D.C..²²⁵ Although Foxconn and other similar electronics suppliers manufacture for a number of Apple competitors, advocates singled out Apple. The protesters used

²²⁰ See, e.g., *Latest Concerns Re Apple Supply Chain*, BUS. & HUM. RTS. RESOURCE CENTRE, <http://www.business-humanrights.org/Documents/ConcernsreApplesupplychain2012> (last updated Jan. 25, 2014) (summarizing media reactions during January and February of 2012).

²²¹ Press Release, Fair Labor Assoc. [FLA], *Apple Joins FLA* (Jan. 13, 2012), available at <http://www.fairlabor.org/blog/entry/apple-joins-fla>.

²²² See Charles Duhigg & David Barboza, *In China, the Human Costs that are Built into an iPad*, N.Y. TIMES, Jan. 26, 2012, at A1.

²²³ See *id.*

²²⁴ See *id.*

²²⁵ See Laurie Segall, *Protesters Target Apple Stores in 'Ethical iPhone' Campaign*, CNNMONEY, (Feb. 9, 2012), http://money.cnn.com/2012/02/08/technology/apple_foxconn_petition/.

Change.org, SumOfUs.org, and other similar sites to collect over 250,000 signatures.²²⁶ Yet, even with these public protests, it is not clear how much these labor practices will actually hurt Apple in the eyes of consumers and how much it may cost Apple to address the issues satisfactorily.²²⁷ Shortly after the protests, however, Apple announced that it would work with Verite, a non-profit group, to help improve the working conditions at the factories manufacturing its products.²²⁸ Around the same time, the FLA issued a public report of the highlights from its investigation of Foxconn.²²⁹ In its month-long investigation, the FLA surveyed over 35,000 Foxconn workers, asking them their perceptions about “working hours, wages and benefits, health and safety, working environment, and the atmosphere within the factory,” and also conducted hundreds of interviews.²³⁰ This investigation revealed “at least 50 issues related to the FLA Code and Chinese labor law,” and recommended remedial action for each in the following areas: working hours, health and safety, industrial relations and worker integration, and compensation and social security insurance.²³¹ Apple subsequently agreed to implement the reforms,²³² which can be difficult in practice because of corruption. For example, auditors may be influenced by bribes

²²⁶ *Id.*

²²⁷ *See, e.g.,* Duhigg & Barboza, *supra* note 222 (noting that only two percent of people surveyed by *The New York Times* mentioned anything about overseas labor practices when asked about their impressions about Apple); Jordan S. Terry, *So What if Apple has a Chinese Labor Problem?*, FORBES (Feb. 19, 2012, 3:42 PM) <http://www.forbes.com/sites/jordanterry/2012/02/19/so-what-if-apple-has-a-chinese-labor-problem/> (expressing skepticism about whether Apple’s loyal customers would turn to competitor products because of labor concerns).

²²⁸ *Apple Turns to Verite to Help Fix Labor Problems*, NEW ENG. PUB. RADIO (Mar. 7, 2012), <http://nepr.net/news/apple-turns-verite-help-fix-labor-problems>.

²²⁹ *See* Fair Labor Ass’n, *Independent Investigation of Apple Supplier, Foxconn Report Highlights* (Mar. 2012), http://www.fairlabor.org/sites/default/files/documents/reports/foxconn_investigation_report.pdf.

²³⁰ *Id.* at 1.

²³¹ *See id.* at 2–3.

²³² Sam Gustin, *Apple Agrees to Labor Reforms After ‘Serious’ Foxconn Violations*, TIME (Mar. 29, 2012), <http://business.time.com/2012/03/29/apple-agrees-to-labor-reforms-after-serious-foxconn-violations/>.

and firms may use fake records, hiding the true amount of hours worked and compensation paid.²³³

However, in August 2012, the FLA issued a follow-up report, which found that Foxconn completed all “195 [items] that were due . . . [plus] [eighty-nine] action items completed ahead of their deadlines,” leaving seventy-six items remaining to be corrected over the course of the year.²³⁴ The FLA also announced that Apple was taking steps to bring the factory in compliance with Chinese legal limits on the number of hours worked per week.²³⁵ Although the progress is impressive, Apple’s labor woes are far from over. China Labor Watch recently alleged that Apple’s entire supply chain is riddled with labor abuses similar to the problems at Foxconn.²³⁶ For instance, in September 2012, workers at Foxconn rioted in protest of their working conditions.²³⁷ At this point, Apple added yet another entity to help get its labor problem under control: it joined the IDH electronics program, which should help it “work collaboratively with key stakeholders to improve the social and environmental performance” at its manufacturing suppliers in China.²³⁸ The IDH Electronics program is a public-private consortium of electronics brands, suppliers, NGOs, international donors, and governments working together to improve the sustainable performance of suppliers in the electronics industry.²³⁹ By joining this program, Apple finally

²³³ *Working Conditions in Factories: When the Jobs Inspector Calls*, ECONOMIST, Mar. 31, 2012, at 73, 73.

²³⁴ Press Release, Fair Labor Assoc., Fair Labor Association Finds Progress at Apple Supplier Foxconn (Aug. 21, 2012), *available at* http://www.fairlabor.org/press-release/foxconn_verification_report. See generally Fair Labor Assoc., Foxconn Verification Status Report (Aug. 2012), http://www.fairlabor.org/sites/default/files/documents/reportsfoxconn_verification_report_final.pdf.

²³⁵ See Foxconn Verification Status Report, *supra* note 234, at 2.

²³⁶ See *Beyond Foxconn: Deplorable Working Conditions Characterize Apple’s Entire Supply Chain*, CHINA LAB. WATCH (June 27, 2012), <http://www.chinalaborwatch.org/pdf/2012627-5.pdf>.

²³⁷ David Barboza & Keith Bradsher, *Factor Riot Underscores Rift in China*, INT’L N.Y. TIMES (Sept. 25, 2012), at B1 (the *International New York Times* was formally published as the *International Herald Tribune*).

²³⁸ *Apple Joins IDH Electronics Program*, IDH (Sept. 28, 2012), <http://www.idhsustainabletrade.com/electronics-news/apple-joins-idh-electronics-program-1>.

²³⁹ See IDH Electronics, *supra* note 185.

started to come around to the idea that it must engage in a dialogue with multiple stakeholders to develop a sustainable supply chain and workforce.

Apple's association with the FLA, Veritas, and IDH Electronics seemed to be leading to improvements by late 2012.²⁴⁰ Workplace changes at Foxconn included chairs with high sturdy backs, protective foam on low stairwell ceilings, automatic shutoff safety devices on machines, curtailed hours, and increased wages.²⁴¹ Apple also "tripled its corporate responsibility staff, . . . reevaluated how it works with manufacturers, [and] . . . asked competitors to curb overtime in China."²⁴² Ultimately, Foxconn agreed that employees will not be required to work more than the maximum amount of hours pursuant to Chinese law (49 hours a week on average) and, accordingly, Foxconn agreed to increase wages to offset any impact of workers working fewer hours.²⁴³ As an FLA inspector stated, "Long-term solutions require a messier, more human approach," rather than focusing on "writing more policies, Apple needed to listen better to workers' complaints and advocacy groups' recommendations."²⁴⁴ Apple's most recent audit report shows it "conducted 393 audits at all levels of [its] supply chain—a 72 percent increase over 2011 . . . [including] twenty-seven bonded labor audits to protect workers from excessive recruitment fees."²⁴⁵ Although Apple has made a great deal of headway at Foxconn, problems persist. A recent audit uncovered seventy-four cases of underage workers at a component maker, which is a core violation of Apple's Code of Conduct.²⁴⁶ As a result, Apple terminated its relationship with a third-party labor agent, who was responsible for illegally recruiting underage workers.²⁴⁷ Underage workers and limiting work

²⁴⁰ See generally Keith Bradsher & Charles Duhigg, *Signs of Changes Taking Hold in Electronics Factories in China*, N.Y. TIMES (Dec. 26, 2012), at A1.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Apple Supplier Responsibility 2013 Progress Report*, APPLE INC. 6 (2013), http://images.apple.com/supplierresponsibility/pdf/Apple_SR_2013_Progress_Report.pdf.

²⁴⁶ *Id.* at 18.

²⁴⁷ *Id.* See also *Apple Labor Audits Uncover Underage Workers*, N.Y. TIMES (Jan. 25, 2013), <http://www.nytimes.com/2013/01/26/technology/>

hours in its supply chain have always been some of Apple's largest challenges;²⁴⁸ but ultimately, Apple's "forthrightness" and transparency on labor issues should help to shield it from critics, boost investor confidence, and help it become more competitive.²⁴⁹

Both the labor situation in Bangladesh and Apple's issues in China underscore the human costs associated with unacceptable working conditions. In both instances, companies are caught in a defensive mode, trying to engage in brand damage control, while also addressing the root causes of the problem. Overall, the success of voluntary, multi-stakeholder governance programs that monitor labor standards in global supply chains varies significantly depending on the depth of the monitoring.²⁵⁰ In other words, if a program focuses more on monitoring minimal labor standards, it is less likely to bring about significant improvements for workers.²⁵¹ On the other hand, programs monitoring workers' freedom of association—the right of workers to form trade unions, bargain collectively, and strike—are much more likely to lead to meaningful change.²⁵² In the meantime, companies are implementing triage measures, such as production

apple-labor-audits-uncover-underage-workers.html?ref=applecomputerinc
&_r=0&pagewanted=print.

²⁴⁸ *Id.*

²⁴⁹ See Cary Krosinsky, *Is Apple the Model of a Sustainable Company?*, BLOOMBERG (June 13, 2012, 12:43 PM), <http://www.bloomberg.com/news/2012-06-13/is-apple-the-model-of-a-sustainable-company-.html>. An ironic side note is that Apple decided to reject a sweatshop game from its App Store because of "offensiveness."; Andrew Leonard, *Apple Kills Sweatshop App*, SALON (Mar. 22, 2013), http://www.salon.com/2013/03/22/apple_kills_a_sweatshop_app/. The game that intended to help raise awareness about labor conditions, involved child labor and blocked fire escapes. *Id.*

²⁵⁰ See Mark Anner, *Corporate Social Responsibility and Freedom of Association Rights: The Precarious Quest for Legitimacy and Control in Global Supply Chains*, 40 POL. & SOC'Y, 609 (2012).

²⁵¹ See *id.* at 610.

²⁵² See *id.* (explaining, however, that corporations are less enthusiastic about supporting freedom of association rights, as such rights empower workers, and can therefore, weaken corporate supply chain management). Ultimately, strengthening democracy where production occurs will give labor advocates a way to hold governments accountable for effective enforcement of labor standards. See Shareen Hertel, *Human Rights and the Global Economy: Bringing Labor Rights Back*, 24 MD. J. INT'L L., 283, 291 (2009).

bonuses, contests, and assorted social events to boost employee morale in their global factories.²⁵³

IV. USING TRADE AGREEMENTS AND LAWS TO PROMOTE WORKER RIGHTS

While Apple and other companies, particularly in the European Union, focused on long-term sustainable labor practices are making strides, there is some question about whether they can survive in the short run competing against companies who are able to gain a competitive edge through cheaper manufacturing costs. Apple, for example, is competing directly with Samsung; yet, despite allegations of illegal labor practices,²⁵⁴ Samsung does not participate in the IDH Electronics Program²⁵⁵ and any remediation efforts are not transparent. There are limits to “ethical consumerism,”²⁵⁶ and less scrupulous companies could gain enough of the market share to force out companies with a longer-termed vision.²⁵⁷ Therefore, voluntary and collaborative initiatives are laudable, but they are not

²⁵³ See, e.g., Kathy Chu, *China Factories Try Karaoke, Speed Dating to Keep Workers*, WALL ST. J., May 2, 2013, at B1 (events include karaoke, speed dating, dinners, and other contests).

²⁵⁴ See, e.g., *An Investigation of Eight Samsung Factories in China: Is Samsung Infringing on Apple's Patent to Bully Workers?*, CHINA LAB. WATCH (Sept. 4, 2012), <http://www.chinalaborwatch.org/pro/show-177.html> (reporting multiple problematic labor practices: workers required to work 100 hours of forced overtime work per month, unpaid work, standing for eleven to twelve hours while working, underage workers, severe age and gender discrimination, abuse of student and labor dispatch workers, a lack of safety procedures, verbal and physical abuse, and a lack of an effective internal grievance mechanisms to report and rectify the problems); *Samsung Finds More Labor Violations at China Factories*, HUFFINGTON POST (Nov. 26, 2012, 4:17 AM), http://www.huffingtonpost.com/2012/11/26/samsung-labor-china_n_2190246.html (reporting illegal hours and fines for absence or tardiness).

²⁵⁵ See IDH *Electronics*, *supra* note 185.

²⁵⁶ Levinson, *supra* note 79, at 54–55.

²⁵⁷ On this point, it is worth noting that China's trade agenda does not include any reference to labor rights or any other form of internationally recognized human rights. See, e.g., Guiguo Wang, *China's FTAs: Legal Characteristics and Implications*, 105 AM. J. INT'L L. 493 (2011) (discussing several of China's recent FTAs, which coincidentally lack any provisions relating to human rights or worker rights).

enough to protect workers from human rights violations.²⁵⁸ Likewise, there are no international institutions with the power to enforce core labor rights and, despite calls from various scholars, the World Trade Organization is unlikely to undertake the endeavor.²⁵⁹

Companies seeking to recognize and promote labor rights as human rights could be at a short-term disadvantage. The trade policy of the United States, however, could be used to reinforce the call for labor standards consistent with human rights and to level the playing field for companies who want to sell their products in the U.S. This section reviews ways to enforce core labor standards by using current labor protections required by U.S. trade agreements and other trade laws, including the power to block goods from being imported into the U.S. This section also recommends enhanced provisions that should be included in future trade agreements that would function as incentives to corporations who respect labor rights in their international supply chain.

Trade agreements are an extension of foreign policy goals. The U.S. State Department has been guided by Secretary of State Hillary Clinton's vision of, what has been termed, "economic statecraft," a way of thinking about national security through diplomacy, development, and defense.²⁶⁰ This philosophy was inspired by the Quadrennial Diplomacy and Development Report (QDDR), which

²⁵⁸ See JUST BUSINESS, *supra* note 2, at 116.

²⁵⁹ See, e.g., Renee Chartres & Bryan Mercurio, *A Call for an Agreement on Trade-Related Aspects of Labor: Why and How the WTO Should Play a Role in Upholding Core Labor Standards*, 37 N.C. J. INT'L L. & COMM. REG. 665, 672–703 (2011–2012) (arguing that the WTO should view trade restrictions that encourage compliance with ILO core labor principles as compatible with the philosophy of both the WTO and international law). See generally Susan Ariel Aaronson & Jean Pierre Chauffour, *The Wedding of Trade and Human Rights: Marriage of Convenience or Permanent Match?*, WORLD TRADE ORG. (Feb. 15, 2011), https://www.wto.org/english/res_e/publications_e/wtr11_forum_e/wtr11_15feb11_e.htm (detailing the history of linking trade and human rights); Theodore H. Moran, *Monitoring Compliance with International Labor Standards: How Can the Process be Improved, and What are the Implications for Inserting Labor Standards in the WTO?* 59 J. BUS. ETHICS 147, 147–48 (2005) (explaining the complexities of designing a system to monitor compliance with the ILO's four core labor standards).

²⁶⁰ See *Hillary Clinton Bows Out: A Legacy at Foggy Bottom*, ECONOMIST, Feb. 9, 2013, at 33.

explains how diplomacy can promote American prosperity by expanding “diplomatic engagement around trade and commercial issues.”²⁶¹ This policy also serves long-term U.S. foreign policy goals about spreading democratic values.²⁶² The essential idea is to use “a range of tools to support reform-minded” individuals as they work toward “democratic societies that protect the [human] rights of all citizens.”²⁶³ The promotion of security and democracy is seen as critical to the achievement of decent global work standards.²⁶⁴ This notion, however, may be provocative to some people. As one commentator notes, “protecting and respecting human rights and freedoms are intimately linked with democracy; something that remains a revolutionary idea in much of the world.”²⁶⁵

A. TRADE AGREEMENTS

Trade agreements promoting and enforcing labor rights as human rights advance this democratic agenda. Stated another way, “By making trade conditional on respect for human beings’ right to dignity, a few economically powerful countries are changing the politics of trade and also the politics of repression.”²⁶⁶ Trade agreements that promote worker rights and prevent goods in violation of the agreement from being imported into the U.S. help to give enforcement to the global initiatives detailed in Part I. For example, when incentives are not effective, making a product’s entry into the U.S. market conditional on labor rights is a powerful way to get the attention of countries that might not enforce their labor laws or may

²⁶¹ U.S. DEP’T OF STATE, LEADING THROUGH CIVILIAN POWER: THE FIRST QUADRENNIAL DIPLOMACY AND DEVELOPMENT REVIEW 39 (2010), available at <http://www.state.gov/documents/organization/153108.pdf> [hereinafter QDDR]. See also *Hillary Clinton Bows Out: A legacy at Foggy Bottom*, *supra* note 260.

²⁶² See QDDR, *supra* note 261, at 10.

²⁶³ *Id.* at 89.

²⁶⁴ ITUC Resolutions, *supra* note 37, at 14.

²⁶⁵ Jim Baker, *The UN Guiding Principles – Opportunities, Challenges – One Year Later*, INST. FOR HUM. RTS. & BUS. (June 19, 2012), <http://www.ihrb.org/commentary/guest/un-guiding-principles-one-year-later.html>.

²⁶⁶ EMILIE M. HAFNER-BURTON, FORCED TO BE GOOD: WHY TRADE AGREEMENTS BOOST HUMAN RIGHTS 4 (2009).

disregard worker rights and encourage those countries to improve standards.²⁶⁷

The labor provisions in the free trade agreement between the United States and Jordan (Jordan FTA) were seen as holding great promise for elevating working conditions in Jordan.²⁶⁸ In this agreement, the labor provisions are incorporated into the body of the agreement (rather than a side agreement), which is particularly important, as it means that the dispute resolution procedures are the same for labor disputes as they are for commercial disputes.²⁶⁹ Accordingly, if a dispute cannot be resolved, “the affected Party shall be entitled to take any appropriate and commensurate measure,” and is not relegated to some alternative, less effective measure.²⁷⁰ The Jordan FTA also specifically reaffirms the parties’ obligations as members of the ILO and mandates that the Parties will strive to ensure that national law protects the following internationally recognized labor rights:

- (a) the right of association;
- (b) the right to organize and bargain collectively;
- (c) a prohibition on the use of any form of forced or compulsory labor;
- (d) a minimum age for the employment of children; and

²⁶⁷ Cf. Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most*, 44 J. PEACE RES. 407 (2007) (providing research that suggests that, overall, human rights treaties have a positive effect on global reform, but they may not have any effect where it is needed the most—the States with the most repressive governments).

²⁶⁸ See e.g., Joseph Kahn, *Dual Purpose of a U.S.–Jordan Trade Pact*, N.Y. Times (Oct. 20, 2000), <http://www.nytimes.com/2000/10/20/world/dual-purpose-of-a-us-jordan-trade-pact.html> (stating that the agreement “mandates compliance with international labor . . . norms”).

²⁶⁹ See Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, U.S.–Jordan, arts. 6, 17(1), Oct. 24, 2000, 41 I.L.M. 63, available at <http://www.ustr.gov/sites/default/files/Jordan%20FTA.pdf>.

²⁷⁰ See *id.* art. 17, para. 2(b).

(e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.²⁷¹

Despite the provisions, however, a lack of enforcement of the labor provisions has allowed working conditions in violation of these labor rights to persist in Jordan.²⁷² To be more than just words on paper and to achieve its promise, the United States must take steps to enforce labor provisions, such as those in the Jordan FTA.

Another example of an agreement with groundbreaking labor provisions is the Cambodia Bilateral Textile Agreement (Cambodia Agreement).²⁷³ The Cambodia Agreement expressly acknowledged that the United States and Cambodia were “seeking to ensure that labor laws and regulations provide for high quality and productive workplaces; and seek to foster transparency in the administration of labor law, promote compliance with, and effective enforcement of, existing labor law, and promote the general labor rights embodied in the Cambodian labor code.”²⁷⁴ A key aspect of the Cambodia Agreement was the government’s agreement that it would “support the implementation of a program to improve working conditions in the textile and apparel sector, including internationally recognized core labor standards, through the application of Cambodian labor

²⁷¹ *Id.* art. 6, paras. 1, 6.

²⁷² See BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP’T OF STATE, 2010 HUMAN RIGHTS REPORT: JORDAN 36–37 (Apr. 8, 2011), available at <http://www.state.gov/j/drl/rls/hrrpt/2010/nea/154464.htm> (reporting forced labor conditions in garment factories, excessive overtime and other abusive conditions, especially affecting migrant workers); Miguel Bustillo, *Sex Abuse Alleged at Apparel Maker*, WALL ST. J., June 20, 2011, at B3 (rape and sexual abuse allegations); Steven Greenhouse & Michael Barbaro, *An Ugly Side of Free Trade: Sweatshops in Jordan*, N.Y. TIMES, May 3, 2006, http://www.nytimes.com/2006/05/03/business/worldbusiness/03clothing.html?_r=2&pagewanted=all& (dismal working conditions complaints).

²⁷³ See Cambodia Bilateral Textile Agreement, U.S.-Cambodia, Jan. 20, 1999 [hereinafter Cambodia Textile Agreement], available at http://khmer.cambodia.usembassy.gov/media2/pdf/uskh_texttile.pdf; see also Don Wells, “Best Practice” in the Regulation of International Labor Standards: Lessons of the U.S.-Cambodia Textile Agreement, 27 COMP. LAB. L. & POL’Y J. 357 (2005–2006) (arguing that the “best practice” to regulate labor standards is to include substantive labor standards provisions).

²⁷⁴ Cambodia Textile Agreement, *supra* note 273, para. 10(A).

law.”²⁷⁵ The United States and Cambodia agreed to have at least two consultations each year to “discuss labor standards, specific benchmarks, and the implementation of th[e] program.”²⁷⁶ If, as a result of those consultations, the United States made a positive determination that working conditions substantially complied with “labor law and standards,” then additional textiles and apparel from Cambodia may have been imported into the United States.²⁷⁷ If, however, a significant change in working conditions occurred that was not positive, then the U.S. may have withdrawn any increased amounts of imports.²⁷⁸ In 2002, based on Cambodia’s progress in reforming labor conditions in textile factories, the Parties extended the Cambodia Agreement through the end of 2004, and increased the quota for textile exports from Cambodia.²⁷⁹

This concept of increasing imports based on positive changes for workers in the textile and garment industry has been very successful with the help of the ILO, which started Better Factories Cambodia (BFC).²⁸⁰ The ILO established this project in 2001 to help the garment industry make, and maintain, improvements in working conditions for Cambodian workers.²⁸¹ Pursuant to the program, monitors make unannounced visits to factories to assess working conditions, including compliance with the law and ILO standards.²⁸² Twice a year, the monitors check for issues related to child labor, freedom of association, employee contracts, wages, working hours, workplace facilities, noise control, and machine safety.²⁸³ Regrettably, the BFC’s most recent report, which assessed 130 garment and 6 footwear factories in Cambodia, reveals backsliding on a number of compliance issues, particularly relating to safety and

²⁷⁵ *Id.* para. 10(B).

²⁷⁶ *Id.* para. 10(C).

²⁷⁷ *See id.* para. 10(D).

²⁷⁸ *See id.*

²⁷⁹ Press Release, U.S. Trade Rep., U.S.-Cambodian Textile Agreement Links Increasing Trade with Improving Workers’ Rights (Jan. 7, 2002), http://www.ustr.gov/archive/Document_Library/Press_Releases/2002/January/Section_Index.html.

²⁸⁰ *See About Us*, BETTER FACTORIES CAMBODIA, http://betterfactories.org/?page_id=979 (last visited Jan. 28, 2014).

²⁸¹ *See id.*

²⁸² *Monitoring*, BETTER FACTORIES CAMBODIA, http://betterfactories.org/?page_id=90 (last visited Jan. 28, 2014).

²⁸³ *See id.*

health.²⁸⁴ The growth in the garment (11%) and footwear (12%) industries, which put pressure on both workers and factory managers, may have predicated these issues.²⁸⁵ During the first ten months of 2012, BFC registered an additional sixty-five factories, which employ over 25,500 workers.²⁸⁶ This rapid growth strains the ability of BFC to monitor compliance and underscores the need for labor protections in a possibly new bilateral trade agreement with Cambodia.²⁸⁷ Moreover, this increase in compliance violations corresponding with the spike in manufacturing further underscores the reason why workers need labor protections that are reinforced by trade. Despite the recent strain on BFC and compliance issues, there is still much to praise about the “incentive-based compliance”²⁸⁸ promoted by the Cambodia Agreement. Thus far, this “carrot,” as opposed to a “stick,” approach is a relative success.²⁸⁹

Unfortunately, subsequent FTAs did not replicate the incentive model of the Cambodia Agreement. In the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR),²⁹⁰ for example, the parties agree to “strive to ensure” that the

²⁸⁴ See *Twenty Ninth Synthesis Report on Working Conditions in Cambodia's Garment Sector*, BETTER FACTORIES CAMBODIA, 1 (Apr. 11, 2013), <http://betterfactories.org/?p=1558> (follow “Download” hyperlink for the report).

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 3.

²⁸⁷ Press Release, U.S. Trade Rep., United States, Cambodia to Explore Possibility of Investment Treaty (Aug. 31, 2012), available at <http://www.ustr.gov/about-us/press-office/press-releases/2012/august/us-cambodia-explore-investment-treaty> (discussing current negotiations between the United States and Cambodia to enter into a bilateral investment treaty).

²⁸⁸ See generally Shima Baradaran & Stephanie Barclay, *Fair Trade and Child Labor*, 43 COLUM. HUM. RTS. L. REV. 1, 58–62 (2011–2012) (arguing that the United States should provide subsidies and tax benefits to companies that participate in fair trade practices); Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 INT'L ORG., 593 (2005) (calling for incentive-based agreements in compliance with the principles of international human rights).

²⁸⁹ Virginia A. Leary, *Labor Standards and Extraterritoriality: Cambodian Textile Exports and the International Labour Organization in UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS* 157, 165 (Mark Gibney & Sigrun Skogly eds., 2010).

²⁹⁰ See generally Dominican Republic-Central America-United States Free Trade Agreement, Aug. 5, 2004, 19 U.S.C. § 4001 et seq. [hereinafter

principles in the ILO's *Fundamental Principles Declaration* and its Follow-up and other "internationally recognized labor rights . . . are recognized and protected by its law," but it is not mandatory.²⁹¹ Because the Parties, "retai[n] the right to exercise discretion" with respect to investigating, prosecuting, regulating, and complying with "other labor matters determined to have higher priorities,"²⁹² it makes it difficult to take action against a Party. If a Party believes that a violation of the Labor Chapter (Chapter 16) exists, it may request "consultations" by submitting a written request containing "information that is specific and sufficient to enable the [alleged offending Party] to respond."²⁹³ The Parties are then to make "every attempt to arrive at a mutually satisfactory resolution"²⁹⁴ within sixty days of the request.²⁹⁵ If the Parties are unable to resolve the matter, then either Party "may request that the Council be convened to consider the matter."²⁹⁶ At such a proceeding, the Council may consult with "outside experts."²⁹⁷ Failure by a Party to enforce its own labor laws can subject the Party to binding dispute settlement and, ultimately, fines or sanctions by the Council.²⁹⁸ The maximum fine is set at \$15 million per year, per violation.²⁹⁹ The fines, however, are not paid to the injured Party; instead, they are directed towards remedying the labor violation.³⁰⁰ Although the enforcement of CAFTA-DR's labor provisions are more "robust" than earlier free

CAFTA-DR], available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>. For more information about CAFTA-DR, see Marisa Anne Pagnattaro, *U.S. Trade Policy: Increased Emphasis on Worker Rights*, 40 GA. J. OF INT'L & COMP. L. 663, 680-82 (2012) [hereinafter *Trade Policy*].

²⁹¹ *Id.* art. 16.1.1.

²⁹² *Id.* art. 16.2.1(b).

²⁹³ *Id.* art. 16.6.1–.2.

²⁹⁴ *Id.* art. 16.6.3.

²⁹⁵ *See id.* art. 16.6.6.

²⁹⁶ *Id.* art. 16.6.4. "[T]he Council shall consist of the cabinet-level representatives of the consulting Parties or their high-level designees." *Id.* at n.2.

²⁹⁷ *See id.* art. 16.6.5.

²⁹⁸ *See id.* arts. 16.6.6, 20.15–.16.

²⁹⁹ *Id.* art. 20.17.2.

³⁰⁰ *Id.* art. 20.17.4.

trade agreements,³⁰¹ they do not require full incorporation of ILO standards outlined in its *Fundamental Principles Declaration*.³⁰²

Recently, these enforcement provisions have been put to the test in connection with a CAFTA-DR request by the United States for consultations with Guatemala regarding labor rights violations.³⁰³ In July 2010, the Obama Administration responded to a 2008 submission by the AFL-CIO alleging labor violations by the Guatemalan government by requesting to address worker's rights violations pursuant to CAFTA-DR consultations with the Guatemalan government.³⁰⁴ This was a welcomed and unusual step to use "every option available in the trade enforcement playbook to help sustain jobs . . . in America."³⁰⁵ In fact, this is the first labor case brought by the United States to dispute settlement under a trade agreement. The act signaled that the United States was finally "sending a strong message that our trading partners must protect their own workers, that the Obama Administration will not tolerate labor violations that place U.S. workers at a disadvantage, and that we are prepared to enforce the full spectrum of American trade rights from labor to the environment."³⁰⁶ The action also received support from

³⁰¹ William "Bud" Clatanoff, *Labor Standards in Recent U.S. Trade Agreements*, 5 RICH. J. GLOBAL L. & BUS. 109, 114 (2005). For an elaboration, see Marisa Anne Pagnattaro, *Leveling the Playing Field: Labor Provisions in CAFTA*, 29 FORDHAM INT'L L.J. 386, 432-39 (2006) (detailing how CAFTA fails to measure up to certain international negotiation objectives).

³⁰² *Trade Policy*, *supra* note 290, at 680-82.

³⁰³ *See id.* at 682-87.

³⁰⁴ *See* Letter from Ron Kirk, U.S. Trade Rep., Exec. Office of the Pres., & Hilda L. Solis, U.S. Sec'y of Labor, U.S. Dep't of Labor, to Erick Haroldo Coyoy Echeverría, Guat. Minister of Econ., & Edgar Alfredo Rodríguez, Guat. Minister of Labor & Soc. Prot. (July 30, 2010), *available at* http://www.ustr.gov/webfm_send/2114; Press Release, U.S. Dep't of Labor, U.S. Secretary of Labor Hilda L. Solis Announces Labor Consultation with Guatemala Under CAFTA-DR Agreement (July 30, 2010), *available at* www.dol.gov/opa/media/press/ilab/ILAB20101078.htm#UPYhoB1QWSo.

³⁰⁵ Ron Kirk, *Tough Trade Enforcement Supports Jobs for American Workers*, WHITE HOUSE BLOG (July 30, 2010, 9:00 AM), <http://www.whitehouse.gov/blog/2010/07/30/tough-trade-enforcement-supports-jobs-american-workers>.

³⁰⁶ Ron Kirk, U.S. Ambassador, Remarks on Enforcement at Allegheny Technologies, Inc. (July 30, 2010), [hereinafter Allegheny Technologies] (transcript available at <http://www.ustr.gov/about-us/press-office/speeches/transcripts/2010/july/remarks-ambassador-ron-kirk-enforcement-allegghn>).

the AFL-CIO, as well as labor groups in Guatemala.³⁰⁷ After negotiations for several years, the United States and Guatemala announced that they reached a landmark 18-point enforcement plan, including concrete actions and time frames that Guatemala agreed to implement “within six months to improve labor law enforcement.”³⁰⁸ Under the enforcement plan, Guatemala agreed to strengthen labor inspections, expedite and streamline the process of sanctioning employers, order remediation of labor violations, increase labor law compliance by exporting companies, improve the monitoring and enforcement of labor court orders, publish labor law enforcement information, and establish mechanisms to ensure that workers are paid what they are owed when factories close.³⁰⁹ Although there is no agreement to limit imports if the terms are not met, the agreement is a positive step to demonstrate that the United States will enforce labor obligations pursuant to its trade agreements.

B. SECTION 301 OF THE TRADE ACT OF 1974

In addition to remedies under trade agreements, another tool that could be used to enforce labor rights is Section 301 of the Trade Act of 1974.³¹⁰ Section 301 “provides the United States with the authority to enforce trade agreements, [and to] resolve trade disputes.”³¹¹ Overall, it is the “principal statutory authority under

³⁰⁷ See *Four Years After CAFTA-DR: A Coup and Incessant Violence Against Workers*, Q. NEWSL., (U.S. Lab. Educ. in the Americas Project, Wash., D.C.), Summer 2010, at 4, 4; Press Release, AFL-CIO, Statement by AFL-CIO President Richard Trumka on Announcement of Guat. Labor Rights Case (July 30, 2010), available at <http://www.aflcio.org/index.php/Press-Room/Press-Releases/Statement-by-AFL-CIO-President-Richard-Trumka-on-A>.

³⁰⁸ Press Release, Office of the U.S. Trade Rep., Acting U.S. Trade Representative Marantis and Acting Labor Secretary Harris Announce Groundbreaking Labor Rights Enforcement Agreement with Guatemala (Apr. 11, 2013), available at <http://www.ustr.gov/about-us/press-office/press-releases/2013/april/marantis-harris-labor-enforcement-guatemala>.

³⁰⁹ See Office of the U.S. Trade Rep., Fact Sheet: Guatemala Agrees to Comprehensive Labor Enforcement Plan (Apr. 11, 2013), <http://www.ustr.gov/about-us/press-office/fact-sheets/2013/april/guatemala-labor-enforcement>.

³¹⁰ Trade Act of 1974 § 301, 19 U.S.C. § 2411 (2006).

³¹¹ *Section 301*, INT’L TRADE ADMIN., http://www.trade.gov/mas/ian/tradedisputes-enforcement/tg_ian_002100.asp (last updated Sept. 26, 2013, 5:11 PM).

which the United States may impose trade sanctions on foreign countries that either violate trade agreements or engage in other unfair trade practices.”³¹² Under Section 301, if negotiations regarding the practice at issue fail, “the United States may take action to raise import duties” on the country’s products as a way of rebalancing trade;³¹³ however, the U.S. has yet to take this sort of action. The AFL-CIO made two unsuccessful attempts to use the law during the Bush administration.³¹⁴ In 2004, the first workers’ rights petition was brought against the Chinese government, contending that exploitation of Chinese workers was an unfair trade practice that created unfair competition.³¹⁵ Several weeks later, the Bush Administration cabinet members rejected the petition.³¹⁶ With problematic labor conditions continuing in China, the AFL-CIO submitted a new petition to the White House in 2006, alleging violations of workers’ rights by suppressing strikes, banning independent unions, and permitting factories to violate minimum wage and child labor laws.³¹⁷ The White House also rejected the second petition.³¹⁸ Although no other petitions have been filed under Section 301 for violations of labor rights, this statute presents another avenue for potential recourse.

³¹² *Id.*

³¹³ *Id.*

³¹⁴ See Paul Blustein, *Labor Seeks Pressure on China*, WASH. POST, Sept. 10, 2004, at E03. See also Press Release, AFL-CIO, Bush Administration Officially Rejects AFL-CIO Section 301 Trade Petition (May 11, 2004), available at <http://www.aflcio.org/Press-Room/Press-Releases/Bush-Administration-Officially-Rejects-AFL-CIO-Sec>.

³¹⁵ See Press Release, AFL-CIO, *supra* note 314. See also Blustein, *supra* note 314.

³¹⁶ See Press Release, AFL-CIO, *supra* note 314.

³¹⁷ See Press Release, AFL-CIO, Statement by AFL-CIO Secretary-Treasurer Trumka on Bush Administration’s Rejection of 301 Petition Against Chinese Government (July 21, 2006) [hereinafter Trumka Statement], available at <http://www.aflcio.org/Press-Room/Press-Releases/Statement-by-AFL-CIO-Secretary-Treasurer-Trumka-on>. See generally THOMAS LUM & DICK K. NANTO, CONG. RESEARCH SERV., RL 31403, CHINA’S TRADE WITH THE UNITED STATES AND THE WORLD (2006) (detailing the surge in imports from China, including the threat posed to U.S. industries and manufacturing employment).

³¹⁸ Trumka Statement, *supra* note 317.

C. FUTURE TRADE AGREEMENTS

Another avenue for the enforcement of labor rights is the creation of more free-trade agreements between the U.S. and its trading partners. The United States is currently negotiating the Trans-Pacific Partnership (TPP) with “Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.”³¹⁹ Although it is unclear what the actual labor provisions will be, elements under discussion include:

commitments on labor rights protection and mechanisms to ensure cooperation, coordination, and dialogue on labor issues of mutual concern. They agree on the importance of coordination to address the challenges of the 21st-century workforce through bilateral and regional cooperation on workplace practices to enhance workers’ well-being and employability, and to promote human capital development and high-performance workplaces.³²⁰

According to the USTR office, during the TPP negotiations, the United States “will seek to ensure a high standard text that protects worker rights, helps to raise working conditions and standards, and becomes a model for other trade negotiations.”³²¹ In negotiations with Vietnam, where there are significant concerns about labor rights, the United States emphasizes how important it is that the final TPP agreement includes “strong, enforceable labor provisions - including a responsibility to adopt and maintain the four core [ILO]

³¹⁹ See Press Release, Office of the U.S. Trade Rep., Obama Administration Notifies Congress of Intent to Include Japan in Trans-Pacific Partnership Negotiations (Apr. 24, 2013), available at <http://www.ustr.gov/about-us/press-office/press-releases/2013/april/congressional-notification-japan-tpp>.

³²⁰ Office of the U.S. Trade Rep., Outlines of the Trans-Pacific Partnership Agreement (Nov. 12, 2011), available at <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement>.

³²¹ *Testimony of Ambassador Demetrios Marantis Acting U.S. Trade Rep.: Hearing Before the S. Comm. on Finance on the President’s 2013 Trade Policy Agenda* 8 (Mar. 19, 2013), <http://www.finance.senate.gov/imo/media/doc/031913%20Testimony%20on%202013%20Trade%20Agenda.pdf>.

standards on worker's rights, including the freedom to associate."³²² With this agreement, the United States has the opportunity to include effective and comprehensive labor provisions in trade agreements that could improve labor conditions and give meaning to labor rights with all of its trading partners. In addition, I propose the following provisions that could be included in future trade agreements to help promote and protect labor rights, as well as to encourage businesses to develop sustainable practices with regard to the workers who manufacture their products.³²³

1. Preamble

The Preamble to FTAs should incorporate resolutions that specifically relate to protecting labor rights as human rights and, as such, the parties should resolve to endeavor towards:

- (1) Improving working conditions, by requiring respect for and enforcement of worker rights and the rights of children consistent with ILO core labor standards;
- (2) Building on their understanding of the relationship between trade and worker rights;
- (3) Ensuring that they do not weaken or reduce protections afforded in domestic labor laws as an encouragement of trade; and
- (4) Requiring universal ratification and full compliance with ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor.

³²² Press Release, Office of the U.S. Trade Rep., Strong Labor Standards, More Investment Opportunities: Working in Vietnam to Advance the TPP (Apr. 22, 2013), *available at* <http://www.ustr.gov/about-us/press-office/blog/2013/april/working-vietnam-advance-tpp>.

³²³ The following proposal is substantially based on one previously published by the author in regards to FTAs under the Bipartisan Trade Promotion Authority Act. See Pagnattaro, *supra* note 301, at 442–46, for a detailed discussion of that proposal.

2. Labor Law Provisions

The main text of the FTA should include a separate article on labor rights that addresses the goals and objectives of the TPA including. Provisions should accomplish the following goals of the parties:

(1) Reaffirm their obligations as members of the ILO and their commitments under the ILO *Fundamental Principles Declaration*.

(2) Agree to strengthen domestic law to be consistent with core labor standards, defined as:

(a) the right of association: workers shall have the right to freedom of association free from any interference from public authorities or their employers, consistent with ILO Convention 87 (Convention on Freedom to Associate and Protection of the Right to Organize);

(b) the right to organize and bargain collectively: workers shall have the right to establish and join organizations of their own choosing; workers shall enjoy adequate protection against acts of anti-union discrimination in respect to their employment, including employment shall not be subject to the condition that a worker not join a union and a worker shall not be dismissed or otherwise prejudiced by reason of union membership or because of participation in union activities outside working hours

or, with the employer's consent, within working hours, consistent with ILO Conventions 87 and 98 (Convention on Right to Organize and Collectively Bargain);

(c) a prohibition on the use of any form of forced or compulsory labor: all work or service which is extracted from any person under the menace of a penalty and for which the person has not offered him or herself voluntarily shall be prohibited; additionally, forced or compulsory labor shall not be used as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the establishment of political, social or economic system; as a method of mobilizing and using labor for purposes of economic development; as a means of labor discipline; as a punishment for having participated in strikes; or as a means of racial, social, national or religious discrimination, consistent with ILO Conventions 29 (Convention on Forced Labor) and 105 (Convention on the Abolition of Forced Labor);

(d) a minimum age for the employment of children, consistent with ILO Conventions 138 (Minimum Age Convention) and 183 (Maternity Protection Convention); and

(e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health, consistent, among other things, with ILO Conventions 100 (Equal Remuneration Convention) and 111 (Employment and Occupation Discrimination Convention).

(3) To require universal ratification and full compliance with ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor.

(4) To work toward full compliance with all other ILO Conventions that the parties have ratified, or will ratify, on an agreed-upon schedule with each country that is appropriate given its economic, social, and legal circumstances.

(5) To the extent that a party's laws are inconsistent with its ILO obligations and commitments or full legal recognition of core labor standards, benchmarks need to be set with a schedule of changes that need to be made with free-trade benefits tied to a clear and relatively short phase-in of those changes.³²⁴

(6) To use an independent oversight board (such as the ILO) to determine the level of compliance, which would also take into consideration annual comments from

³²⁴ See, e.g., Cambodia Bilateral Textile Agreement, *supra* note 273, para. 10(D) (providing for increased imports in recognition of Cambodia's labor condition reforms in textile factories).

international groups who monitor labor issues.³²⁵

(7) To refrain from failing to effectively enforce the labor laws of each Party to the FTA (through a sustained or recurring course of action or inaction) in a manner affecting trade between the United States and that Party after a trade agreement between those countries enters into force.

(8) To recognize that each Party shall retain the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters; and to make decisions regarding the allocation of resources to enforcement with respect to other labor matters determined to have higher priorities, *unless* it is apparent that a country is not effectively enforcing its laws.

(9) To avoid weakening, relaxing, or reducing the protections afforded in domestic labor laws as an encouragement of trade; to the extent there is any weakening, relaxing, or reducing domestic labor laws, the country shall be subject to trade sanctions.

3. Dispute Resolution Procedures

(1) Any failure to comply with the labor provisions is subject to the same dispute resolution procedures used to resolve any disagreement under the agreement. Dispute will expressly *not* be limited to a party's failure to enforce its own labor laws.

³²⁵ This process could be similar to that provided for under the GSP, which has an annual review process to determine a country's GSP eligibility—a country must take or be “taking steps to afford internationally recognized worker rights to workers in the country (including any designated zone in that country).” See 19 U.S.C. § 2462(b)(2)(G) (2006).

(2) A Party to the FTA can bring an action against another signatory Party.

(3) The dispute resolution proceedings shall be open to the public.

4. Enforcement/Remedies/Penalties

(1) Trade sanctions should be available for disputes regarding any provision of the labor article in the same manner they are available for a commercial dispute—in the form of suspension of tariff benefits and/or payment of penalties or fines.

(2) Goods manufactured in violation of a member's labor laws shall not be allowed to be imported into the United States.

5. Labor Cooperation and Capacity Building Mechanism

(1) A specific provision for adequate funding should be included to ensure that the goals of improving labor laws and enforcement can be met.

CONCLUSION

This paper concludes that although it may be a challenge to compete with corporate entities that do not endeavor to protect workers; this is ultimately outweighed by the importance of corporate, labor-related initiatives as a strategy to maintain a sustainable and productive global workforce. Moreover, strategic trade policies can be used to further incentivize corporate responsibility toward workers for both domestic companies, and other companies, importing goods into the United States. The United States should seize the opportunity to improve the labor standards of its trading partners, and hold countries and companies alike accountable to internationally recognized labor standards. Over fifty years of work by the ILO and other international groups to promote core international labor standards could move toward full realization if the United States requires its trading partners to respect core labor

rights. Moreover, access to United States markets should incentivize countries to enforce fundamental and internationally recognized labor standards, and those who strive to ensure that all workers have a standard of living adequate for health and well-being in accordance with Article 25 of the *Universal Declaration*. The United States should not allow its trading partners and companies doing business in those countries to violate the human rights of their workers.