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A LOOK INTO VOLUNTARY NONGOVERNMENTAL ORGANIZATION (NGO)  
CERTIFICATIONS ON LABOR CONDITIONS IN INTERNATIONAL TRADE LAW:  
NIKE, A CASE STUDY

*Elvira Oviedo*

INTRODUCTION

The purpose of this paper is to address the increasing voluntary use of non-governmental organization (NGO) certification programs by corporations to uphold some form of structural labour standards in their overseas factories. The increasing use of voluntary NGO labour-based certification programs is a direct result of the gaping holes and lack of enforcement left by the World Trade Organization (WTO), the International Labour Organization (ILO), and the laws and regulations of the lands that these unethical labour practices are taking place in. This paper deep dives into a case study of Nike, Inc. who, due to mass media attention on the unethical labour practices occurring in their overseas manufacturing factories, were forced to reevaluate and incorporate into their business model a code of standards primarily centered on remedying the labour practices that were costing them millions of dollars.

Nike exemplifies the new trend in the corporate world of using NGO labour-based certifications while also highlighting the shortcomings that such certification programs struggle with such as lack uniformity, lack of enforcement, and possible biased participation. A quick overview of alternatives to NGOs shows that while such alternatives can offer some solution, these alternatives also have their own pitfalls. The Alien Tort Claims Act is currently pending in the United States Supreme Court awaiting a decision that could either move bounds for labour activists or heighten the political and legal barriers labour activists often find themselves in front of. Additionally, state laws are few and far in between. They offer no real enforcement and the environmental, social, and governance (ESG) factors being implemented by some corporations are not yet widespread enough to have any large effect. The lingering influence of past Secretary–Generals of the United Nations who emphasized human labour practices and of the Human Rights Council and the Global Compact Initiative are just that–lingering, and have opened a gateway for participation of initiatives as proof of ethical labour practices when the reality is to the contrary.

While international agreements and organizations, national laws, and NGO labour-based certifications all have weaknesses that vary in degree, the conclusion, with the support of Nike as a case study, is that NGO labour-based certification programs do have merit and have the potential to greatly change the corporate world's operations into one that prioritizes ethical labour practices.

I. THE WTO AND ILO'S STANCES ON LABOUR STANDARDS

It is important to note that the WTO states almost no rules or regulations for labor conditions regarding international trade and production.<sup>1</sup> The only exception to the WTO's silence regarding labor conditions is in Article XX (General Exceptions) of the General

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<sup>1</sup> See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 State. A-11, 55 U.N.T.S. 197 [hereinafter GATT].

Agreement on Tariffs and Trade (GATT) which states that products made by prison labor are a general exception and are allowed in international trade and production.<sup>2</sup>

Besides this one exception allowing the use of prison labor in production practices, the WTO is of the “clear consensus: all WTO member governments are committed to a narrower set of internationally recognized ‘core’ standards—freedom of association, no forced labour, no child labour, and no discrimination at work (including gender discrimination).”<sup>3</sup> However, the WTO has not implemented any explicit regulations or codes that would enforce these core standards in making of products that are traded internationally or are outsourced for cheaper production purposes.<sup>4</sup> The WTO justifies their lack of action towards implementing any form of regulatory practices through a number of reasons. Some nations are highly in favor of adding labor standards into the WTO structure with the belief system that doing so would provide great incentive to nations to improve labor standards and would help towards fostering universal criteria for labor standards.<sup>5</sup> However, many developing nations are in opposition to the WTO adding in labor standards because of the fear that the more industrial nations would actually use these labor standards to take advantage of and undermine the low wage trading partners that are available in these developing nations.<sup>6</sup> Developing nations also fear that they would not be able to meet the criteria mandated by labor standards simply because they might not be able to afford it.<sup>7</sup> Imposing labor standards on developing nations could greatly undermine and impair the rise of their economic development which would then possibly dismantle parts of the international trade system.<sup>8</sup> Developing nations also worry that the developed nations’ eagerness to add labor standards to the WTO framework is really just a guise for protectionism instead of any real concern for bettering labor conditions.<sup>9</sup> The possible conflict between member nations that initiating labor standards through the WTO could cause is the main motivation behind the WTO’s unwillingness to form any real agreement regarding labor standards.

Instead, the WTO defers to the International Labor Organization (ILO) to negotiate labor standards between nations.<sup>10</sup> The WTO allows their secretariat to work with the secretariat of the ILO to work together on policy making with the goal of meeting some form of universal “coherence” in labor standards and to allow the WTO to indirectly have some say over decisions that impact the global economy.<sup>11</sup>

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<sup>2</sup> *See id.* at 37-38.

<sup>3</sup> WORLD TRADE ORG., *Labour Standards: Consensus, Coherence and Controversy*, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/bey5\\_e.htm#:~:text=There%20is%20a%20clear%20consensus,work%20\(including%20gender%20discrimination\)](https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm#:~:text=There%20is%20a%20clear%20consensus,work%20(including%20gender%20discrimination)) (last visited Sept. 30, 2020) [hereinafter WTO Labour Standards].

<sup>4</sup> *See id.*

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

<sup>6</sup> *See id.*

<sup>7</sup> *See id.*

<sup>8</sup> *See id.*

<sup>9</sup> *See id.*

<sup>10</sup> *See id.*

<sup>11</sup> *See id.*

The main mission of the ILO is to “promot[e] social justice and internationally recognized human and labor rights...”<sup>12</sup> The ILO was established in 1919 shortly after World War I as part of the Treaty of Versailles with the intention that the ILO would operate under the belief system that “universal and lasting peace can be accomplished only if it is based on social justice.”<sup>13</sup> In 1946, the ILO became the first special agency of the newly formed United Nations and eventually came to be the agency in power that the WTO deferred to when it came to matters of labor standards.<sup>14</sup>

The international labour standards set by the ILO are separated into two different forms; the standards are either Conventions (sometimes called Protocols) or Recommendations.<sup>15</sup> Conventions are “legally binding international treaties that may be ratified by member states” while Recommendations “serve as non-binding guidelines.”<sup>16</sup> Conventions lay down the basic principles that ratified countries are implementing, while Recommendations supplement the Convention by providing more detailed guidelines on how ratifying countries can best implement the new principles.<sup>17</sup> Representatives of member governments, employers, and workers provide input for, and then write, both Conventions and Recommendations.<sup>18</sup> Once a standard has been adopted, it is then up to the member government to submit to the appropriate authority within twelve months for consideration for ratification.<sup>19</sup> Once a member state “ratifies” a Convention, that member state commits to fully applying said Convention into its national law and practice.<sup>20</sup> By ratifying, the member state is also committing to sending regular reports on the application process and results of the ratified Convention to ILO.<sup>21</sup> If the Convention is approved for ratification, that member state is expected to fully implement it within one year from the date that it was ratified.<sup>22</sup>

The ILO has identified eight Conventions the ILO considers highly important and which covers the “fundamental principles and rights at work: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.”<sup>23</sup> Currently, the United States has only ratified two of the eight Fundamental Conventions: the *Abolition of Forced Labour Convention, 1957 (No. 105)* and

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<sup>12</sup> INT’L LABOUR ORG., *Mission and impact of the ILO*, <https://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm> (last visited Sept. 30, 2020).

<sup>13</sup> INT’L LABOUR ORG., *History of the ILO*, <https://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm> (last visited Sept. 30, 2020).

<sup>14</sup> *See id.*; *see supra* WTO Labour Standards.

<sup>15</sup> INT’L LABOUR ORG., *Conventions and Recommendations*, <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> (last visited Sept. 30, 2020) [hereinafter ILO Conventions and Recommendations]

<sup>16</sup> *Id.*

<sup>17</sup> *See id.*

<sup>18</sup> *See id.*

<sup>19</sup> *See id.*

<sup>20</sup> *See id.*

<sup>21</sup> *See id.*

<sup>22</sup> *See id.*

<sup>23</sup> *Id.*

the *Worst Forms of Child Labour Convention, 1999 (No. 182)*.<sup>24</sup> Additionally, the ILO has designated four Conventions to be Governance Conventions which are deemed high priority in an effort to encourage member states to ratify them because of their integral role in ensuring efficiency of the international labour standard system.<sup>25</sup> The four Governance Conventions cover areas such as employment policies, labour inspections, and agriculture-specific labour standards.<sup>26</sup> Compared to their participation in ratifying the ILO Fundamental Conventions, the United States has only ratified one (*Tripartite Consultation – International Labour Standards*) of the four Governance Conventions.<sup>27</sup> Although there is not as great of an emphasis on them to be ratified by member states, the ILO also currently has 178 Technical Conventions available.<sup>28</sup> Currently, the United States has only ratified eleven of the 178 Technical Conventions.<sup>29</sup> Of these eleven Technical Conventions that have been ratified by the United States, two of them are not currently in force.<sup>30</sup>

It is important to delve deeper into why the United States has yet to ratify Conventions that as far as precedent and moralistic values goes to show, are Conventions that the U.S. is inherently in favor of supporting. Yet the U.S. chooses not to do so, even in the case of some Conventions which one would think would be easy to ratify in terms of logistics because many American corporate companies that outsource manufacturing or have supply overseas already have company-wide regulations set in place that match the ILO Fundamental Conventions.

For example, one of the two ILO Fundamental Conventions that the United States has ratified is the Abolition of Forced Labour, which states that any state that ratifies it agrees to “[undertake] to suppress and not to make use of any form of forced or compulsory labour” as a means of “political coercion, as a means of labour discipline, as a method of mobilizing economic development, as punishment for participating in strikes, or as a mean of racial, social, national, or religion discrimination.”<sup>31</sup> However, the United States has not ratified the Forced Labour Convention, in which ratified states would undertake “to suppress the use of forced or compulsory labour in all its forms within the shortest possible period.”<sup>32</sup> In fact, the United States is one of only nine states out of 187 ILO members to have not yet ratified the Forced Labour Convention.

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<sup>24</sup> NORMLEX, *Ratifications for United States of America*, INTERNATIONAL LABOUR ORGANIZATION, [https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:102871](https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102871) (last visited Sept. 30, 2020) [hereinafter USA ILO Ratifications]

<sup>25</sup> *Conventions and Recommendations*, see *supra* note 15.

<sup>26</sup> *Id.*

<sup>27</sup> *Ratifications for United States of America*, see *supra* note 24.

<sup>28</sup> *See id.*

<sup>29</sup> *See id.*

<sup>30</sup> *See id.*

<sup>31</sup> NORMLEX, *C105 - Abolition of Forced Labour Convention, 1957 (No. 105)*, INTERNATIONAL LABOUR ORGANIZATION, [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_INSTRUMENT\\_ID:312250:NO](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312250:NO) (last visited Dec. 14, 2020).

<sup>32</sup> NORMLEX, *C029 - Forced Labour Convention, 1930 (No. 29)*, INTERNATIONAL LABOUR ORGANIZATION, [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100::NO:12100:P12100\\_ILO\\_CODE:C029:NO](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100::NO:12100:P12100_ILO_CODE:C029:NO) (last visited Dec. 14, 2020) [hereinafter Forced Labour Convention].

<sup>33</sup> While the United States has not explicitly stated why they have not ratified the Forced Labour Convention despite ratifying the Abolition of Forced Labour Convention, one can take a few guesses by looking at the language of the Forced Labour Convention.

Article II (2) of the Forced Labour Convention seeks to define what forced or compulsory labour is by listing all the things that do *not* fall under the definition of forced or compulsory labour.<sup>34</sup> Specifically, Article II (2)(c) states that “any work...exacted...as a consequence of a conviction in a court of law, provided that the said work...is carried out under the supervision and control of a public authority and...not hired to or placed at the disposal of private individuals, companies or associations.”<sup>35</sup> In consolidation with Article XX of the WTO Agreement, Article II (2)(c) is allowing for the use of prison labour for international trade and production.<sup>36</sup> This is not peculiar in itself but the devil is in the details and in the wording “not hired to or placed at the disposal of private individuals, companies or associations.”<sup>37</sup> The United States is infamous for its mass incarceration and is the country with the highest private prison population.<sup>38</sup> In 2016, the United States had 8.5%, or 128,063, of its prison population of 1.5 million incarcerated in private prisons.<sup>39</sup> Even more drastic, 73%, or 26,249, of detained immigrants in the United States were being detained in privately-run facilities.<sup>40</sup> Being for-profit businesses, private prisons quite often make their prisoners engage in labour if they are physically able to do so.<sup>41</sup> Private prisons try to avoid scandal and outcry by “paying” their workers, but this pay is dollars below the national minimum wage standard with prisoners on average getting paid \$0.14–\$0.40 an hour.<sup>42</sup> When accounting for currency differences, we will later see that this pay is not much different than the amount Nike’s overseas workers were getting paid in their manufacturing factories. This calls into question whether the United States has refused to ratify the Forced Labour Convention in preference of the capitalistic pros that having a privatized prison system that partakes in manufacturing and prison work brings.

Another example includes the United States refusing to ratify the Fundamental ILO Freedom of Association and Protection of the Right to Organize Convention, which is perplexing in itself since the right to assemble is included in the First Amendment of the United States

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<sup>33</sup> See NORMLEX, C029 - *Forced Labour Convention, 1930 (No. 29) - Countries that have not ratified this Convention*, INTERNATIONAL LABOUR ORGANIZATION, [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310\\_INSTRUMENT\\_ID:312174:NO](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312174:NO) (last visited Dec. 14, 2020).

<sup>34</sup> *Forced Labour Convention*, see *supra* note 32.

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

<sup>36</sup> *Id.*; see WTO Labour Standards.

<sup>37</sup> *Forced Labour Convention*, *supra* note 32.

<sup>38</sup> See Vinay Basti and Kara Gotsch, *Capitalizing on Mass Incarceration: U.S. Growth in Private Prisons*, THE SENTENCING PROJECT (2018), <https://www.sentencingproject.org/publications/capitalizing-on-mass-incarceration-u-s-growth-in-private-prisons/>.

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

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

<sup>41</sup> See *id.*

<sup>42</sup> See *id.*

Constitution.<sup>43</sup> However, the First Amendment would not apply to non-U.S. citizens on foreign territory, so a plausible explanation is that United States is willing to prevent people not on U.S. soil from assembling in a call for more ethical labour practices if it allows for the continuation of capitalistic endeavors. Just as interesting is that the United States has also yet to ratify the Fundamental ILO Minimum Age Convention that states that, depending on the type of work involved, the minimum child work requirement will be fourteen or fifteen.<sup>44</sup> This is not much different from the United States, which sets the minimum age requirement at fourteen years old under the Fair Labour Standards Act (FLSA).<sup>45</sup> It seems almost hypocritical on the United States' part to not ratify such a convention, especially when it is becoming increasingly commonplace for American corporations to include the same, if not slightly higher at age sixteen, minimum age requirements in their company policies. Regardless of the cause for the United States' lack of action towards ratifying the ILO conventions, the United States government looks complacent and uncaring in the face of their corporations participating in unethical and poor working conditions overseas.

The United States is a prime example of the shortcomings a country can have despite being an active member state of the ILO and trying to ratify and implement Conventions. Implementation of ratified Conventions are not fully enforced, as exemplified by the two Technical Conventions that the United States has ratified but does not currently have in force.<sup>46</sup> The lack of accountability for full implementation of ratified Conventions calls into question whether the labour standards set by the ILO are being met. There is also much suspicion regarding the Conventions that countries choose not to ratify. News reporting and documentaries about sweatshops, child slavery, and unhygienic conditions within outsourced factories owned by American companies further solidifies the skepticism regarding ILO and the implementation of their labour standards.<sup>47</sup>

## II. NGO CERTIFICATIONS

As big American companies sought to maximize their profits, they began outsourcing the production of their products in factories in underdeveloped or developing countries.<sup>48</sup> There, American companies were able to reduce manufacturing costs due to lower labour standards, less organized labour unions, and lower employee wages.<sup>49</sup> In response to criticism by the media and advocacy groups, large American companies which engaged in practices that involved unethical

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<sup>43</sup> See NORMLEX, *C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) - Countries that have not ratified this Convention*, INTERNATIONAL LABOUR ORGANIZATION (Jul. 04, 1950), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310\\_INSTRUMENT\\_ID:312232:NO](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312232:NO).

<sup>44</sup> See NORMLEX, *C138 - Minimum Age Convention, 1973 (No. 138) - Countries that have not ratified this Convention*, INTERNATIONAL LABOUR ORGANIZATION (Jun. 19, 1973), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310\\_INSTRUMENT\\_ID:312283:NO](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312283:NO).

<sup>45</sup> See U.S. Department of Labor, *Age Requirements*, U.S. DEPARTMENT OF LABOR, <https://www.dol.gov/general/topic/youthlabor/agerequirements#:~:text=As%20a%20general%20rule%2C%20the,under%20the%20age%20of%202016>.

<sup>46</sup> See *supra* USA ILO Ratifications.

<sup>47</sup> See Max Nisen, *How Nike Solved Its Sweatshop Problem*, BUSINESS INSIDER (May. 9, 2013, 10:00 AM), <https://www.businessinsider.com/how-nike-solved-its-sweatshop-problem-2013-5>.

<sup>48</sup> See *id.*

<sup>49</sup> See *id.*

labour standards were forced to dramatically change their labour practices abroad or risk further boycott and negative scrutiny from the public.<sup>50</sup>

Companies moved towards making these changes by garnering certifications by non-governmental organizations (NGOs).<sup>51</sup> NGOs exist on both a national and international level and are a “voluntary group or institution with a social mission, which operates independently from government.”<sup>52</sup> NGOs cover a broad assortment of topics such as healthcare, environmental issues, women’s rights, foreign policy, and labour conditions.<sup>53</sup> NGOs aspire to develop and implement programs and approaches that uphold the social and economic policies the NGO is trying to achieve.<sup>54</sup> NGO certifications provide a form of regulatory expectations for companies who choose to conform to the requirements and specifications of the desired NGO certifications they are seeking to obtain.<sup>55</sup> In order to dissipate scrutiny or criticism from the media and the public, companies will often alter their own corporate policies to meet the requirements that would allow them to comply with the policies of the NGO certification they are hoping to obtain.<sup>56</sup>

Because the GATT/WTO intentionally does not mention labour conditions except for an explicit exclusion allowing for use of prison labour and because corporations are voluntarily exposing themselves to the certification programs offered by various NGOs, neither NGOs nor the corporations who choose to participate in their programs are in violation of the GATT/WTO. The only “persons” allowed to bring disputes before the WTO are WTO members, so even if corporations fail to pass or continue compliance with the certifications and accreditations that NGOs provide, there are no real legal consequences from the WTO for these corporations. In these cases, the only consequences corporations would face was loss of certification and potentially bad press from the media. However, bad press and sour public opinion can have lasting consequences on corporations, especially on issues heavily pushed by a sense of morality and ethics.

A prime example of an NGO that provides labour standards certifications is the Fair Labor Association.<sup>57</sup> In response to several labour condition scandals that involved overseas child labour and sweatshops within American apparel and footwear companies, President Bill Clinton put together a national task force that consisted of both NGOs and multinational companies in an attempt to resolve these issues.<sup>58</sup> President Clinton challenged the task force to work together to establish regulations and standards to improve labour conditions and the task force then shortly evolved into the Fair Labor Association.<sup>59</sup>

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<sup>50</sup> *See id.*

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

<sup>52</sup> *FAQ: What is an NGO*, NGO SOURCE, <https://www.ngosource.org/what-is-an-ngo> (last visited Oct. 18, 2020).

<sup>53</sup> Bureau of Democracy, Human Rights, and Labor, *Non-Governmental Organizations (NGOs) in the United States*, U.S. DEPARTMENT OF STATE, (Jan. 20, 2017), <https://www.state.gov/non-governmental-organizations-ngos-in-the-united-states/>.

<sup>54</sup> *See id.*

<sup>55</sup> *See id.*

<sup>56</sup> *See id.*

<sup>57</sup> *See History*, FAIR LABOR ASSOCIATION <https://www.fairlabor.org/about-us/history>.

<sup>58</sup> *See id.*

<sup>59</sup> *See id.*



The Fair Labor Association has a Workplace Code of Conduct of “labor standards that aim to achieve decent and humane working conditions” and which are “based on International Labor Organization standards and internationally accepted good labor practices.”<sup>60</sup> Companies that choose to affiliate themselves and mark themselves as having been approved, so to speak, by the Fair Labor Association are “expected to comply with all relevant and applicable laws and regulations of the country in which workers are employed and to implement the Workplace Code in their applicable facilities.”<sup>61</sup> The Fair Labor Association Workplace Code of Conduct focuses on elements such as regulating the amount of hours workers can work in a week, requiring that minimum compensation be sufficient to meet the basic needs of the workers in the nation they are employed in with some discretionary income, and that employers provide a safe and healthy work environment with contingency plans in case harm or an accident befalls an employee.<sup>62</sup> Other elements also include child labor regulations, compliance with nondiscrimination practices, and a recognition of the employees’ right to association and unionization.<sup>63</sup> It is interesting to note that while Article XX of the GATT explicitly allows the use of prison labor, the Fair Labor Association Code of Conduct outwardly contradicts the GATT/WTO Agreement by stating that “there shall be no use of forced labor, including prison labor, indentured labor, bonded labor or other forms of forced labor.”<sup>64</sup> This is exemplary of how although the GATT/WTO Agreement lacks any substantial form of labour standard regulations, NGO certifications can fill in the gaps.

However, NGO certifications themselves have come into scrutiny as they became increasingly popular with companies in just a couple of decades.<sup>65</sup> The scrutiny towards NGO’s have been persistent in topic and is rooted in the duplication of certification programs which leads to wasted resources, poor coordination, a lack of professionalism, and the lack of power NGOs actually have to enforce their certification regulations.<sup>66</sup>

The following case study dives deep into the unfair labour standards and conditions that were behind the growing worldwide success of Nike, Inc in the 1970’s through the early 2000’s. It follows the public outrage at the discovery that Nike was participating in overseas sweatshops which unfairly treated their majority female and child workers and the steps Nike took with great help from NGO programs and certifications to remedy these injustices in their labor practices and in the eyes of the strict public scrutiny. The present status of Nike’s certification compliance with labour-based NGO certifications is also reviewed as well as recent news releases that speak to the contrary.

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<sup>60</sup> Code of Conduct, FAIR LABOR ASSOCIATION, <https://www.fairlabor.org/our-work/labor-standards> (last visited Oct. 20, 2020).

<sup>61</sup> *Id.*

<sup>62</sup> *See Workplace Code of Conduct*, FAIR LABOR ASSOCIATION, [https://www.fairlabor.org/sites/default/files/fla-code\\_of\\_conduct\\_.pdf](https://www.fairlabor.org/sites/default/files/fla-code_of_conduct_.pdf)

<sup>63</sup> *See id.*

<sup>64</sup> *See id.* *See* GATT, *supra* note 2.

<sup>65</sup> *See* Charles-Antoine Hofmann, *NGO certification: time to bite the bullet?*, HUMANITARIAN PRACTICE NETWORK, (Nov. 1999), <https://odihpn.org/magazine/ngo-certification-time-to-bite-the-bullet/> (last visited Oct. 18, 2020).

<sup>66</sup> *See id.*

### III. NIKE, A CASE STUDY

Originally, most of the shoes and apparel that Nike was internationally known for were manufactured in factories in Taiwan and South Korea.<sup>67</sup> In these countries, Nike was able to pay their workers low wages without much thought of labour standards regulation or minimum wage paying laws.<sup>68</sup> However, as labour unions and organizations formed and spread in amount of members in both Taiwan and North Korea, minimum employee wage prices began to be formed, enforced, and increased.<sup>69</sup> As a result, Nike urged their overseas manufacturing contractors to move to China, Indonesia, and Vietnam.<sup>70</sup> Because of a lack of organized labour unions in China, Indonesia, and Vietnam, Nike was able to pay the workers at factories mere cents an hour for their labour.<sup>71</sup>

The amount of money that Nike was saving by not paying their factory workers fair or living wages is widely regarded to be one of the main reasons why Nike's popularity and revenue steadily surged into the early 1990's.<sup>72</sup> With the money Nike was saving from minimizing their manufacturing and overseas employee wages, Nike turned their business model into one that used those saved costs for aggressive marketing campaigns which included highly visible and widespread sponsorships with sports team, athletes, and celebrities.<sup>73</sup> For example, Nike spent \$200 million sponsoring American basketball player, Michael Jordan, in return for him endorsing and wearing the Nike brand during the 1992 Summer Olympics in Barcelona, Spain.<sup>74</sup> However, as Nike's revenue continued to increase, journalists were becoming aware of the labour injustices and inequality taking place in what they deemed to be Nike's "sweatshops" and were working towards publicly exposing Nike for their misdeeds.<sup>75</sup>

In 1991, labour rights activist Jeffrey Ballinger, who spent three and half years in Indonesia working for a labour organization, published a report in which he was the first to report on the shockingly low wages and poor working conditions inside one of Nike's manufacturing factories in Indonesia.<sup>76</sup> Ballinger followed that report the following year by publishing an article, *The New Free-Trade Heel: Nike's profits jumps off the backs of Asian workers*, in *Harper's Magazine* in which he more heavily documented the lack of labour standards and unethical practices taking place in Nike's manufacturing factories in Indonesia.<sup>77</sup> In his article, Ballinger focused on

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<sup>67</sup> See Nisen, *supra* note 32.

<sup>68</sup> See *id.*

<sup>69</sup> See *id.*

<sup>70</sup> See *id.*

<sup>71</sup> See *id.*

<sup>72</sup> See *id.*

<sup>73</sup> See *id.*

<sup>74</sup> See Jeffrey Ballinger, *The New Free-Trade Heel: Nike's profits jumps off the backs of Asian workers*, HARPER'S MAGAZINE 46-47, August 1992, <http://archive.harpers.org/1992/08/pdf/HarpersMagazine-1992-08-0000971.pdf?AWSAccessKeyId=AKIAJXATU3VRJAAA66RA&Expires=1466354923&Signature=GuzAGJL99jmQtdjxkHswIOWLZJA%3D>.

<sup>75</sup> See Nisen, *supra* note 32.

<sup>76</sup> See *id.*; see Ballinger, *supra* note 59.

<sup>77</sup> See Ballinger, *supra* note 59.

instances of abuses the workers faced and specifically criticized the poor working conditions, child labour, exceedingly low wages, and lack of labour organization within the factories.<sup>78</sup>

The *Harper's Magazine* article also included a specific highlight from Ballinger on a female Indonesian worker, Sadish, who was getting paid just fourteen cents an hour, which was well below Indonesia's minimum wage at the time.<sup>79</sup> Sadish was working six days a week, each day being a ten and a half hour workday and working about sixty three hours of overtime for her paycheck to come out to \$37.46.<sup>80</sup> Every hour of overtime only added an additional 2 cents to Sadish's overtime time and although Sadish and many others took overtime work shifts primarily out of economic necessity, the workers expressed that they were also being compelled to take extra shifts by their employer.<sup>81</sup> Ballinger highlighted Sadish in an attempt to exemplify how Nike's low wages were negatively effecting and exploiting foreign workers, with women being disproportionately on the backhand of Nike's lack of labor standards and unethical business practices.<sup>82</sup>

Ballinger drew attention to the fact that while Nike had made \$3 billion dollars in sales in 1991 alone, \$200 million dollars of which went towards funding Michael Jordan's sponsorship the following year, Nike was complacent in paying their overseas workers abysmal wages in similarly abysmal working conditions.<sup>83</sup> By shifting their manufacturing factories to cheaper labor pools, Nike was also shifting their business model to be an active participant in negatively furthering the poor working conditions of workers in developing countries.

Nike's initial response was to deny that they were at fault for the conditions the overseas employees in question were working in.<sup>84</sup> Nike's director of compliance, Todd McKean, argued that Nike was not directly at fault and stated "our initial attitude was, 'Hey, we don't own the factories. We don't control what goes on there.'"<sup>85</sup> With that mindset, Nike continued to assert that they were not who should be blamed for the labor practices the owners who operated these factories chose to partake in.<sup>86</sup> However, Nike executives quickly realized that this rationalization didn't absolve Nike of fault in the media's eyes and quickly moved to mitigate the negative media attention they were receiving.<sup>87</sup> Nike's next response to the public outcry and criticism to the initial report Ballinger published prior to his article in *Harper's Magazine* was to create their own code of conduct regarding labor conditions and practices.<sup>88</sup> *Nike Code of Conduct* was to be implemented on a company-wide scale.<sup>89</sup> The *Nike Code of Conduct* was designed to lay out

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<sup>78</sup> *See id.*

<sup>79</sup> *See id.*

<sup>80</sup> *Id.*

<sup>81</sup> *See id.*

<sup>82</sup> *See id.*

<sup>83</sup> *See id.*

<sup>84</sup> *See id.*

<sup>85</sup> Dale Miller, *Sarah Soule: How Activism Can Fuel Corporate Social Responsibility*, STANFORD GRADUATE SCHOOL OF BUSINESS, (Oct. 10, 2014) <https://www.gsb.stanford.edu/insights/sarah-soule-how-activism-can-fuel-corporate-social-responsibility> (last visited Nov. 06, 2020).

<sup>86</sup> *See Nisen, supra* note 47.

<sup>87</sup> *See id.*

<sup>88</sup> *See id.*

<sup>89</sup> *See Nisen, supra* note 47.

minimal standards Nike expected all their supplier factories and facilities to meet in order to show Nike's "commitment to the welfare of workers and to using resources responsibly and efficiently."<sup>90</sup>

The *Nike Code of Conduct* focused on voluntary employment, compensation and benefits policies, minimum age requirements for employees that were minors, safe and clean working environments, and sustainability practices.<sup>91</sup> Additionally, in complete contradiction to the exception made by the GATT–WTO Agreement which allows for countries to utilize prison labor, Nike explicitly stated in *Nike Code of Conduct* that employment is voluntary and that "the supplier does not use forced labor, including prison labor, indentured labor, bonded labor or other forms of forced labor."<sup>92</sup> Nike excluding prison labor from their own labor regulations goes to show how companies themselves, often with the incentive to be in good standing with public opinion and in compliance with labor based NGO certifications, can enact their own labor standards and policies to be used internationally to fill in the gaping gaps that the GATT–WTO Agreement leaves open for countries and international companies to exploit for their own economic benefit.

The *Nike Code of Conduct* was distributed to all of Nike's factories and suppliers both on domestic land and in foreign countries.<sup>93</sup> Within five years of the *Nike Code of Conduct* being established and implemented, Nike had conducted more than 600 audits in their factories to ensure that factories were in compliance with the *Nike Code of Conduct*.<sup>94</sup>

Despite Nike's efforts in enacting a labor based code of conduct, Jeffrey Ballinger's expose in *Harper's Magazine* the following year highlighting the unethical labor practices in one of Nike's Indonesian factories proved that Nike and the *Nike Code of Conduct* had yet to fully resolve the issues surrounding their "sweatshops" overseas.<sup>95</sup> More heightened public criticism and disgust at Nike and their low wages and poor labor conditions inside their sweatshops were immediate in the wake of Ballinger's expose.<sup>96</sup> Protests erupted at the 1992 Summer Olympics where Nike was undergoing a massive marketing campaign at and CBS quickly interviewed Indonesian factory workers of the abuses they were experiencing in Nike's factories which further confirmed what Ballinger had been reporting.<sup>97</sup>

Nike's next attempt at trying to clean up their tainted brand image was to create a department whose sole purpose was to implement changes that would improve the working conditions of their factory workers.<sup>98</sup> However, Nike was still struggling to disassociate itself with the image of barely paid workers making Nike athletic shoes in foreign sweatshops that the media and their consumers had latched on to and refused to let go of. Groups at numerous university and

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<sup>90</sup> Nike, Inc., *Nike Code of Conduct*, NIKE, INC., 1-3 (Sept. 2017), <https://purpose-cms-production01.s3.amazonaws.com/wp-content/uploads/2018/06/11175434/English-Nike-Code-of-Conduct-2017.pdf> [hereinafter *Nike Code of Conduct*].

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

<sup>92</sup> *Id.* *See* GATT, *supra* note 1.

<sup>93</sup> *See* Nike Code of Conduct, *supra* note 90.

<sup>94</sup> *See* Miller, *supra* note 85.

<sup>95</sup> *See* Nisen, *supra* note 47.

<sup>96</sup> *See id.*

<sup>97</sup> *See id.*

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

colleges throughout the United States were teaming up with the Worker Rights Consortium (WRC) to organize national hunger strikes in protest of their schools' athletics departments and teams being sponsored by Nike.<sup>99</sup> University students called for the college and universities to end their sponsorships with Nike.<sup>100</sup> Student activists at big reputation schools with well-known sports teams such as Duke University, the University of Michigan, and the University of Wisconsin and others staged sit-ins which garnered thousands of student participants.<sup>101</sup>

In some cases, this topic of unethical labour conditions became a stepping stone for the call to ethical business practices in the United States. Students at the University of Oregon stormed the entrances of the buildings that housed the school's top administrators and staged a sit-in that blocked entrance to the building.<sup>102</sup> Signs with Nike's signature logo read in bright, bold letter's "TAKE A HIKE, NIKE."<sup>103</sup> Tensions became especially high at the University of Oregon because Phil Knight, the chairman of Nike, was an alum of the university and was also the school's biggest benefactor, with Knight providing funding for many of the school's new buildings, renovations for the football stadium, and for many of the school's athletics programs.<sup>104</sup> Knight was considered to be the university's most important benefactor, and because the University of Oregon was the single biggest employer in Eugene, where the university was located, the town as a whole relied heavily on the funding that Knight provided to the university.<sup>105</sup> After the University of Oregon refused to remove itself from being a part of the Worker Rights Consortium (WRC), Knight revoked his \$30 million pledge to the university.<sup>106</sup> The Worker Rights Consortium was a watchdog group that monitored the labour practices and conditions of factories.<sup>107</sup> The WRC did not allow corporations to participate in setting their terms for labour conditions and instead set their own terms without corporate participation that corporations needed to be in compliance with to obtain WRC certification.<sup>108</sup> Nike was not aligned with WRC and was instead partnered with the Fair Labor Association (FLA) which did allow to corporations to participate in setting their terms for working conditions.<sup>109</sup>

Upon learning that women were disproportionately victim to Nike's poor labour conditions, feminist groups and coalitions joined in protest against Nike.<sup>110</sup> The presence of these feminist groups were further amplified when Nike started an advertising campaign in an attempt

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<sup>99</sup> See Joshua Hunt, *The Student Movement That Went Toe-to-Toe with Nike: On One of the Many Real Costs of Globalization*, LITERARY HUB (Feb. 14, 2020) <https://lithub.com/the-student-movements-that-went-toe-to-toe-with-nike/> (last visited Nov. 6, 2020).

<sup>100</sup> *See Id.*

<sup>101</sup> *See id.*

<sup>102</sup> *See id.*

<sup>103</sup> *See id.*

<sup>104</sup> *See id.*

<sup>105</sup> *See id.*

<sup>106</sup> *See* Wired Staff, *Nike Fires Back at Protesters*, WIRED (June 01, 2000, 12:00PM) <https://www.wired.com/2000/06/nike-fires-back-at-protesters/> (last visited Nov. 6, 2020).

<sup>107</sup> *See id.*

<sup>108</sup> *See id.*

<sup>109</sup> *See id.*

<sup>110</sup> *See* George H. Sage, *Justice Do It! The Nike Transnational Advocacy Network: Organization, Collective Actions, and Outcomes*, in 16 SOCIOLOGY OF SPORT JOURNAL 206 – 235 (1999).

to promote their female athletic gear.<sup>111</sup> In retaliation, these feminist groups started their own campaign with the slogan of “Just Don’t Do It,” a play on words on Nike’s infamous brand slogan “Just Do It” in an attempt to encourage people to boycott buying Nike athletic shoes and gear.<sup>112</sup>

Student activism did prove to be effective at some schools. Students at St. John’s University protested Nike’s sponsorship deal with the athletic department and consequently, Jim Keady, an assistant soccer coach at the university, quit his job in protest over his contract demanding he wear Nike’s athletic gear.<sup>113</sup> Citing Nike’s poor working conditions as the cause behind his actions, Keady stated “I don’t want to be a billboard for a company that would do these things.”<sup>114</sup>

Nike once again attempted to fix their image by hiring civil rights activist Andrew Young to examine Nike’s working condition in their overseas factories.<sup>115</sup> After inspecting numerous factories manufacturing Nike products in Asia and Latin America, Young reported that found no evidence of poor working conditions or of widespread mistreatment of any of the workers.<sup>116</sup> Young admitted that although Nike needed to do more to safeguard the changes the *Nike Code of Conduct* had implemented to ensure continued compliance, that he found “Nike to be in the forefront of a global economy” and that the “[F]actories we visited that produce Nike goods were clean, organized, adequately ventilated and well lit.”<sup>117</sup> Young’s only real criticism of the company’s overseas factories was that actual supervisors hired and trained by Nike to ensure quality control were noticeably absent from the factories and that the factories seemed to be largely run by expatriates who struggled to speak the local language fluently.<sup>118</sup>

The report by Andrew Young did not have the effect Nike intended and quickly backfired with many public outlets criticizing the report.<sup>119</sup> Nike and Young were criticized for using Nike’s own interpreters during the inspections, which questioned whether there was a positive bias towards Nike in the answers Young was hearing and basing his report off.<sup>120</sup> Nike was also accused of trying to use Young and his report to deflect from increasing the pay of their overseas factory workers and from having to implement any real, long-lasting ethical working standards.<sup>121</sup> In response, Nike denied any claims of deflection and asserted that they only intended to use Young’s report as “a level of oversight to its commitment to setting the standard for global workplace

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

<sup>112</sup> *See id.*

<sup>113</sup> *See* Hunt, *supra* note 84.

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

<sup>115</sup> *See* Dana Canedy, *Nike’s Asian Factories Pass Young’s Muster*, THE NEW YORK TIMES (June 25, 1997)

<https://www.nytimes.com/1997/06/25/business/nike-s-asian-factories-pass-young-s-muster.html> (last visited Nov. 6, 2020).

<sup>116</sup> *See id.*

<sup>117</sup> *Id.*

<sup>118</sup> *See id.*

<sup>119</sup> *See id.*

<sup>120</sup> *See id.*

<sup>121</sup> *See id.*

standards” and that Nike had every intention of fully implementing and taking into consideration all of Young’s recommendations and criticisms.<sup>122</sup>

The actions of student activists, public officials, labour unions, and of customers in the face of unethical labour conditions and standards brings into focus the power the individual and the collective have as consumers. The public refused to allow Nike to not take accountability for their poor labour conditions, and Nike suffered the consequences of their actions. In the face of losing a large base of their consumer demographic, Nike was forced to reevaluate and reinvent the labour practices and standards they participated in overseas. The negative outlook on consumers and public opinion regarding Nike’s working conditions and practices was the catalyst or Nike partnering up with nongovernmental organizations in an effort to come into compliance with a higher and more ethical standard of corporate labour practices in foreign countries.

Due to weak demand for their products and unwavering criticism from the public regarding their labour practices, Nike’s profits dramatically decreased, and they were forced to lay off workers. By then, Phil Knight, the University of Oregon alum who withheld millions of donations from the school for their refusal to separate themselves from the Worker Rights Consortium (WRC), had become the new chief executive officer (CEO) of Nike and started his tenure with a call for change in the way Nike operated its overseas factories and employees.<sup>123</sup> “The Nike product has become synonymous with slave wages, forced overtime, and arbitrary abuse,” stated Knight in a speech following his new position as CEO of Nike. Knight then raised the minimum wage of their factory workers and implemented changes to increase quality control in monitoring to ensure that the *Nike Code of Conduct* regulations and standards were being enforced.<sup>124</sup> In an effort to make the factories a safer and more healthy workplace, Knight also announced that overseas Nike factories would adopt the United States Occupational Safety and Health Administration (OSHA) standards for clean air in manufacturing factories.<sup>125</sup>

In collaboration with the World Bank and the International Youth Foundation, Nike helped launch their own nongovernmental organization called Global Alliance for Workers and Communities in 1999.<sup>126</sup> Global Alliance was an effort by Nike to better their standing in the public eye and to better the working conditions of factory workers in developing countries.<sup>127</sup> Global Alliance operates under two primary objectives. The first objective is “to give voice to the concerns and aspirations of factory workers, initially, those employed by the footwear and apparel industry, mostly young women in their late teens and early twenties.”<sup>128</sup> Global Alliance sought to meet this objective by interviewing thousands of workers in Nike factories in Vietnam, Thailand, and Indonesia about the conditions they were working in, what they sought improvements in their workplace, and about career plans they had for the future and how Global Alliance could instill a

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<sup>122</sup> *See id.*

<sup>123</sup> *See Nisen, supra note 32.*

<sup>124</sup> *See id.*

<sup>125</sup> *See id.*

<sup>126</sup> *See Kevin F. Quigley, Global Alliance aims to improve factory workers’ lives, ALLIANCE MAGAZINE (Mar. 1, 2001), <https://www.alliancemagazine.org/analysis/global-alliance-aims-to-improve-factory-workers-lives/> (last visited Nov. 6, 2020).*

<sup>127</sup> *See id.*

<sup>128</sup> *See id.*

workplace environment that helped them achieve their aspirations.<sup>129</sup> The second objective is to “design and deliver programmes that respond to the hopes and concerns expressed.”<sup>130</sup> One of the biggest concerns of the factory workers was their health, and as a result, the factories began to offer training seminars on nutrition, women’s health, and basic health.<sup>131</sup> Nike also started bringing mobile clinics into their Thailand factories which focused on women’s health and screened the female workers for cervical cancer, breast cancer, and sexually transmitted diseases.<sup>132</sup> The clinics helped women through their pregnancy and counseled them on various other health issues that were common to women since their workforce consisted predominantly of women.<sup>133</sup>

Corporations that sought to be in compliance with Global mission were expected not only to provide financial resources to Global Alliance in order to help Global Alliance accomplish their mission statement, but were also expected to be fully transparent with Global Alliance about the operations in their factories.<sup>134</sup> Corporations were also expected to give Global Alliance full access to their vendor factories so that Global Alliance could ensure they were in compliance with their labour regulations and stay current on issues that still needed to be addressed in order to improve the working and personal lives of their factory workers.<sup>135</sup> In return, corporations would be able to say that their labour standards were in collaboration with Global Alliance’s high standards of labour conditions for foreign factories.<sup>136</sup> The corporations would also have access to programs and research targeted at improving the specific labour-related issues the corporation’s factories were struggling.<sup>137</sup>

However, it is not in Global Alliance’s practice to consistently monitor to ensure that participating companies are keeping up with labour practices that are up to par with their own code of conducts.<sup>138</sup> Such a practice calls into question how effective Nike’s partnership with Global Alliance really is as there is no system in place to ensure regular and updated compliance with ethical labour practices. Global Alliance has no definitive way of keeping Nike and other corporations accountable in their promise to work towards bettering the lives of their factory workers. Such issues furthered the groundwork for Nike to partner itself with other nongovernmental organizations (NGOs) that have voluntary certifications for labour practices and working conditions, which corporations could get if they met the specific and high standards required for compliance.

Nike is widely known to be in partnership with the Fair Labor Association (FLA), a nongovernmental organization that seeks to create “lasting solutions to abusive labor practices by offering tools and resources to companies, delivering training to factory workers and management, conducting due diligence through independent assessments, and advocating for greater accountability and transparency from companies, manufacturers, factories and others involved in

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<sup>129</sup> *See id.*

<sup>130</sup> *See id.*

<sup>131</sup> *See id.*

<sup>132</sup> *See id.*

<sup>133</sup> *See id.*

<sup>134</sup> *See id.*

<sup>135</sup> *See id.*

<sup>136</sup> *See id.*

<sup>137</sup> *See id.*

<sup>138</sup> *See id.*



global supply chains.”<sup>139</sup> However, the FLA has been publicly criticized for being “relatively toothless” in the face of corporations because the FLA allows for active corporate participation in the making of their labour standards.<sup>140</sup> This creates an opportunity for corporations to help create a labour standards certification program that leaves a lot of room for leniency in corporate compliance, which could potentially cause scenarios where corporations get accredited with a labour standards certification that lacks strict adherence to regulations and is not up to par with the standards of other labour-related NGOs that disallow corporate participation. This was the decisive reason for which, then chairman, CEO Phil Knight decided to pull a personal pledge to donate \$30 million to the University of Oregon, his alma mater.<sup>141</sup> The University of Oregon was affiliated with the Worker Rights Consortium (WRC), which did not allow for corporate participation in creating the standards that the WRC based their certification programs on.<sup>142</sup> Phil Knight was trying to sway the University of Oregon from affiliating itself with the WRC and to move towards a partnership with the FLA.<sup>143</sup> This situation perfectly exemplifies how even NGOs cannot fix the gaping hole in regards to labour practices in the WTO/GATT and how corporations like Nike can still find weak spots in organizations formed to try and remedy these issues.

Besides the Fair Labor Association, Nike has also partnered up with several other labour-related NGOs in an effort improve the working conditions in their factories. Specifically, Nike partnered up with the International Textile, Garment and Leather Workers’ Federation (ITGLWF), which is a global union and whose aim is to “ensure protection of workers against all dangers arising from their employment ...; support national and international action arising in the struggle against economic exploitation and political oppression of workers ...; [and] secure genuine equality for women employed in the sector to ensure their integration into trade union organizations.”<sup>144</sup> Nike is also in collaboration with the Social and Labor Convergence Program (SLCP), which aims to establish and implement an industry-wide framework to assess social and labour conditions.<sup>145</sup> In order to gain certification from SCLP, Nike had to undergo a three-step process which included data collection, verification, and data hosting and sharing.<sup>146</sup> During the verification process, experienced and accredited auditors travel to corporations’ foreign factories and assess the labour and social conditions of the factories.<sup>147</sup> Assessment includes doing thorough walk-throughs of the factories, in-depth interviews with factory workers, and a combination of self-assessment and joint-assessment of the factory by the corporations and auditors.<sup>148</sup> From the results, SCLP determines whether the corporation is adhering to the current standards of labour

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<sup>139</sup> *Home*, FAIR LABOR ASSOCIATION, <https://www.fairlabor.org/> (last visited Nov. 6, 2020).

<sup>140</sup> Hunt, *supra* note 99.

<sup>141</sup> *See id.*

<sup>142</sup> *See id.*

<sup>143</sup> *See id.*

<sup>144</sup> *Int’l Textile, Garment and Leather Worker’s Fed’n (ITGLWF)*, UNION OF INTERNATIONAL ASSOCIATION, <https://uia.org/s/or/en/1100047837> (last visited Nov. 6, 2020).

<sup>145</sup> *See Home*, THE SOCIAL AND LABOR CONVERGENCE PROGRAM, <https://slconvergence.org/> (last visited Nov. 6, 2020).

<sup>146</sup> *See About SLCP: Our Tool*, THE SOCIAL AND LABOR CONVERGENCE PROGRAM, <https://slconvergence.org/tool> (last visited Nov. 6, 2020).

<sup>147</sup> *See id.*

<sup>148</sup> *See id.*

and social conditions in the industry and issues mandates for the areas where the individual factory scored lowed or was severely lacking in.<sup>149</sup>

Many human and labour-rights activists acknowledged the efforts Nike was making to better the lives of their foreign workers and to improve the working conditions of the factories.<sup>150</sup> Nike became the first corporation in the apparel industry to reveal a complete list of factories they contracted with which went to show the amount of increased transparency Nike had committed to.<sup>151</sup> This came after activists had spent years urging Nike to release a comprehensive list of all the overseas factories that they subcontracted to in an effort to increase the amount of independent monitoring done by NGOs, labour unions, and activists.<sup>152</sup> Nike then went on to a publish their own comprehensive report consisting of 108 pages in which they admitted their own shortcoming and continued abuses that were still present in their factories, specifically those in Thailand, China, Vietnam, and South Korea.<sup>153</sup>

However, the same human and labour rights activists stood firm in their belief that although increased monitoring had dramatically improved the working conditions of Nike's factories, that Nike still had a multitude of severe issues they had to confront.<sup>154</sup> These issues took place in the form of hazardous materials that workers were frequently exposed to, unsafe air quality in the workplace, and the eyebrow raising locking of factory doors during employment hours so that their workers could not leave the factory.<sup>155</sup> Activists cited Nike's own 108 page report which highlighted that many workers in a quarter of factories were still experiencing both physical and verbal abuse; that up to half of all factories engaged in restricting workers from having access to the bathroom and drinking; and that half of the factories denied workers even one day off in a seven-day work week.<sup>156</sup> In a quarter of all factories, wages were still below the minimum wage standard that Nike had committed to in their *Nike Code of Conduct*.<sup>157</sup> The majority of workers were still working over sixty hours a week and many of them were punished if they refused to work overtime.<sup>158</sup>

While still working towards meeting the requirements needed to comply with various labour-based NGOs, Nike was also making efforts at their annual corporate shareholder meetings to talk about implementing more ethical labour and environmental practices in their factories.<sup>159</sup> According to their 2001 Proxy Statement that was submitted to the Securities and Exchange Commission, Nike had charged their Corporate Responsibility Committee with the task of being

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<sup>149</sup> See *id.*

<sup>150</sup> See David Teather, *Nike list abuses at Asian factories*, THE GUARDIAN (Apr. 14, 2005, 5:26PM) <https://www.theguardian.com/business/2005/apr/14/ethicalbusiness.money> (last visited Nov. 6 2020).

<sup>151</sup> See *id.*

<sup>152</sup> See *id.*

<sup>153</sup> See *id.*

<sup>154</sup> See *id.*

<sup>155</sup> See *id.*

<sup>156</sup> See *id.*

<sup>157</sup> See *id.*

<sup>158</sup> See *id.*

<sup>159</sup> See NIKE, INC., FORM DEF 14A NIKE, INC. 6, 19-20, 23-26 (Nike, Inc., 2001) <https://sec.report/Document/0001095811-01-503848/> (last visited Nov. 6, 2020).

in charge of significant activities and policies regarding labor practices.<sup>160</sup> The proxy statement also revealed that Nike was using a portion of their funds for consulting services for labor relations.<sup>161</sup> Most significantly, was a shareholder proposal by a Class B shareholder who had set up a framework of eleven principles which were designed to respect “human and labor rights of workers” in China, one of the countries where Nike’s own reports showed that ethical labour practices were still severely lacking.<sup>162</sup> The principles were written as a joint effort between the International Labour Organization (ILO) and the United Nations Covenants on Economic, Social and Cultural Rights, and Civil, and Political Rights.<sup>163</sup> The proposal was signed and approved by the Chinese government and China’s national laws.<sup>164</sup> In short, the eleven principles centered around banning the manufacturing of goods through forced or prison labor; supplying fair and decent working hours and wages that could realistically meet the needs of the worker; the prohibition of child labour; and allowed for the freedom of association and unionization amongst the factory workers.<sup>165</sup> Principle three also explicitly prohibited the use of corporeal punishment and prohibited any form of physical, verbal, or sexual abuse of the workers which was an issue that Nike’s factories struggled with especially in Asian countries.<sup>166</sup>

Despite being epitome of everything that Nike was supposedly doing their hardest to improve in their overseas factories, Nike’s Board of Directors voted against adoption of the U.S. Business Principles for Human Rights of Workers in China.<sup>167</sup> The Board rationalized their decision by asserting that their own *Nike Code of Conduct* already addressed most of the principles contained in the Proposal and that some of the principles were too vague in nature to make enforceable.<sup>168</sup> The Board argued that as a corporation, they were already committed to following the applicable laws of the countries their factories were located in and expected their subcontractors to abide by these laws when manufacturing Nike products.<sup>169</sup> The Board attempted to further their argument with a reminder that Nike was the first in the industry to publish a code of conduct establishing their own personal standards for labour practices and environmental responsibility, and that the *Nike Code of Conduct* requirements for Nike factories often exceed the local and national laws of the countries in which Nike’s factories were situated in.<sup>170</sup>

Although Nike’s arguments against approving the Proposal were true in essence, the Board of Director’s reluctance to adopt even portions of the Proposal that were relatively reasonable and ones which Nike supposedly already upheld gave rise to the question of how far Nike was willing to bind itself to programs and agreements that would hold the company accountable to someone else’s standards, not just their promises to engage in a higher standard of working conditions. Just as questionable is Nike’s assurance that their contractors were committed to following the

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<sup>160</sup> *See id.*

<sup>161</sup> *See id.*

<sup>162</sup> *See id.*

<sup>163</sup> *See id.*

<sup>164</sup> *See id.*

<sup>165</sup> *See id.*

<sup>166</sup> *See id.*

<sup>167</sup> *See id.*

<sup>168</sup> *See id.*

<sup>169</sup> *See id.*

<sup>170</sup> *See id.*

applicable local and national labor laws of the countries their factories were in. Some of the local and national laws of the factories' country of origin did not have strict labor laws or strict enforcement policies. A lack of labour laws and weak enforcement of existing labour in these developing countries were the reasons Nike originally moved their manufacturing to the factories in these locations. Nike had purposely sought out areas in which they could get away with paying factory workers extremely low wages in poor and unsafe working conditions. Thus, Nike's argument that they were committed to upholding the local and national labor laws of their factories' countries is a weak one because the labor laws of the developing countries Nike was manufacturing in were not up to par with the western ideals of ethical labor practices or with the standards the International Labour Organization (ILO) held itself to. While it was clear that Nike was committed to improving the working conditions of their factory workers, their absolute commitment could be called into question by critics who choose to see Nike's Board of Directors' recommendation against the Proposal as a limit to how far Nike is willing to go as a company to ensure ethical labour conditions.

#### IV. NIKE'S PRESENT-DAY COMPLIANCE

Nike has been abundantly public in their constantly updated, continued efforts to improve and better the working conditions of their factory workers.<sup>171</sup> Nike has rebranded itself from the company that was the face of unethical labor practices and sweatshops, into the figurehead of the industry for ethical business and labor practices.<sup>172</sup> However, despite Nike's new image and efforts, the company has proven in recent years through multiple series of events that they are yet still far from actually abstaining from labor practices that are unethical and exploit their workers.

Most recently, public outrage exists over Nike's manufacturing factories in China.<sup>173</sup> The People's Republic of China has been the subject of international criticism due to their treatment of the Uyghurs, a minority ethnic group whom the majority of practicing Muslims.<sup>174</sup> Led by the Chinese Communist Party, the People's Republic of China has taken to furthering their Communist campaign by trying to assimilate the Uyghur people by placing restrictions on Uyghur's cultural, social, and religious life.<sup>175</sup> In an effort to assimilate the Uyghur people, the Chinese government detained hundreds of thousands of Uyghurs in mass detention camps which were aimed to "mass-educate".<sup>176</sup> Many of the Uyghur people were then sent by the government to work in factories that manufactured goods for more than eighty established global brands, Nike being one of them.<sup>177</sup> Familiar with facing harsh backlash for labour-related issues, Nike quickly issued a press statement stating that at Nike "we respect human rights in our extended value chain, and always strive to conduct business ethically and responsibly" and that Nike is "committed to upholding

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<sup>171</sup> See Nisen, *supra* note 32.

<sup>172</sup> See *id.*

<sup>173</sup> See Anna Fifield, *China compels Uighurs to work in shoe factory that supplies Nike*, THE WASHINGTON POST (Feb. 29, 2020 1:30PM) [https://www.washingtonpost.com/world/asia\\_pacific/china-compels-uighurs-to-work-in-shoe-factory-that-supplies-nike/2020/02/28/ebddf5f4-57b2-11ea-8efd-0f904bdd8057\\_story.html](https://www.washingtonpost.com/world/asia_pacific/china-compels-uighurs-to-work-in-shoe-factory-that-supplies-nike/2020/02/28/ebddf5f4-57b2-11ea-8efd-0f904bdd8057_story.html) (last visited Nov. 12, 2020).

<sup>174</sup> See *id.*

<sup>175</sup> See *id.*

<sup>176</sup> *Id.*

<sup>177</sup> See *id.*

international labor standards globally.”<sup>178</sup> Also in their press statement, a Nike spokeswoman insisted that Nike “strictly prohibited from using any type of prison, forced, bonded or indentured labor.”<sup>179</sup> Despite Nike’s assertions that their factories were not a part of the factories that the Uyghur people were being sent to work at by their government as a means of assimilation, the chief executive of the plant that owns and operates Nike’s manufacturing factories stated that about 600 Uyghurs were currently working in Nike’s factories.<sup>180</sup> While the Republic of China maintains that the labor of the Uyghur people that have been sent from their homes to work in factories far from their native land is not forced labor because they are still getting paid, many international labour organizations are still uneasy at what has been regarded as “highly disturbing coercive labor practices that [were] consistent with the International Labour Organization’s definition of forced labor.”<sup>181</sup> The Australian Strategic Policy Institute (ASPI) was not able to find conclusive evidence that the labor by the Uyghurs is forced, but maintains that they do not believe the Uyghur people are working in these Chinese factories on their own volition.<sup>182</sup> The ASPI was able to find Chinese government documents that “show that transferred workers are assigned minders and have limited freedom of movement.”<sup>183</sup> The ASPI urged corporations such as Nike that were currently operating factories which employed the Uyghur people to end their contracts with those factories as they potentially find themselves in breach of trade laws which prohibit the importation of goods using forced labor.<sup>184</sup> Corporations ending their contracts with manufacturing factories participating in the “employment” of the Uyghur people could also work to encourage the Chinese government from sending the Uyghur people to work in these factories as a means as “re-education.”<sup>185</sup>

Nike’s reluctance to acknowledge that they could have been unknowing participants in thinly disguised forced labor, a practice they explicitly state in their *Nike Code of Conduct* that they prohibit in all their manufacturing factories and supply chains, brings further skepticism the effectiveness and continuance of Nike’s own *Code of Conduct* and of the labour-related certifications programs they are in compliance with.

## V. ALTERNATIVES TO NGO CERTIFICATIONS

Although many corporations are relying on labour-based NGO compliance certifications to keep the public at bay and to show that labour standards are a priority in their business models, there still other avenues of labour justice available to not only corporations, but also as statutes and acts written for the victims of poor labour conditions. Because these alternatives are not widespread, are currently pending results, or have yet to show any long-lasting or large effect on labor practices, only a brief walkthrough is needed in order to complete the overall picture.

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *See id.*

<sup>181</sup> *Id.*

<sup>182</sup> *See* Vicky Xiuzhong Xu, Danielle Cave, Dr. James Leibold, Kelsey Munro, & Nathan Ruser, *Uyghurs for Sale*, AUSTRALIAN STRATEGIC POLICY INSTITUTE (Mar. 01, 2020) <https://www.aspi.org.au/report/uyghurs-sale> (last visited Nov. 13, 2020).

<sup>183</sup> *Id.*

<sup>184</sup> *See id.*

<sup>185</sup> *Id.*

The first option is one which allows foreign individuals to bring civil suits against American individuals under the Alien Tort Claims Act (ATCA) in federal jurisdiction.<sup>186</sup> The Alien Tort Claims Act is quite often used for suits against corporations for international human rights violations and environmental crimes.<sup>187</sup> Most recently, the Supreme Court has heard oral hearings in the case of *Nestlé USA, Inc. and Cargill, Inc. v. John Doe et al.* which is a suit brought by six former child slaves who were trafficked out of Mali and were victims of forced labour in the cocoa fields of the Ivory Coast.<sup>188</sup> The cocoa fields the Malians worked are part of one of the major suppliers for both Nestle USA and Cargill, Inc.<sup>189</sup> Nestle and Cargill argue that while they find human trafficking and child labor to be deplorable practices that deserved to be punished, the suit the Malians bring is in the wrong forum and that applicable law does not apply to them because they are corporations—not individuals.<sup>190</sup> Nestle and Cargill’s attorneys also went so far as to argue for immunity on behalf of the American corporations; with the stance that even if their suppliers were found guilty of committing such crimes, the American companies should not be held liable for ignorantly furthering the facilitation of human trafficking and forced child labor.<sup>191</sup> While the Supreme Court has yet to declare judgment on this case, if they rule in favor of the Malians, doing so would set a precedent that American corporations can be held liable for the suppliers and manufacturing plants they use who violate human and labour rights. American corporations would have to act with more diligence when going through normal ordinary business operations and would not be able to plead ignorance in the face of a third party in their supply chain violating labour and human rights.<sup>192</sup> This would be a big win for labour activists as such a ruling would allow for the law to more formidably back them up on claims against large corporations who rarely face the consequences of the labour rights they violate overseas.

Second, is corporations who choose to continue the legacy that a past Secretary-General of the United Nations instilled through the formation of the Human Rights Council and the Global Compact Initiative which was started as an effort to promote corporate social responsibility.<sup>193</sup> However, criticism lies behind this approach because decades later corporations are still engaging in unethical labour practices without any real consequences and because it has created a gateway for foreign trial cases to rely heavily on their participation in such initiatives as proof that they are not in violation of labour rights.<sup>194</sup>

Some states have taken matters into their hands and have enacted statutes in hope of instilling some form of corporate liability for American corporations who do not have ethical working conditions. For example, the state of California has enacted the California Transparency

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<sup>186</sup> See Duane Windsor, *Alien Tort Claims Act*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Alien-Tort-Claims-Act> (last visited Dec. 16, 2020).

<sup>187</sup> See *id.*

<sup>188</sup> See David J. Scheffer, *U.S. Supreme Court Assesses Corporate Complicity in Child Slavery*, COUNCIL ON FOREIGN RELATIONS (Dec. 09, 2020), <https://www.cfr.org/article/us-supreme-court-assesses-corporate-complicity-child-slavery>.

<sup>189</sup> See *id.*

<sup>190</sup> See *id.*

<sup>191</sup> See *id.*

<sup>192</sup> See *id.*

<sup>193</sup> See U.N. Secretary-General, *Kofi Annan*, UNITED NATIONS SECRETARY-GENERAL <https://www.un.org/sg/en/content/kofi-annan> (last visited Dec. 16, 2020).

<sup>194</sup> See *id.*

in Supply Chains Act which requires “companies, including some companies headquartered outside of California but doing business in California, to report on their websites the activities they engage in to monitor their supply chains to prevent human trafficking and slavery.”<sup>195</sup> Although the companies covered under the Act are not required to participate in the anti-trafficking and anti-slavery activities, they are required to put out a mandatory disclosure on their website that they are not in compliance with that part of the Act.<sup>196</sup> The statute obviously lacks in any real action against the corporations for violations, but it does effect consumer perspective who could boycott companies not in compliance and that possibility could serve as encouragement to corporations to come in full compliance with the Act as a preventive measure and avoid a Nike-like scandal.

Lastly, there is the rising integration of the environmental, social, and governance (ESG) factors in corporations which seeks to implement itself in the decision-making process of corporations by taking into consideration the environmental and social impacts corporate decisions have.<sup>197</sup> The rationale behind the ESG factors is that it is beneficial for both the corporate world and society to make decisions which lead to more sustainable markets for the future.<sup>198</sup> While the ESG factors more heavily focus on environmental factors, an integration of ESG factors into the corporate decision-making process still serves to better the labour conditions of many overseas individuals since many employees are put into unsafe and unsanitary environments in the line of work.

#### CONCLUSION

With so much discretion left from the WTO and the GATT due to their lack of setting an international standard for labour regulations and working conditions, it was left to the International Labour Organization, nongovernmental organizations (NGOs), and international labour unions to fill in the gaping hole. American states and federal acts also worked towards filling in the gap left by the WTO and GATT, but as we have seen, these states have their weaknesses and still require much work and change in order to truly fill in the goal to a respectable and effective measure. The other alternatives to NGO certifications mentioned also leave much to be desired in terms of effectiveness, enforceability, and in remedying their own personal weaknesses.

Nike is a prime example of how a corporation, when left to their own devices, will set in place a business model that engages in unethical labour practices until a series of events happen which jeopardize their profits. Nike was not a passive player in the low wages, physical and verbal abuse, and poor and unsafe working conditions that took place in their overseas sweatshop. Nike intentionally switched the locations of the factories they outsourced to minimize their manufacturing costs as much as possible with little regard as to how their business model negatively impacted their workers. It was not until Nike’s profits started dramatically decreasing in the face of widespread public backlash that Nike chose to change their business practice to meet

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<sup>195</sup> See Latham & Watkins Corp. Dep’t, *The California Transparency in Supply Chains Act (SB 657)*, LATHAM & WATKINS (Dec. 6, 2011) [https://www.lw.com/thoughtLeadership/california-transparency-in-supply-chains-act-2010#:~:text=The%20California%20Transparency%20in%20Supply%20Chains%20Act%20of%202010%20\(SB,to%20prevent%20human%20trafficking%20and](https://www.lw.com/thoughtLeadership/california-transparency-in-supply-chains-act-2010#:~:text=The%20California%20Transparency%20in%20Supply%20Chains%20Act%20of%202010%20(SB,to%20prevent%20human%20trafficking%20and).

<sup>196</sup> See *id.*

<sup>197</sup> See George Kell, *The Remarkable Rise Of ESG*, FORBES MAGAZINE (Jul. 12, 2018 at 10:09AM), <https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/?sh=50d4047c1695>.

<sup>198</sup> See *id.*

the more ethical labour practices and working conditions that consumers expected out of the brand that they were wearing.

Nike's strides towards raising the standards of their labour practices were largely helped by various NGOs they partnered with. Although arguably weak in the face of any real accountability, NGOs still instilled in Nike, and in many other corporations which faced similar issues as Nike, a form of accountability and gave the public some level of certification that helped ensure that the labour practices Nike was originally participating were being remedied.

However, as the very recent issue of the Uyghur people in China shows, NGOs are not the end all, be all solution to the lack of international labour standards that we currently have. Even combined with an aggressive corporate approach towards committing to upholding ethical and high standards of labour practices and compliance with numerous national and international labour-related nongovernmental organizations, Nike was still an operating character in an international framework that allows for the exploitation and mistreatment of factory workers.