

AVENUES TO IMPROVING WORKERS' RIGHTS AND LABOR-STANDARDS COMPLIANCE IN A GLOBALIZED ECONOMY

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I. INTRODUCTION.....	108
2. LABOR STANDARDS IN MULTILATERAL AND BILATERAL TRADE AGREEMENTS	110
3. ARGUMENTS AGAINST LABOR STANDARDS IN TRADE AGREEMENTS.....	112
4. ARGUMENTS FOR LABOR STANDARDS IN TRADE AGREEMENTS.....	113
5. THREE APPROACHES FOR ADDRESSING NON-COMPLIANCE WITH LABOR STANDARDS.....	114
5.1. Trade-Incentives Programs	114
5.2. Corporate Codes of Conduct and Monitoring	117

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5.3. Adjusting Pricing Mechanisms in Global Supply Chains —	
“Jobbers Agreements”.....	I20
6. CONCLUSION.....	I24

I. INTRODUCTION

The April 2013 collapse of the Rena Plaza factory building near Dhaka, Bangladesh, that killed more than 1,100 workers—the highest fatality count in the history of garment factory disasters—has brought the issue of poor working conditions and low labor standards in developing countries again into the spotlight.² According to Kimberly Elliott, an expert on global trade and labor standards, the root of this problem lies in both the nature of the industry and the consumer:

This is an industry that’s very low wage, very low skill, highly mobile, and highly competitive, so the incentives are for factory managers to cut costs as much as they can. . . . Buyers are looking around the world for the lowest prices they can find, and unfortunately we as consumers are complicit, because we’re looking for the cheapest clothing we can find.³

Bangladesh’s garment industry has steadily grown since the early 1980s.⁴ The industry has been characterized by low wages and generally low compliance with international labor standards and the country’s own labor laws, helping to account for very low labor costs.⁵ Bangladesh continues to experience strong pressures to cut labor costs and improve the price competitiveness of its textile and garment exports.⁶

Recent studies have shown consistent violations of working conditions and labor-compliance failures, under both domestic laws and international standards, throughout the Bangladesh garment industry.⁷ Such studies found violations of labor standards related to wages, hours of work, union rights, employment

2 See, e.g., Lawrence MacDonald, *How to Avoid Another Bangladesh Factory Disaster—Kimberly Elliott*, Center for Global Development (May 7, 2013), available at <http://www.cgdev.org/blog/how-avoid-another-bangladesh-factory-disaster-kimberly-elliott>.

3 *Id.* (quoting Kimberly Elliott, a senior fellow at the Center for Global Development).

4 See Günseli Berik & Yana van der Meulen Rodgers, *The Debate on Labor Standards and International Trade: Lessons from Cambodia and Bangladesh*, Working Paper Series, The International Working Group on Gender, Macroeconomics, and International Economics, at 8-9 (June 2007).

5 See *id.* at 8. See *id.* at 12-13 for a more extensive description of the characteristics of the Bangladesh garment production industry and labor standards within the industry.

6 See *id.* at 8.

7 See *id.* at 17. See *id.* at 17-21 for a detailed account of these studies.

discrimination, and worker abuse.⁸ Unannounced factory inspections by the Fair Labor Association (FLA) in 2004 also found severe violations of health and safety regulations, including poor fire safety equipment; inadequate and unsanitary toilet facilities; non-use of protective gear; poor ventilation and maintenance of equipment; and excessive heat.⁹ In its 2004 study, the FLA determined that many factories were operating in residential buildings that were not equipped for factory production, putting workers at great risk of injury or death from fires and collapsed buildings.¹⁰

It should come as no surprise, then, that the Dhaka factory collapse on April 24, 2013, that killed 1,127 people was preceded five months earlier by a factory fire near Dhaka that killed more than 100 people, and that the Dhaka disaster was followed by a factory fire on May 9, 2013, that killed eight workers. With global competition in the garment industry expected to become even more intense with the eventual adoption of the Trans-Pacific Partnership Agreement, a free trade agreement that will include Vietnam—one of the top-ten garment-exporting countries worldwide¹¹—labor standards and workers' rights will be at even greater risk of being violated.

Globalization, in the form of foreign direct investment and global supply chains, has allowed developing countries to take advantage of employment opportunities for their citizens, have access to capital and international markets, and enjoy overall economic growth.¹² At the same time, however, globalization has arguably allowed retailers in the United States and other developed countries to exploit low wages and weak regulations in order to make higher profits.¹³ An important question is whether exporting countries can protect jobs and stay competitive in the garment industry while also ensuring the safety, welfare and rights of workers.¹⁴ This paper provides an analysis of some of the mechanisms that have been suggested or implemented by academics, governments, retailers, non-governmental organizations (NGOs), and consumers to enforce workers' rights and compliance with labor standards in an increasingly globalized economy.

8 See *id.* at 17-20.

9 See *id.*

10 See *id.* at 19.

11 See *id.* at 10.

12 See Richard M. Locke, Fei Qin & Alberto Brause, *Does Monitoring Improve Labor Standards? Lessons from Nike*, 61:1 ILRReview 1, 3 (Oct. 2007), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1310&context=ilrreview>.

13 See *id.* at 4.

14 See Berik & Rodgers, *supra* note 4, at 1.

2. LABOR STANDARDS IN MULTILATERAL AND BILATERAL TRADE AGREEMENTS

Historically, labor provisions have not been a part of multilateral trade agreements, because the regulation of labor was generally considered a domestic issue and not applicable to trade. The responsibility for monitoring labor protections fell to the International Labor Organization (ILO), which was founded in 1919 and is now an arm of the United Nations. The ILO has been working to create conventions that set international labor standards for nearly 90 years.¹⁵

Eight current ILO conventions reflect four areas that have come to be considered “core labor standards”: (1) freedom of association and collective bargaining; (2) the elimination of forced labor; (3) the elimination of child labor; and (4) the elimination of discrimination in employment and occupation. In 1998, these four core labor standards were included in the *ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up*, which commits all ILO member countries to comply with and enforce labor standards.¹⁶

More recently, the United States and other countries have negotiated numerous bilateral trade agreements that go beyond the very limited scope of labor protections in the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO), and often reference ILO convention standards. The United States has included labor provisions in all bilateral trade agreements since 1993.¹⁷

The inclusion of labor provisions in bilateral trade agreements has evolved slowly.¹⁸ The first two U.S. free trade agreements, with Israel (1985) and Canada (1988), did not include labor provisions. This changed after 1993, when three factors helped make labor standards a priority. First, the United States began to negotiate with less-developed countries. Second, it became increasingly accepted that trade and labor standards were connected—specifically, that in developing countries pressures to become low-cost producers potentially led to diminished working conditions and workers’ rights. And third, corporations became more willing to make “some concessions to labor groups in order to promote trade agreements and pave the way for greater trade and investment in developing countries.”¹⁹

In early 2007, Democratic members of Congress indicated that some labor provisions in pending U.S. free trade agreements would have to be strengthened

15 See Mary Jane Bolle, *Overview of Labor Enforcement Issues in Free Trade Agreements*, Congressional Research Service, at 1 (Feb. 29, 2008).

16 See *id.*

17 See Sandra Polaski, *Protecting Labor Rights Through Trade Agreements: An Analytical Guide*, 10:13 J. INT’L L. & POL’Y (Davis California) 13, 14 (July 19, 2004).

18 See Bolle, *supra* note 15, at 1.

19 See *id.* at 2-3.

to gain their approval. On May 10, 2007, bipartisan congressional leaders and the Bush administration reached a consensus on a new trade framework titled *The New Trade Policy for America*, which called for the inclusion and enforcement of internationally recognized labor rights, including the four “core labor standards,” in pending free trade agreements.²⁰ *The New Trade Policy for America* changed the model for labor chapters in U.S. free trade agreements and is most recently reflected in U.S. free trade agreements with Panama, Colombia, and South Korea that were executed under the Obama Administration.²¹

In constructing labor provisions in any trade agreement, the parties must determine which obligations they will undertake with respect to labor standards, including what types of labor rights will be covered and whether existing national laws and/or international standards will be incorporated within the agreement.²² When international standards were included in U.S. trade agreements in the past, they were often aspirational rather than actual commitments.²³ However, language in the Panama, Colombia, and South Korea trade agreements requires the incorporation of *enforceable* international labor standards into each country’s domestic laws.²⁴ A country’s failure to adopt and maintain its statutes, regulations, and practices “consistent with the rights stated in the *ILO Declaration*” constitutes a violation of the agreements.²⁵ Enforcement mechanisms include dispute settlement procedures and penalties (including the withdrawal of trade benefits).²⁶

Proponents of the international enforcement of labor standards through free trade agreements present two main arguments: (1) low labor standards and conditions exist in many developing countries that the United States trades with and invests in, and enforceable labor standards in U.S. trade agreements are an effective trade policy measure by which to “level the playing field” and prevent job loss in competing U.S. industries, and (2) workers in developing countries are subject to suppressed wages and exploitative working conditions in the name of market competition, and enforceable labor standards within U.S. trade agreements can help to alleviate these problems and avoid a “race to the bottom” among

20 M. Angeles Villarreal, *The U.S.-Colombia Free Trade Agreement: Background and Issues*, Congressional Research Service, at 8 (Nov. 9, 2012).

21 They were also incorporated into the labor chapter for the U.S.-Peru FTA, which was implemented during the George W. Bush Administration.

22 See Polaski, *supra* note 17, at 16.

23 See, e.g., the U.S.-Chile FTA.

24 This language was also included in the U.S.-Peru FTA under the Bush administration, as part of *The New Trade Policy for America*.

25 See David A. Gantz, Discussion Paper No. 11-13, *Labor Rights and Environmental Protection under NAFTA and Other U.S. Free Trade Agreements*, UNIV. MIAMI INTER-AM. L. REV., 2011; Arizona Legal Studies Discussion Paper No. 11-13, at 43 (Mar. 21, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1791839.

26 See Polaski, *supra* note 17, at 18.

developing nations.²⁷

Despite the incorporation of stronger, enforceable language in these recent U.S. free trade agreements, critics question whether *The New Trade Policy for America* will actually improve compliance with labor standards and protect workers' rights. The first and only labor case that the United States has brought to dispute settlement under a trade agreement occurred in 2011, under the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) regarding the government of Guatemala's apparent failure to effectively enforce its labor laws.²⁸ The result was an 18-point plan including concrete actions that Guatemala must implement within specific timeframes to improve its labor law enforcement. In this way, more enforceable labor provisions may encourage trade partners "to negotiate reasonable solutions."²⁹ However, as noted by professor David A. Gantz, the effectiveness of *The New Trade Policy* in current and future trade agreements will depend primarily on the U.S. Administration's willingness to commit sufficient funds and technical assistance, as well as political will, to enforce labor provisions.³⁰

3. ARGUMENTS AGAINST LABOR STANDARDS IN TRADE AGREEMENTS

Opponents of labor provisions in trade agreements argue that if developing nations are forced to set higher standards than what the current level of productivity allows, their workers will eventually be penalized in the world market. The price of labor "will be higher than what that labor is worth, which will drive out foreign investors, leading to increased unemployment."³¹ There is statistical and anecdotal evidence to support this premise. Numerous empirical studies have measured the degree to which workers were displaced when mandated minimum wages were raised by different amounts. Similarly, protective labor legislation has been known to backfire when the measures are too costly for the employer. There is anecdotal evidence of companies being driven out of a sector when unions made very costly demands (e.g., United Fruit in Costa Rica).³²

Further, as noted by professors Robert M. Stern and Katherine Terrell, pol-

27 See Robert M. Stern & Katherine Terrell, *Labor Standards and the World Trade Organization*, Discussion Paper No. 499, Gerald R. Ford School of Public Policy, Univ. of Michigan, at 2 (Aug. 2003), available at <http://fordschool.umich.edu/rsie/workingpapers/Papers476-500/r499.pdf>.

28 See <http://www.ustr.gov/trade-topics/labor/bilateral-and-regional-trade-agreements/guatemala-submissionunder-cafta-dr>.

29 See Gantz, *supra* note 25, at 43.

30 See *id.* at 44.

31 Gabriel H. Sahlgren, Issue Analysis No. 10, *The United States-South Korea Free Trade Agreement: An Economic and Political Analysis*, Competitive Enterprise Institute, at 1 (Oct. 2007), available at <http://cei.org/pdf/6189.pdf>.

32 See Stern & Terrell, *supra* note 27, at 7.

icies or regulations imposed on countries that do not have the infrastructure, human resources, or proper training to support and enforce them will be unsustainable.³³ Opponents of enforceable labor standards, like many economists, generally view trade liberalization and globalization as tools that promote improved social and economic conditions over the long run; efforts to mandate more extensive and stricter labor standards in trade agreements only impede trade liberalization and in turn economic development.

The arguments presented above are not specific to the inclusion of stronger labor standards within free trade agreements under the framework of *The New Trade Policy for America*. Opponents of stricter, enforceable labor provisions within U.S. trade agreements are generally opposed to *any* form of trade-linked enforcement of labor standards.³⁴ Such opponents argue that global enforcement of labor standards, especially through employers who compete on the basis of labor costs, may result in production being relocated to countries with weaker worker protections, thereby leading to job losses in those countries with higher labor standards and costs.³⁵

4. ARGUMENTS FOR LABOR STANDARDS IN TRADE AGREEMENTS

While some statistical and anecdotal evidence supports the argument that the enforcement of labor standards through trade mechanisms may result in lost jobs, less foreign direct investment (FDI), and/or slower economic growth in certain sectors—especially in countries that lack the infrastructure, training, and internal programs in place to properly comply with and enforce such standards—the overwhelming evidence suggests just the opposite. Improving labor standards may in fact increase a country’s competitiveness and economic growth.³⁶ However, competition to attract FDI, especially among developing countries, tends to lead to a “race to the bottom” with regard to labor standards and workers’ rights.³⁷

A study in 2002 determined that FDI tends to be greater in countries with *stronger workers’ rights*.³⁸ This may be due to multiple factors, primarily evidence that higher labor standards and stronger workers’ rights contribute to greater political and social stability, which in turn leads to more rapid economic growth—and

33 *Id.* at 8.

34 *See* Berik & Rodgers, *supra* note 4, at 2.

35 *See id.* at 3.

36 *See id.*

37 David Kucera, *Core Labour Standards and Foreign Direct Investment*, 141: 1-2 INT’L LAB. REV. 31, 31 (2002).

38 *See id.* at 33.

more economic growth attracts FDI.³⁹ Corporate surveys have suggested that even if stronger labor standards are associated with higher labor costs, these costs are outweighed by the greater political/social stability and potential for economic growth that result from such labor standards.⁴⁰

Still, the inclusion of strict and enforceable labor standards in trade agreements is not enough to ensure enforcement. As stated above, the United States has only once sought to enforce labor standards under a free trade agreement. And if the United States does not seek to enforce such provisions, developing countries certainly cannot be expected to voluntarily comply with domestic labor standards or international labor regulations—especially if they do not have the motivation, finances, or infrastructure to do so.⁴¹ Three different approaches have been either suggested by academics or implemented by governments, NGOs, and corporations in an effort to address the problems of non-compliance with labor standards and inadequate protection of workers' rights in the developing world.

5. THREE APPROACHES FOR ADDRESSING NON-COMPLIANCE WITH LABOR STANDARDS

5.1. Trade-Incentives Programs

While Bangladesh has experienced its share of poor working conditions and labor law violations in recent history, Cambodia — which has a similarly poor economy and a growing garment export industry — saw improved compliance with labor standards after it signed a trade agreement with the United States that linked positive trade incentives with labor-standards enforcement.⁴² The different directions taken by these two similar countries can possibly be explained by an innovative labor standards program in Cambodia that not only helped labor conditions but also increased exports.⁴³ The *Better Factories Cambodia* program, which developed out of the U.S.-Cambodia Bilateral Textile Trade Agreement negotiated in 1999, achieved its goals in three ways:

39 See *id.* at 34-35.

40 See *id.* at 35-36.

41 Numerous developing countries, including Cambodia and Bangladesh, have constitutions and labor laws that encompass comprehensive labor regulations and workers' rights provisions that reflect their ratification of the ILO's core labor standards. However, the fact that such domestic labor regulations exist within a given country does not guarantee enforcement. For example, Cambodia has ratified all eight of the ILO's conventions representing the ILO's core labor standards, yet enforcement of the country's Labor Code has been difficult due to rampant corruption within the industry. Bangladesh has extensive domestic labor laws to protect workers and has ratified seven out of eight of the core ILO conventions, yet there is weak enforcement of trade union rights and anti-discrimination legislation. See Berik & Rodgers, *supra* note 4, at 10-13.

42 See *id.* at 7.

43 See *id.* at 2.

- 1) Linking the expansion of Cambodia's access to the U.S. market to labor standards improvements;
- 2) Relying on the ILO to serve as the monitoring agent; and
- 3) Adopting rigorous transparency measures when reporting the results of factory inspections.⁴⁴

The U.S.-Cambodia Bilateral Textile Trade Agreement conditioned increased garment exports to the United States on Cambodia's compliance with national labor laws and internationally recognized labor standards.⁴⁵ The agreement, therefore, used trade incentives (rather than sanctions) to enforce labor-standards compliance, and relied on the ILO to monitor the Cambodian factories to ensure such compliance.⁴⁶ Although the agreement has expired, the monitoring program has continued and has even been expanded in scope since 2004.⁴⁷

The *Better Factories Cambodia* program includes technical assistance and capacity building for strengthening the enforcement capability of the Cambodian government, as well as the direct monitoring and inspections of garment factories by ILO personnel.⁴⁸ *Better Factories Cambodia* also includes training programs to help new workers understand their rights, to help employers improve their training methods, and to educate human relations personnel and union leaders on employment contracts, working conditions, and worker recruitment.⁴⁹ Because transparency is a significant characteristic of the program, reports from factory inspections are posted online (www.betterfactories.org).⁵⁰ As its website states, "Better Factories Cambodia monitors factories, trains management and workers, and provides guidance and advice on factory improvements that help enterprises preserve profits

44 *See id.*

45 *See id.* at 8.

46 *See id.*

47 *See id.*

48 *See id.* at 14.

49 *See id.* at 14-15.

50 *See id.* at 15.

while respecting workers' rights."⁵¹

Better Factories Cambodia promotes and facilitates compliance with labor standards rather than simply punishing factories with fines or sanctions for labor violations.⁵² In this regard, the program has the potential to (1) offer greater protection to workers' rights and job security; (2) create the potential for economic growth within the industry; and (3) appeal to companies seeking to invest in countries with a reputation for greater compliance with labor standards.⁵³

Nevertheless, the program has faced criticism with regard to its continued effectiveness in promoting workers' rights and job security. A 2013 independent study determined that during the eleven years of the program's operations, wages and basic job security declined, and "genuine collective bargaining between employers and workers and basic elements of occupational safety and health continue to be elusive."⁵⁴ *Better Factories Cambodia's* own most recent semi-annual assessment of working conditions notes "a decline in compliance and increase in strikes starting in 2011 after impressive gains in the decade after the signing of the U.S.-Cambodian garment trade agreement."⁵⁵ Highlighting the Rena Plaza collapse in Bangla-

51 A statement which finds support in the 30 reports that have been issued by the ILO from November 2001, through July 2013. See www.betterfactories.org. While the ILO continues to express its commitment in support of the *Better Factories Cambodia* program and the progress that has been made, it is obvious from reading many of the reports provided on the website that there are still significant problems with labor compliance at Cambodian factories. In its April 2013 report the ILO cited failures in compliance relating to fire safety, meal allowances, heat levels, access to clean drinking water and soap, and limiting overtime work. *Better Factories Cambodia, Twenty Ninth Synthesis Report on Working Conditions in Cambodia's Garment Sector and Statement of the Project Advisory Committee*, ILO (Apr. 11, 2013), available at <http://betterwork.com/cambodia/wp-content/uploads/2013/04/Synthesis-Report-29th-EN-Final.pdf>. At the time of publication there were nationwide garment factory workers' strikes for increased wages. See, e.g., Sean Teehan & Amelia Woodside, *Violent Clash as Garment Strike Intensifies*, PHNOM PENH POST, Dec. 28, 2013, available at <http://www.phnompenhpost.com/national/violent-clash-garment-strike-intensifies>.

52 In examining state labor regulation practices in Latin America, Michael Piore and Andrew Schrank argue that labor inspectors are most effective when they act as advisors and consultants, rather than as policeman. In other words, when violations are detected that result from suppliers attempting to remain competitive, state labor inspectors serve an important role in disseminating advice and plans on how to reconcile competitiveness with labor compliance, rather than simply imposing sanctions or fines for violations. Mark Anner, Jennifer Bair & Jeremy Blasi, *Buyer Power, Pricing Practices, and Labor Outcomes in Global Supply Chains*, Univ. of Colorado at Boulder, Institutions Program Working Paper Series: INST2012-II, at 4 (Aug. 2012).

53 Berik & Rodgers, *supra* note 4, at 21.

54 *Monitoring in the Dark: An Evaluation of the International Labour Organization's Better Factories Cambodia Monitoring and Reporting Program*, International Human Rights and Conflict Resolution Clinic, Mills Legal Clinic, Stanford Law School and Worker Rights Consortium, at ii (Feb. 2013), available at <http://humanrightsclinic.law.stanford.edu/project/monitoring-in-the-dark/>. The study goes on to suggest reforms to make the program more effective in protecting workers' rights and safety in Cambodian factories, including methods to increase transparency of the program's monitoring and reporting. *Id.* at 56-72.

55 *Statement of the Project Advisory Committee of Better Factories Cambodia*, International Labor Organization (July 18, 2013), available at <http://betterfactories.org/wp-content/uploads/2013/07/Final-PAC-statement-SR-30-EN.pdf>.

desh — and a May 2013 factory collapse in Cambodia that killed two footwear employees⁵⁶ — the report says “global buyers are demanding that Cambodia’s industry make good on its commitment to decent work.”⁵⁷

The deterioration of working conditions after *Better Factories Cambodia*’s apparent initial success suggests that although the development and implementation of trade-incentives programs globally could be an effective tool for improving and enforcing labor standards and workers’ rights,⁵⁸ this approach must be coupled with regular monitoring and encouragement of strong domestic policies in order to support and enhance its effectiveness.⁵⁹ Moreover, trade-incentives programs may not do enough on their own. The *Better Factories Cambodia* assessment notes that many recent problems stem not only from national labor policies but also from “relationships and pressures in the global supply chain,”⁶⁰ discussed in § 5.3, below.

5.2. Corporate Codes of Conduct and Monitoring

In the wake of well-publicized scandals in the mid-1990s involving the exploitation and mistreatment of workers in developing countries, multinational corporations have developed codes of conduct along with monitoring mechanisms to enforce compliance with such codes.⁶¹ Given the limited ability of many developing countries to enforce their own labor laws, monitoring for compliance with corporate codes of conduct has become the primary way corporations and NGOs currently seek to address subpar working conditions and unenforced labor rights in supply-chain factories.⁶²

Corporate codes of conduct establish a “set of guidelines under which a factory must operate and is administered by company-employed inspectors or by in-

56 See, e.g., Leang Phannar, Shane Worrell & May Titthara, *Company Admits “Negligence in Factory Disaster,”* PHNOM PENH POST, May 17, 2013, available at <http://www.phnompenhpost.com/national/company-admits-%E2%80%98negligence%E2%80%99-factory-disaster>. A second collapse occurred a few days later. See Shane Worrell & Chhay Channyda, *Accident Rocks Garment Industry Again,* PHNOM PENH POST, May 20, 2013, available at <http://www.phnompenhpost.com/national/accident-rocks-garment-industry-again>.

57 Better Factories Cambodia, *Thirtieth Synthesis Report on Working Conditions in Cambodia’s Garment Sector*, ILO, at I (July 18-2013), available at <http://betterfactories.org/wp-content/uploads/2013/07/30th-Synthesis-Report-Final-EN.pdf> (noting deterioration in the areas of “fire safety, child labour, and worker safety and health,” which “may be attributed to rapid growth of the industry”).

58 See Berik & Rodgers, *supra* note 4, at 22.

59 See *id.* at 23-24.

60 BFC, *Thirtieth Synthesis Report*, *supra* note 57, at 8. Independent monitors have emphasized that *Better Factories Cambodia*’s effectiveness is constrained because “it does not address buying practices by brands and retailers that strongly contribute to [labor rights violations].” *Monitoring in the Dark*, *supra* note 54, at ii.

61 See Locke, Qin & Brause, *supra* note 12, at 4.

62 See *id.* at 4.

dependent audit companies.”⁶³ Such codes are self-regulating formal policies which shape corporate behavior toward employees in certain ways, including with respect to labor standards.⁶⁴ Proponents argue that this form of corporate self-governance, which usually entails the public disclosure of factory audits, allows consumers to reward good firms with more purchases and punish bad firms by taking their business elsewhere.⁶⁵

Firms may establish corporate codes of conduct for various reasons, including the need to develop a framework for consistent managerial conduct from site to site; the belief that using codes of conduct will ensure proper application of fair labor practices and in turn economically benefit the firm; the desire to be a “good corporate citizen”; or the desire to enhance/protect its reputation.⁶⁶

According to the ILO, a number of elements should be present before a corporate code of conduct can operate “equitably and efficiently,” including:

- The code is written, developed, and implemented in a manner that involves and empowers workers;
- The code reflects the local needs of workers and at an absolute minimum guarantees the core standards of the ILO;
- The code is not just a piece of paper issued by a head office, with no real impact on actual company operations, policies, or people;
- The company’s labor practices are open to external audit.⁶⁷

Critics of codes of conduct and monitoring argue that they are not designed to actually protect workers or improve labor conditions but rather are implemented in order to “limit the legal liability of global brands and prevent damage to their reputation.”⁶⁸ Critics further argue that these codes and private monitoring programs often undermine state regulation and union intervention.⁶⁹

Another criticism of monitoring is the potential for untrustworthy or inaccurate auditing where the factory inspectors have a conflict of interest or inadequate knowledge.⁷⁰ Because corporations may have an interest in hiding labor violations,

63 Berik & Rodgers, *supra* note 4, at 6.

64 See Jill Murray, *Corporate Codes of Conduct and Labor Standards*, Working Paper, Corporate Codes of Conduct, Cornell Univ. ILR School (Mar. 5, 1998), at 3, available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1007&context=codes>.

65 See Anner, Bair & Blasi, *supra* note 52, at 3.

66 See Murray, *supra* note 64, at 18.

67 See *id.* at 4-5.

68 Locke, Qin & Brause, *supra* note 12, at 5.

69 See *id.*

70 See *id.*

internal auditing mechanisms may be viewed with understandable skepticism.⁷¹ Hiring an “independent” private auditing firm may ease this skepticism and reduce the risk of corruption; however, auditing firms still want to please their clients in order to retain future business.⁷² A not-for-profit NGO may provide the most trustworthy and unbiased audit but may also lack the technical expertise of a private monitoring firm.⁷³

A final critique of the corporate code and monitoring system is that there are a multitude of codes of conduct for different corporations with different goals, inspection protocols, and monitoring systems, leading to an uneven quality of audits being performed.⁷⁴ Furthermore, a supplier attempting to implement and monitor multiple codes of conduct for different corporations operating within a single factory leads to inefficiency, confusion, “monitoring fatigue,” and “monitoring limbo.”⁷⁵

Regardless of one’s view toward the effectiveness of corporate codes and monitoring, compliance auditing *alone* is insufficient to achieve sustainable improvements in labor conditions and other workplace variables. While monitoring can serve as an important tool for identifying gaps in the system, what happens after the audit matters more.⁷⁶ For this reason, firms have begun to shift the emphasis away from compliance auditing to more collaborative approaches, working with suppliers to “assess gaps, build capacity, and incentivize sustainable improvements.”⁷⁷

71 See *id.*

72 See *id.*

73 See *id.*

74 See *id.* at 5-6.

75 *Id.* at 6. As an example, suppliers may be required to rearrange fire extinguishers or adjust the ratio of toilets to employees as different auditors for different brands perform plant inspections. *Id.* See also *Respecting Human Rights Through Global Supply Chains*, Shift Workshop Report No. 2, at 13 (Oct. 2012), available at <http://shiftproject.org/sites/default/files/%20Respecting%20Human%20Rights%20Through%20Global%20Supply%20Chains%20Report.pdf>.

76 See *id.* As the Asian proverb states, “You don’t fatten a pig by continually weighing it.” *Id.* at 13.

77 *Id.* Using data based on factory audits of working conditions in over 800 Nike suppliers across 51 countries from 1998-2005, a study found that monitoring for compliance with corporate codes of conduct alone produced only limited results, but when monitoring is combined with action taken on the part of suppliers to better schedule their work and improve quality and efficiency, labor conditions are shown to improve. Locke, Qin & Brause, *supra* note 12, at 3-23. According to Locke, Qin and Brause, what is needed to effectively improve working conditions and enforce global labor rights is “a more systematic approach, one combining external (countervailing) pressure (be it from the state, or unions, or labor-rights NGOs) with comprehensive, transparent monitoring systems and a variety of ‘management systems’ interventions aimed at eliminating the root causes of poor working conditions.” *Id.* at 4.

5.3. Adjusting Pricing Mechanisms in Global Supply Chains—“Jobbers Agreements”

According to Mark Anner, Jennifer Bair, and Jeremy Blasi, a principal cause of the persistent violation of workers’ rights in the global apparel supply chain is the pricing mechanism between buyers and their suppliers.⁷⁸ Any initiative to rein in sweatshop conditions in clothing factories globally must recognize the systematic cost pressures on suppliers that are conducive to violations of workers’ rights.⁷⁹ In a recent study, data was collected on trends in the price paid by American importers for apparel from 1989 to 2010, as well as the status of workers’ rights in the top twenty apparel-exporting countries to the United States during the same period.⁸⁰ The data suggested that (1) the average price per square meter of imported apparel is declining; and (2) countries that are increasing their share of apparel exports to the United States are becoming more likely to violate core labor standards, while in contrast, those countries that have increased respect for workers’ rights are finding their share of exports to the United States in decline.⁸¹

Anner, Bair, and Blasi argue that these correlations are consistent with their theory that “any sustained effort to address workers’ rights abuses in the apparel global supply chain must address the pricing dynamics between suppliers and buyers, as well as the broad need for buyers to take greater responsibility for the terms and conditions of labor at supplier factories.”⁸² Corporate codes and monitoring will not achieve much if the trend continues toward retailers buying apparel at lower and lower prices.⁸³ Both the buyers and the suppliers will have to share the costs of compliance with more stringent international labor standards, domestic labor laws, and corporate codes of conduct.⁸⁴ But how does one share these costs? Anner, Bair, and Blasi say the answer lies in “jobbers agreements,” which are negotiated between labor, suppliers, and buyers. Such agreements have “brought stability to subcontracting relations within the domestic apparel industry and went a long way towards eradicating sweatshop conditions in those regions where workers were organized.”⁸⁵

Throughout much of the twentieth century, jobbers agreements were the driving force behind dramatic improvements in wages and working conditions for

78 See Anner, Bair & Blasi, *supra* note 52, at 5.

79 See *id.* at 1.

80 See *id.* at 5-10.

81 See *id.*

82 *Id.* at 10.

83 See *id.*

84 See *id.*

85 *Id.*

domestic garment workers in the United States.⁸⁶ The International Ladies Garment Workers Union (ILGWU) created these collective bargaining agreements to address sweatshop conditions in New York’s garment industry that had become notorious in the wake of the 1911 Triangle Shirtwaist Factory Fire, when 146 workers were killed.

Prior to jobbers agreements, the “jobbers” (a category of apparel firms that designed and sold, but did not manufacture, clothing) subcontracted production work to independent shops that would produce the apparel that the jobbers designed and marketed.⁸⁷ By subcontracting out production work, the jobbers were able to avoid dealing directly with the worker.⁸⁸ However, the ILGWU insisted that the responsibility for labor conditions in independent shops resided with the jobbers and not solely with the contractors who employed the garment workers.⁸⁹ In order to force the jobbers to accept this responsibility, the ILGWU instituted a jobbers agreement. The parties who contracted were the union (representing the interests of the garment workers) and the jobber.⁹⁰ According to Anner, Bair, and Blasi, jobbers agreements “brought stability to subcontracting relations within the domestic apparel industry and went a long way towards eradicating sweatshop conditions in those regions where workers were organized.”⁹¹

Jobbers agreements became the norm in the garment industry and “served as the lynchpin of a system that was sometimes called triangular collective bargaining”—triangular because there were technically three sides: the workers represented by unions; the contractors, who employed the workers; and the jobbers, who were the most powerful industry actor.⁹² Jobbers agreements and “triangular bargaining” helped to stabilize and eradicate abuses in the garment industry for decades, and their validity was preserved in federal legislation as an effective tool against sweatshops.⁹³ These agreements constrained buyer power by (1) insuring that lead firms paid the contractors a fair price; (2) stabilizing and regulating subcontracting relationships; and (3) making lead firms directly liable for some labor costs.⁹⁴

Competition among contractors on the basis of labor costs was prevented because the agreements were negotiated between the workers’ unions and the job-

86 *See id.*

87 *See id.* at 11.

88 *See id.*

89 *See id.*

90 *See id.* at 12.

91 *Id.* at 10.

92 *See id.* at 13-14.

93 *See id.* at 14-15.

94 *See id.* at 1.

bers directly.⁹⁵ The workers were guaranteed certain wages and worked only the number of hours stipulated in these agreements, regardless of which contractor hired them.⁹⁶ Therefore, contractors could not compete for a jobber's business by offering lower prices as a result of lower wages or working conditions. Rather, such competition would be "driven by differences among contractors on the basis of quality and efficiency."⁹⁷

The same principles that made jobbers agreements effective in the United States could be applied in the context of today's global supply chains.⁹⁸ However, there would be many challenges to doing so. Within the last 30 or so years, increased globalization of the industry has changed the system dramatically.⁹⁹ Today, jobbers in the United States place orders with independent factories in developing countries, allowing them to circumvent both U.S. labor standards and the triangular collective bargaining process that had historically forced them to be more accountable and responsible for working conditions in global supply chains.¹⁰⁰ While there are examples of retailers that have tried to implement programs that require their contractors to provide a living wage and adequate working conditions for workers (and pay a sufficient price to their contractors to allow this to occur),¹⁰¹ those firms that implement such programs often find it difficult to stay competitive and achieve profitability, since they are competing against other retail brands that are not voluntarily following the same business practices.¹⁰² Jobbers agreements once ensured that buyers bore at least some of the costs of ensuring decent wages and working conditions throughout their supply chain.¹⁰³ However, in the modern day, such costs are not built into contractual agreements between buyers and suppliers in the apparel industry.¹⁰⁴ Implementing jobbers agreements for workers in Bangladesh and other undeveloped countries would require, on an industry-wide level, a departure from current pricing practices.¹⁰⁵

Jobbers agreements regulated and stabilized the buyer-contractor relationship by including detailed clauses that promoted long-term relationships between the buyer and contractor and precluded buyers from switching between contractors to

95 See *id.* at 17.

96 See *id.* at 18.

97 *Id.*

98 See *id.* at I

99 See *id.* at I6.

100 See *id.*

101 See *id.* at 18-20, for a discussion of Knights Apparel implementing key elements of the Designated Suppliers Program.

102 See *id.* at 20.

103 See *id.* at 22.

104 See *id.*

105 See *id.*

secure short-term gains.¹⁰⁶ Contemporary sourcing practices in the apparel industry are drastically different, as buyers today spread their production across multiple locations worldwide, and a buyer's commitment to a supplier generally is only short-term.¹⁰⁷ Why is this bad for labor compliance? In the words of Anner, Bair and Blasi:

When a buyer's commitment to a supplier does not extend beyond the most recent order that is placed, and when buyers can choose among a virtually limitless supply of factories in making the next sourcing decision, the likely result is insecurity on the part of the supplier, which the buyer may attempt to leverage into concessions, such as shorter lead times or lower prices, that result in a deterioration of working conditions and/or violations of labor rights.¹⁰⁸

Longer-term production agreements, coupled with fair pricing and wage standards, would provide contemporary contractors with both the incentive and the capacity to ensure compliance with labor standards.¹⁰⁹

Finally, in the past, jobbers agreements made buyers (not just contractors) liable for labor costs. In the modern developing world, it is not atypical for contractors to suddenly shut down while still owing workers up to a year in terminal compensation, leaving the workers with no means of income.¹¹⁰ Under jobbers agreements, this was not a problem, as the union managed benefit accounts funded by the jobbers for workers' pensions, health care, vacations, etc.¹¹¹ The accounts remained portable and fully funded in the event that a contractor went out of business and a worker lost his or her job or had to switch to another contractor.¹¹² Labor advocates have suggested creating similar funds in today's major apparel exporting countries as a form of corporate social responsibility, but no retailers or governments have agreed to implement them.¹¹³ The creation of such funds would lead to higher production cost for buyers, which they are currently unwilling to absorb.¹¹⁴

Addressing the lack of labor compliance in contemporary global supply chains requires a system that recognizes the significant role buyers play in setting the stan-

106 *See id.* at 24; *see id.* at 23-24, for examples of such provisions.

107 *See id.* at 25-26.

108 *Id.* at 26.

109 *See id.* at 27.

110 *See id.*

111 *See id.* at 27-28.

112 *See id.* at 28.

113 *See id.* (regarding comparable systems, such as the FGTS system in Brazil).

114 *See id.*

dards and labor conditions for workers at the bottom of the chain.¹¹⁵ At one time in history, jobbers agreements were critical in not only recognizing the significant role of buyers but also forcing buyers to absorb the higher costs of production required to ensure fair wages and labor standards.¹¹⁶ Although the changing nature and globalization of the apparel industry may prevent traditional jobbers agreements from existing in the modern-day developing world, characteristics of such agreements—specifically the increased role and responsibility that buyers ought to play in setting labor standards and absorbing associated labor costs—should be taken into account when attempting to determine how best to regulate and enforce labor compliance throughout global supply chains.

6. CONCLUSION

In response to the vocal anti-sweatshop movement that emerged in the mid-1990s, economist Paul Krugman offered the following opinion over 15 years ago:

The lofty moral tone of the opponents of globalization is possible only because they have chosen not to think their position through. While fat-cat capitalists might benefit from globalization, the biggest beneficiaries are, yes, Third World workers. [...] You might say that the wretched of the earth should not be forced to serve as the hewers of wood, drawers of water, and sewers of sneakers for the affluent. But what is the alternative? Should they be helped with foreign aid? Maybe—although the historical record of regions like southern Italy suggests that such aid has a tendency to promote perpetual dependence. Anyway, there isn't the slightest prospect of significant aid materializing. Should their own governments provide more social justice? Of course—but they won't, or at least not because we tell them to. And as long as you have no realistic alternative to industrialization based on low wages, to oppose it means you are willing to deny desperately poor people the best chance they have of progress for the sake of what amounts to an aesthetic standard—that is, the fact that you don't like the idea of workers being paid a pittance to supply rich Westerners with fashion items.¹¹⁷

115 See *id.* at 30.

116 See *id.*

117 Paul Krugman, *In Praise of Cheap Labor: Bad Jobs at Bad Wages Are Better Than No Jobs At All*, SLATE, Mar. 21, 1997, available at http://www.slate.com/articles/business/the_dismal_science/1997/03/in_praise_of_cheap_labor.html.

This still-relevant statement by Krugman—whether interpreted by the reader as economically sound or morally deficient—leaves open the possibility for a “realistic alternative to industrialization based on low wages” in the developing world. There may not yet be a realistic solution to the problem of unsafe and unfair working conditions—not without a drastic shift in thinking and action by governments, corporations, and consumers worldwide. But the approaches discussed in this paper offer examples of how labor-standards compliance and workers’ rights can at the least be better enforced and protected throughout the developing world. The entire nature of the industry is not likely to change based on trade agreements or corporate codes, but they have a role to play in ensuring that the rights and safety of workers in the developing world are protected in an increasingly globalized and competitive economy.

To ensure that globalization and labor standards progress together requires a multifaceted approach.¹¹⁸ Trade-based approaches will help to focus attention on labor issues and help encourage trading partners to reform, especially where trade-based incentives are offered in exchange for compliance. The roles of NGOs and the ILO are crucial in providing training, monitoring, technical assistance, and capacity building through programs that governments and firms are unable or unwilling to take on. Corporate accountability and self-regulation through codes and monitoring can continue to be effective if done transparently and collaboratively with the suppliers, and if retailers come to understand that having compliant labor standards are in the best economic interests of those at the bottom *and at the top* of global supply chains.¹¹⁹ A realistic solution to the problem may only come when and if a dramatic shift occurs in the nature of supply-chain dynamics, and cost pressures are moved from suppliers to buyers so that buyers take responsibility for the terms and conditions of their workforce and absorb the associated labor costs. While an increasingly globalized and competitive economy may provide benefits to workers in the developing world, it also exposes such workers to dangers and exploitation that first-world governments, retailers, and consumers have an obligation to protect against, through these and other avenues of relief.

118 See Kimberly Ann Elliott, *Trading Up: Labor Standards, Development, and CAFTA*, 3:2 Center for Global Development 7 (May 2004), available at http://www.cgdev.org/sites/default/files/2849_file_CGD_brief_May04_CRABlue2.pdf.

119 See Richard Feinberg, Tamar Benzaken Koosed, Carlued Leon & Terry Nelidov, *Creating an Enabling Environment for Responsible Labor Practices: Experiences in Costa Rica and El Salvador*, Better Work Research Conference, at 2 (June 2011), available at <http://betterwork.com/global/wp-content/uploads/Session-9-Creating-an-Enabling-Environment-for-Responsible-Labor-Practices1.pdf>.

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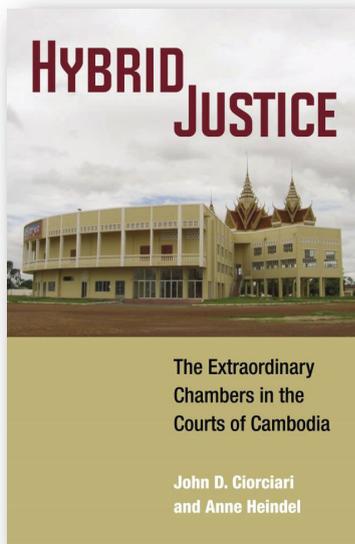
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