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Jennifer L. Hagerman

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NAVIGATING THE WATERS OF INTERNATIONAL EMPLOYMENT LAW: DISPUTE AVOIDANCE TACTICS FOR UNITED STATES-BASED MULTINATIONAL CORPORATIONS

*"[W]e cannot wait for governments to do it all. Globalization operates on Internet time."*¹

I. INTRODUCTION

Consider a situation in which a Japanese company is fighting over Russian engineers in a California courtroom.² This very scenario was the subject of an international employment dispute resolved by a Santa Clara County judge in November 2005.³ A high-tech Silicon Valley company with global operations was fighting for key personnel.⁴ The company is owned by Javad Ashjaee, who splits his time between Saratoga and Moscow.⁵ A Japanese company had purchased Ashjaee's Moscow-based global positioning satellite business only to see forty employees migrate to Ashjaee's new company in Silicon Valley.⁶ These kinds of international employment disputes are commonplace in the globalized world;⁷ however, this is the world in which we now compete.⁸ Companies are willing to invest money and fight for talent, as they try to gain traction in locations such as China or Bangalore.⁹ As one employment lawyer has stated, "We've received numerous calls from U.S.-based clients who are concerned about some kind of activity abroad, either by their own employees or their competitor raiding their employees" and "[t]hese situations are often tricky and difficult to find a legal remedy in the U.S. legal system."¹⁰

¹ Kofi A. Annan, *A Deal with Business To Support Universal Values*, INT'L HERALD TRIB., July 26, 2000. Kofi Annan, the Secretary-General of the United Nations, made this statement in July, 2000, while speaking at the United Nations' headquarters in New York at a high-level meeting on the Global Compact. *Id.*

² Marie-Anne Hogarth, *Labor Woes Going Global*, THE RECORDER, Nov. 18, 2005, at PP.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

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Globalization has flourished with the recent trends toward liberalization of trade, economic deregulation, and privatization.¹¹ Businesses increasingly operate in a global economy rather than local markets.¹² Foreign markets are more accessible to American companies, and the American market is more accessible to foreign companies.¹³ Consequently, companies are expanding in order to offer their products and services world-wide.¹⁴

Corporations have emerged as the primary force in aiding the development of global marketplace regulation.¹⁵ There is currently no formal international legal system in place.¹⁶ Many complexities and risks arise when United States-based corporations operate abroad, as Multinational Corporations (“MNCs”) must contend with United States employment laws, foreign employment laws, and the operation of these laws in the international context.¹⁷ For the most part, United States law cannot be applied to operations in other countries due to sovereignty

¹¹ Charles W. Smitherman III, *The Future of Global Competition Governance: Lessons from the Transatlantic*, 19 AM. U. INT’L L. REV. 769, 774 (2004).

¹² See *infra* notes 28-29 and accompanying text.

¹³ See *infra* notes 28, 33 and accompanying text; see also RAYMOND VERNON, *STORM OVER THE MULTINATIONALS: THE REAL ISSUES* 5 (1977) (discussing the decline of national distinctions in consumer goods and industrial products due to the opening in markets); Theodora R. Lee, *Global Employment Claims: Emerging International Labor and Employment Issues*, 730 PLI/LIT 681, 698-704 (Sept./Nov. 2005) (addressing the impact of United States labor and employment laws on foreign companies operating in the United States, which is not discussed in this Note).

¹⁴ See *infra* notes 33-34 and accompanying text.

¹⁵ See *infra* note 38 and accompanying text.

¹⁶ See *infra* note 40 and accompanying text.

¹⁷ See Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT’L L. & FOREIGN AFF. 81, 84-87 (1999) (discussing the complexities of the international legal system in relation to MNCs). “Various corporate consortia have filed amicus briefs attesting to difficulties, or the increased costs, of conducting business abroad where human rights litigation is a risk.” Beth Van Schaack, *With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change*, 57 VAND. L. REV. 2305, 2345 (2004). For a discussion of the motivating factors in American employers’ adoption of compliance practices, including risk management, see Susan Bisom-Rapp, *Exceeding Our Boundaries: Transnational Employment Law Practice and the Export of American Lawyering Styles to the Global Worksite*, 25 COMP. LAB. L. & POL’Y J. 257, 284 (2004) [hereinafter Bisom-Rapp, *Exceeding Our Boundaries*]. See also THEODORE H. MORAN, *MULTINATIONAL CORPORATIONS: THE POLITICAL ECONOMY OF FOREIGN DIRECT INVESTMENT* 108-12 (1985). Moran discusses “Project Vulnerability and Strategic Planning for Political Risk” and identifies five characteristics that have primary importance in evaluating the risk of a foreign direct investment project. *Id.* The five variables that Moran identifies are the size of the required fixed investment; the extent of competition, or potential competition, among investors; the technology associated with the project; marketing, or the importance of product differentiation in advertising; and vertical integration. *Id.*

issues and jurisdictional obstacles.¹⁸ Similar obstacles arise when foreign countries attempt to apply their laws to American companies.¹⁹ In addition, corporations are effectively above the law in less developed countries, as they often have more power and influence than the governments in those countries.²⁰

The international operation of United States-based MNCs presents new challenges in the arena of human resources.²¹ A patchwork of international treaties and conventions, International Labor Organization (“ILO”) standards, and voluntary codes of conduct currently comprise the informal, international regulatory system referred to as international employment law.²² This Note focuses on the development of this unique area of international employment law and proposes coping techniques for United States-based MNCs faced with the intricacies of international employment law.

Part II of this Note provides a survey of international employment law in its current state and the elements from which it is comprised.²³ Part III analyzes the international employment law system by reducing it to a basic framework.²⁴ This framework includes employment challenges in an informal regulatory system, core labor standards, social and political circumstances, and self-regulation.²⁵ The advantages and disadvantages of the elements in this system are identified and analyzed.²⁶ Finally, Part IV proposes eight tactics to assist United States-based MNCs in navigating the complexities of international employment law.²⁷

¹⁸ See *infra* notes 39-40, 135 and accompanying text.

¹⁹ See *infra* note 64 and accompanying text.

²⁰ See *infra* notes 57, 63-64 and accompanying text.

²¹ See ROBERT GILPIN, *THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS* 231, 238-41 (1987) (defining multinational corporation). A multinational corporation is a firm that owns and manages economic units in two or more countries. *Id.* at 231. See George J. Siedel, *Legal Complexity in Cross-Border Subsidiary Management*, 36 *TEX. INT’L L.J.* 611, 618-20 (2001), for a discussion of the complexities faced by one experienced human resources manager on her first international assignment.

²² See *infra* Parts II.B-II.E.

²³ See *infra* Part II.

²⁴ See *infra* Part III.

²⁵ See *infra* Part III.

²⁶ See *infra* Part III.

²⁷ See *infra* Part IV.

II. BACKGROUND

Dramatic increases in international trade and cultural exchange make the world more globalized.²⁸ Hence, new international systems of law are developing to provide a necessary legal infrastructure for global business.²⁹ One such system is international employment law.³⁰ International employment law is an informal regulatory system developed from treaties, conventions, voluntary codes of conduct, non-governmental organizations (“NGOs”), and domestic enforcement mechanisms.³¹ The following four subparts provide a synopsis of international employment law, its role in the globalized world, and its development.³²

A. Globalization

1. What Is Globalization?

Globalization is a system of business arrangements that moves large quantities of goods, services, and information between national

²⁸ See RICHARD J. BARNET & RONALD E. MÜLLER, GLOBAL REACH: THE POWER OF THE MULTINATIONAL CORPORATIONS 113-18 (1974) (discussing the denationalization process due to international cultural exchange); VERNON, *supra* note 13, at 1 (discussing the widely held view that multinational enterprises threaten the autonomy of the nation-state); Martin Wolf, *Will the Nation-State Survive Globalization?*, FOREIGN AFF., Jan./Feb. 2001, <http://www.foreignaffairs.org/20010101faessay4252/martin-wolf/will-the-nation-state-survive-globalization.html> (defining a globalized economy as one in which “neither distance nor national borders impede economic transactions”); Globalization, <http://en.wikipedia.org/wiki/Globalization> (last visited Sept. 7, 2006) (defining globalization).

²⁹ See Anne-Marie Slaughter, Andrew S. Tulumello & Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT’L. L. 367, 370 (1998) (discussing “the emergence and increasing importance of substate and nonstate actors, increasing international economic and political interdependence, the perceived transformation or disintegration of state sovereignty, the ascendancy of difficult ‘global’ issues” in relation to globalization); International Development Law Organization, *Why the ILDO’s Work Is Important*, http://www.idli.org/idlo_importance.htm (last visited Nov. 14, 2005) (explaining why the development of global law is important); ILO, *Introduction to ILS*, <http://www.ilo.org/public/english/standards/norm/introduction/index.htm> (last visited Sept. 18, 2006) (quoting the World Commission on the Social Dimension of Globalization, 2004, as stating “The rules of the global economy should be aimed at improving the rights, livelihoods, security, and opportunities of people, families and communities around the world.”) (emphasis removed).

³⁰ See generally Donald C. Dowling Jr., *The Practice of International Labor & Employment Law: Escort Your Labor/Employment Clients into the Global Millennium*, 17 LAB. LAW. 1 (2001) [hereinafter Dowling, *Escort*] (providing an overview of international employment law).

³¹ See *infra* Parts II.B-II.E.

³² See *infra* Parts II.B-II.E.

economies with high efficiency.³³ The scope and influence of globalization is rapidly increasing along with technological development.³⁴ These changes place workers from different global jurisdictions in competition with one another.³⁵

In a political context, globalization is known as neo-liberalism.³⁶ Neo-liberals believe that market forces are the superior form of social

³³ Harry Arthurs, *Reinventing Labor Law for the Global Economy: The Benjamin Aaron Lecture*, 22 BERKELEY J. EMP. & LAB. L. 271, 273 (2001) (defining globalization); see BARNET & MÜLLER, *supra* note 28, at 14, 303 (discussing the global corporations' creation of a world economy and a "global payroll"); Phillip R. Seckman, *Invigorating Enforcement Mechanisms of the International Labor Organization in Pursuit of U.S. Labor Objectives*, 32 DENV. J. INT'L L. & POL'Y 675, 678-79 (2004) (discussing the debate over the actual impact of globalization on the U.S. economy); Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT'L & COMP. L. REV. 273, 275 (2002) (defining globalization).

³⁴ THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 6-7 (2005). Thomas Friedman recounts a conversation he had with Nandan Nilekani, CEO of Infosys Technologies, on the advent of the globalized world. *Id.* Nilekani discussed a recent fundamental change in the world, including massive investment in technology, particularly worldwide broadband technology and undersea cables; computers becoming cheaper; and the explosion of software, e-mail, and search engines. *Id.* The product of all these elements coming together around the year 2000 created a platform for intellectual work and capital to be delivered to and from anywhere. *Id.* This fundamental change leveled the playing field in the global economy and is allowing countries like India to compete for global intellectual work more than ever before. *Id.*

[G]lobalization consists of a variety of elements such as the dramatic facilitation of travel and communication around the world, combined with an equally dramatic drop in relative cost. Other factors are the liberalization of capital transfers, both by deregulation and by technical progress, as well as the enlargement of the scope of the GATT (and later WTO) to include both trade in services and also many more countries. These developments provide for an entirely new level of international labor distribution.

Frank Emmert, *Labor, Environmental Standards and World Trade Law*, 10 U.C. DAVIS J. INT'L L. & POL'Y 75, 83 (2003).

³⁵ Arthurs, *supra* note 33, at 281-82; Kenneth G. Dau-Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 IND. L.J. 1, 11 (2001); Richard Johnstone, Claire Mayhew & Michael Quinlan, *Outsourcing Risk? The Regulation of Occupational Health and Safety Where Subcontractors Are Employed*, 22 COMP. LAB. L. & POL'Y J. 351, 369-70 (2001); see FRIEDMAN, *supra* note 34, at 284 (discussing the changes for employees in a "flat" world). Employers in the globalized world do not guarantee lifetime employment. FRIEDMAN, *supra* note 34, at 284. Instead, employers offer employees the tools to achieve lifetime employment. *Id.* "The whole mind-set of a flat world is one in which the individual worker is going to become more and more responsible for managing his or her own career, risks, and economic security, and the job of government and business is to help workers build the necessary muscles to do that." *Id.*

³⁶ Arthurs, *supra* note 33, at 273-74; see James Atleson, *The Voyage of the Neptune Jade: The Perils and Promises of Transnational Labor Solidarity*, 52 BUFF. L. REV. 85, 103 (2004) (discussing neo-liberal economists' view of globalization's effect on wage rates); Mark Duffield, *Globalization and War Economies: Promoting Order or the Return of History?*, 23

ordering and that states should govern to the most minimal extent possible.³⁷ Accordingly, private sector actors, particularly multinational corporations, are the major players in the development of global law.³⁸

2. Why Is Globalization Important to Employment Law?

Globalization transforms the way we think about employment law, as almost no United States employment law applies in an international context.³⁹ As such, obstacles that do not apply to domestic employment

FLETCHER F. WORLD AFF. 21, 21-22 (1999) (acknowledging the predominance of neo-liberal assumptions that market reform will promote growth and order and referring to neo-liberalism as “hyperglobalization”); Amy A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT’L L.J. 419, 420, 425 (2000) (acknowledging the “fundamentally apolitical stance of neoliberalism” and discussing neoliberalism’s triumph in the United States and rising acceptance by Third World governments). For a discussion of the nature of a political economy, see GILPIN, *supra* note 21, at 8-64. Gilpin identifies and explains the three ideologies of the political economy. *Id.* at 25-64. See generally James Thuo Gathii, *Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy*, 98 MICH. L. REV. 1996 (2000); John K. Setear, *Law in the Service of Politics: Moving Neo-Liberal Institutionalism from Metaphor to Theory by Using the International Treaty Process To Define “Iteration”*, 37 VA. J. INT’L L. 641 (1997).

³⁷ Arthurs, *supra* note 33, at 274. Neo-liberalism is attributed to “Adam Smith and the 19th century liberal economists who built on his work.” *Id.* Neo-liberals seek to eliminate all market regulation and barriers to transnational trade. *Id.*; see also GILPIN, *supra* note 21, at 26-31; MORAN, *supra* note 17, at 149-51; Neoliberalism, <http://en.wikipedia.org/wiki/Neoliberalism> (last visited Sept. 9, 2006) (defining neoliberalism).

³⁸ Su-Ping Lu, *Corporate Codes of Conduct and the FTC: Advancing Human Rights Through Deceptive Advertising Law*, 38 COLUM. J. TRANSNAT’L L. 603 (2000); see BARNET & MÜLLER, *supra* note 28, at 72-104 (discussing corporate diplomacy, the exercise of political power by corporations); GILPIN, *supra* note 21, at 243-59.

³⁹ Arthurs, *supra* note 33, at 281-82; Dau-Schmidt, *supra* note 35, at 1; see Terry Collingsworth, *Resurrecting the National Labor Relations Act—Plant Closings and Runaway Shops in a Global Economy*, 14 BERKELEY J. EMP. & LAB. L. 72, 101 (1993) (arguing that judicial interpretation of the NLRA has created unnecessary protections for United States companies that relocate production to developing countries); Benjamin N. Davis, *The Effects of Worker Rights Protections in United States Trade Laws: A Case Study of El Salvador*, 10 AM. U. J. INT’L L. & POL’Y 1167, 1180 (1995); Lee, *supra* note 13, at 694-98. “The jurisdiction of the NLRA [National Labor Relations Act] extends only to workplaces in the United States and its possessions.” Lee, *supra* note 13, at 694. The Employee Retirement Income Security Act of 1974 (“ERISA”) has no explicit provision extending coverage overseas. *Id.* at 695. The Occupational Safety and health Act (“OSHA”) only applies to employment that is performed in United States workplaces and its possessions. *Id.* The Workers Adjustment and Retraining Notification Act (“WARN”) does not apply to foreign workplaces, and the Fair Standards Act (“FLSA”) and Equal Pay Act (“EPA”) do not apply to employment performed in a foreign country. *Id.* at 696. Similarly, the Family and Medical Leave Act (“FMLA”) does not apply to employees abroad. *Id.* The whistleblower provisions of the Sarbanes-Oxley Act of 2002 do not apply to employees of United States companies who are employed outside of the United States. *Id.* at 697. State employment laws do not apply overseas, unless the law is found to be intended to apply extraterritorially. *Id.* at 697-98.

For another example, see *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991). In *Arabian American Oil*, an employee of an American corporation sued his employer for discrimination under Title VII of the Civil Rights Act of 1964, but the Court held that Title VII was inapplicable to the discriminatory employment practices of U.S. employers who employed U.S. citizens overseas. *Id.* In reaching that decision, the Court relied on a “longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’” *Id.* at 248. The Court noted that Congress would have extended the statute extraterritorially if that was its intent. *Id.* at 258. To illustrate that point, it recalled that the Age Discrimination in Employment Act (“ADEA”), as originally drafted, did not provide for extraterritorial coverage and that Congress amended that statute to reach overseas in the wake of federal court decisions limiting its coverage to the territorial boundaries of the United States. *Id.* The essential holding of the Supreme Court’s decision in *Arabian American Oil* was that there is a presumption against the extraterritorial application of United States legislation that cannot be overcome absent clear intent of Congress for a particular statute to apply to events and transactions occurring outside United States territory. *Id.* at 248; see *Smith v. United States*, 507 U.S. 197, 204 (1993) (holding that there must be “clear evidence” of congressional intent to apply a statute extraterritorially); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957) (holding that the NLRA only applies to workplaces in the United States and its possessions); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285-87 (1949) (holding that the federal Eight Hour Law did not apply to American employees working abroad for contractors hired by the United States); *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355-59 (1909) (rejecting the application of the Sherman Act where damage resulted inside United States from acts occurring outside of the United States, the Court found that, “the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done”); *Asplundh Tree Experts Co. v. NLRB*, 356 F.3d 168 (3d Cir. 2004) (holding that the Taft Hartley Act did not apply to employees of a United States company while they were performing temporary work in Canada); *Reyes-Gaona v. N.C. Growers Ass’n, Inc.*, 250 F.3d 861 (4th Cir. 2001) (holding that the ADEA’s extraterritorial provisions do not apply to residents who are not United States citizens when those individuals apply in foreign countries for jobs in the United States); *Denty v. SmithKline Beecham Corp.*, 109 F.3d 147 (3d Cir. 1997) (holding that the ADEA did not apply to decisions of a British parent corporation because it was not sufficiently controlled by its United States subsidiary); *Smith v. Raytheon Co.*, 297 F. Supp. 2d 399 (D. Mass. 2004) (holding that employees working in Antarctica are ineligible for overtime pay under the FLSA); *Carnero v. Boston Scientific Corp.*, Civ. A. 04-10031-RWZ, 2004 U.S. Dist. LEXIS 17205 (D. Mass. 2004) (holding that the whistleblower provisions of the Sarbanes-Oxley Act do not apply to employees of United States companies who are employed outside of the United States); *Maurais v. Guardian Life Ins. Co. of Am.*, 2000 U.S. Dist. LEXIS 13818 (E.D. Pa. 2000) (holding, in accordance with *Arabian Am. Oil*, that ERISA could not be applied extraterritorially because there is no language in ERISA with clear intent of Congress to apply it extraterritorially); *Hu v. Skadden, Arps, Slate, Meagher & Flom LLP*, 76 F. Supp. 2d 476 (S.D.N.Y. 1999) (holding that the ADEA does not apply to foreign nationals who worked or sought work abroad for United States companies or their subsidiaries); *Hugh E. O’Loughlin Sr. v. Pritchard Corp.*, 972 F. Supp. 1352 (D. Kan. 1997) (holding that the ADEA’s extraterritorial reach does not extend to residents who are not United States citizens when those individuals are employed by a United States corporation abroad); *Doricent v. Am. Airlines, Inc.*, 1993 U.S. Dist. LEXIS 15143 (D. Mass. Oct. 19, 1993) (holding that state employment laws generally do not apply extraterritorially); *Wirtz v. Healy*, 227 F. Supp. 123 (N.D. Ill. 1964) (holding that tour escorts who perform services in both the United States and abroad within the same work week are likely to be entitled to

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law – primarily related to sovereignty – block the development of global employment law and stand in the way of the creation of one global labor law regime.⁴⁰

The lack of such a labor law regime creates the necessity for the propagation of “best practices” to the development of the current

the minimum wage protections of the FLSA); *Burghard v. Fluor Daniel, Inc.*, No. G025875, 2001 Cal. App. Unpub. LEXIS 864 (Dec. 11, 2001) (holding that the California Family Rights Act (“CFRA”), which has been amended to conform to the FMLA, does not apply to employees working in foreign countries at the time they request medical leave); *Concone v. Capital One Fin. Corp.*, DOL ALJ, No. 2005-SOX-00006 (2004) (holding that the whistleblower provisions of the Sarbanes-Oxley Act do not apply to employees of United States companies who are employed outside of the United States); *RCA OMS, Inc. (Greenland)*, 202 N.L.R.B. 228 (1973) (holding that the NLRB does not have jurisdiction over employees located in Greenland, a possession of Denmark, even though the employees were hired in the United States, paid from the United States, and returned to the United States upon completion of their jobs); *cf. Dowd v. Int’l Longshoreman’s Ass’n*, 975 F.2d 779 (11th Cir. 1992) (granting preliminary injunction against a United States union that allegedly violated the NLRA’s ban on secondary boycotts by inducing Japanese unions to threaten to refuse to unload ships carrying non-union citrus); *Labor Union of Pico Korea, Ltd. v. Pico Prod., Inc.*, 968 F.2d 191 (2d Cir. 1992) (holding that § 301 of the Labor Management Relations Act did not apply extraterritorially to a claim by Korean workers against their employer, a United States-based MNC); *Coastal Stevedoring Co.*, 313 N.L.R.B. 412 (1993) (finding that a United States Union violated the NLRA’s secondary boycott prohibition by inducing Japanese union to threaten to boycott). *But see* 42 U.S.C. § 2000e et seq. (1991) (“Title VII”) (amending Title VII to apply extraterritorially to United States citizens). Title VII applies to foreign companies controlled by American companies. *Id.* Congress also specified that American companies abroad are not required to comply with Title VII if doing so would require them to violate foreign law. *Id.*; *see also* 29 U.S.C. § 621 et seq. (1984) (amending the ADEA to apply extraterritorially); 42 U.S.C. § 12101 et seq. (1991) (“ADA”) (amending the ADA to provide extraterritorial protection to United States citizens and foreign citizens employed by a United States entity or United States-controlled entity); *Skiriotes v. Florida*, 313 U.S. 69, 77 (1941) (holding that state law permissibly may regulate conduct abroad concerning “matters in which the State has a legitimate interest and where there is no conflict with acts of Congress”); *Torrico v. Int’l Bus. Machines Corp.*, 213 F. Supp. 2d 390 (S.D.N.Y. 2002) (holding that the New York Human Rights Law applied to a New York domiciliary, who was a citizen of Chile, to maintain an action against his employer for alleged disability discrimination against him while working in Chile on a temporary expatriate assignment); *Iwankow v. Mobil Oil Corp.*, 150 A.D. 2d 272-73 (N.Y. App. 1989) (holding that the New York Human Rights Law applies extraterritorially).

⁴⁰ *Arthurs*, *supra* note 33, at 284; *see Arabian Am. Oil Co.*, 499 U.S. at 248 (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963)). The reason for the Court’s presumption against extraterritoriality is to “protect against unintended clashes between our laws and those of other nations which could result in international discord.” *Arabian Am. Oil Co.*, 499 U.S. at 248; *see also* Frank Balzano, *Extraterritorial Application of the National Labor Relations Act*, 62 U. CIN. L. REV. 573, 598-599 (1993) (citing *Arabian Am. Oil Co.*, 499 U.S. 244); Michael A. Warner Jr., Comment, *Strangers in a Strange Land: Foreign Compulsion and the Extraterritorial Application of United States Employment Law*, 11 NW. J. INT’L L. & BUS. 371 (1990).

patchwork of global employment law.⁴¹ Under the best practices theory, “ideas of law, management and work” originating in one country are “exported and re-engineered abroad, and ultimately returned to challenge—even change—the thinking in their country of origin.”⁴² Global labor practices develop as MNCs and countries compete with one another and learn from each other’s mistakes and successes.⁴³ Consequently, a system of global law flourishes through best practices, and international employment lawyers are increasingly sought after to help companies navigate this complex system.⁴⁴

⁴¹ Arthurs, *supra* note 33, at 288; see Boris Kozolchyk, *The “Best Practices” Approach to the Uniformity of International Commercial Law: The UCP 500 and the NAFTA Implementation Experience*, 13 ARIZ. J. INT’L & COMP. L. 443, 445 (1996). In describing the best practices process, Mr. Kozolchyk notes, “Once the differences are clear and the actual business practices are identified, businessmen and lawyers of the three nations select the best practice by identifying those that most effectively and fairly carry out the purposes of the transaction.” Kozolchyk, *supra*, at 445; see also Robert Eli Rosen, “We’re All Consultants Now”: *How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services*, 44 ARIZ. L. REV. 637, 679 (2002). Mr. Rosen notes, in describing best practices, “Until recently, each of the professional service industries thought of itself as distinct from others, and so looked primarily to its direct peers and competitors in learning how to confront key business challenges.” Rosen, *supra*, at 679; see also Judith Kimerling, *Rio + 10: Indigenous Peoples, Transnational Corporations and Sustainable Development in Amazonia*, 27 COLUM. J. ENVTL. L. 523, 530 (2002); Mark Sidel, *The Guardians Guarding Themselves: A Comparative Perspective on Nonprofit Self-Regulation*, 80 CHI.-KENT. L. REV. 803, 821 (2005) (discussing how best practices are valuable for strengthening standards in a sector).

A popular view has emerged: that “corporate responsibility” and “best practice” by TNCs—generally referred to in Spanish as “normas internacionales” (international standards) and “tecnología de punta” (cutting edge technology)—will complement nascent government regulation, as developing nations gain environmental experience and capacity, and strengthen national democratic institutions and the rule of law, including environmental law. However, those assumptions are seldom checked by close observation of corporate conduct in the developing world.

Kimerling, *supra*, at 531.

⁴² Arthurs, *supra* note 33, at 288; National Electronic Library for Health, *Identifying and Sharing Best Practices*, http://www.nelh.nhs.uk/knowledge_management/km2/best_practices_toolkit.asp (last visited Jan. 19, 2007) [hereinafter *Best Practices*] (discussing the re-use of knowledge in sharing best practices).

⁴³ Arthurs, *supra* note 33, at 288. Key steps to acquire best practices are: (1) Identify users’ requirements; (2) Discover good practices; (3) Document good practices; (4) Validate best practices; (5) Disseminate and apply; and (6) Develop a supporting infrastructure. *Best Practices*, *supra* note 42.

⁴⁴ Arthurs, *supra* note 33, at 288; see *supra* notes 41-42 and accompanying text (discussing best practices). See generally *INTERNATIONAL LABOR AND EMPLOYMENT LAWS* (William L. Keller & Timothy J. Darby eds., 2d ed. 2003) (evinced the complexity of international employment law in an exhaustive two-volume treatise and supplement published by the

Further, the increasing role of American lawyers in international employment law results in American lawyering styles heavily impacting transnational business.⁴⁵ The diversity and cultural specificity of the world's legal systems make it essential for attorneys in the United States to establish international networks with employment lawyers in other countries.⁴⁶ Nonetheless, MNCs' focus on dispute avoidance is credited to "American management-side lawyering."⁴⁷ In this respect, many MNCs focus simultaneously on eradicating illegal bias and safeguarding employment procedures from legal challenges by preserving evidentiary records and training employees, thereby eliminating the arbitrary exercise of discretion by supervisors.⁴⁸ Accountability "is an essential

ABA Section of Labor and Employment Law, and hence the need for international employment lawyers); Roy Heenan, *Employment Law Issues in the International Arena*, in CROSS-BORDER HUMAN RESOURCES PROJECTS AND INTERNATIONAL EMPLOYMENT LAW AND PRACTICE (2001) (discussing the need for international employment lawyers in an ABA-CLE publication published with a ninety-minute teleconference on international employment law); Philip M. Berkowitz et al., *International Employment*, 34 INT'L LAW 453 (2000); Dowling, *Escort*, *supra* note 30 (addressing the complexities of international employment law and the need for international employment lawyers in an article derived from the author's chapter titled *International Labor & Employment Law*, in INTERNATIONAL LAWYER'S DESKBOOK (L. Low, P. Norton & D. Drory eds., ABA, 2d ed. 2001)).

⁴⁵ See Bisom-Rapp, *Exceeding Our Boundaries*, *supra* note 17, at 263. See *id.* at 305-10 for a discussion of the United States' propensity for exporting culture.

⁴⁶ Bisom-Rapp, *Exceeding Our Boundaries*, *supra* note 17, at 262; see, e.g., *Comparativism in Labour Law and Industrial Relations*, in COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMICS 3-22 (Roger Blanpain & Chris Engels eds., 1998); ABAGAIL C. SAGUY, WHAT IS SEXUAL HARASSMENT: FROM CAPITOL HILL TO THE SORBONNE (2003) (studying the legal, social, and interpretive differences in France and the United States regarding sexual harassment); Carole Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 FORDHAM INT'L L.J. 1039, 1039-40 (2002) [hereinafter Silver, *Foreign Lawyer*]. "The interactions resulting from . . . cross-border meetings provide an opportunity for national models of lawyering to influence one another, through the competition and cooperation of lawyers and their firms in work performed on behalf of clients, both shared and competing." Silver, *Foreign Lawyer*, *supra*, at 1039-40. "By working alongside and across the table from each other, U.S. and foreign lawyers have opportunities to influence one another and extend the reach of their conceptions about the way law and legal practice should work." Carole Silver, *Regulatory Mismatch in the International Market for Legal Services*, 23 NW. J. INT'L L. & BUS. 487, 488 (2003); see also Carolyn Gould and Barbara Schmidt-Kemp, *Hiring and Managing a Multinational Work Force*, INTERNATIONAL HUMAN RESOURCES GUIDE (IHRGD) § 8:4 (June 2005) (providing practitioner tips on multinational hiring practices).

⁴⁷ Bisom-Rapp, *Exceeding Our Boundaries*, *supra* note 17, at 275. "[A]mong the most notable characteristics of American management-side lawyering is its emphasis on dispute avoidance and litigation prevention." *Id.* See generally Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 976-84 (1999) [hereinafter Bisom-Rapp, *Bulletproofing*].

⁴⁸ Bisom-Rapp, *Bulletproofing*, *supra* note 47, at 963; Donald C. Dowling, Jr., *The Practice of International Labor and Employment Law for Multinational Employer Clients*, 730 PLI/LIT 773, 813 (2005) [hereinafter Dowling, *Practice*]. But see Bisom-Rapp, *Exceeding Our Boundaries*,

check” on an organization’s propensity to implement symbolic, as opposed to substantive, dispute avoidance and compliance policies.⁴⁹

Employers are motivated to establish litigation prevention policies by risk management and preservation of flexibility, as well as by a sense of social obligation.⁵⁰ Furthermore, in a global market, employers must contend with employees who engage in transnational collective action.⁵¹ The American lawyering style permeates international employment law as the self-regulating policies of United States-based MNCs dominate the international employment legal system.⁵² The world’s governments are simply unable to match the fast pace of globalization in creating one global employment law regime.⁵³

3. The Role of Multinational Corporations in the Development of International Employment Law

The lack of an enforceable system of international employment law places moral and ethical duties on corporations, rather than legal

supra note 17, at 277-78 (discussing the masking of biased decision-making in “bulletproofing” efforts and the implications on civil rights law).

⁴⁹ Bisom-Rapp, *Exceeding Our Boundaries*, *supra* note 17, at 280. “Making accountability integral to preventing, discerning, and eliminating discrimination is an essential check on the natural tendency of organizations to adopt symbolic rather than substantive litigation prevention and compliance strategies.” *Id.*

⁵⁰ *Id.* at 283-84; Peter J. May, *Compliance Motivations: Affirmative and Negative Bases*, 38 *LAW & SOC’Y REV.* 41, 44 (2004). The Labor and Employment Committee of the United States Council for International Business (“USCIB”) seeks to globalize the market with the least amount of government intervention. USCIB, <http://www.uscib.org/index.asp?documentID=697> (last visited Oct. 8, 2005). See generally Isabella D. Bunn, *Global Advocacy for Corporate Accountability: Transatlantic Perspective from the NGO Community*, 19 *AM. U. INT’L L. REV.* 1265 (2004) (discussing corporate social responsibility).

⁵¹ MORAN, *supra* note 17, at 184. “Beyond its effects on overall wages and income distribution, the MNE may change the welfare of workers through its employment policies and its stance in collective bargaining.” *Id.*; see BARNET & MÜLLER, *supra* note 28, at 117-23. See generally Atleson, *supra* note 36.

⁵² Bisom-Rapp, *Exceeding Our Boundaries*, *supra* note 17, at 300-01; see FRIEDMAN, *supra* note 34, at 246 (discussing America’s unique ability to take advantage of the global economy and, in this respect, the export of its labor practices). “The United States also has among the most flexible labor laws in the world. The easier it is to fire someone in a dying industry, the easier it is to hire someone in a rising industry that no one knew would exist five years earlier.” FRIEDMAN, *supra* note 34, at 246.

⁵³ Annan, *supra* note 1 (discussing the need for nongovernmental regulation as governments cannot operate at the same speed as globalization); see Michael C. McClintock, *Sunrise Mexico: Sunset NAFTA-Centric FTAA – What Next and Why?*, 7 *SW. J. L. & TRADE AM.* 1, 13 (2000) (discussing the “rapidly changing global economy” in relation to government responses to NAFTA issues).

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duties.⁵⁴ Some critics believe that companies are, at a minimum, under a duty to respect the rights of others.⁵⁵ A movement towards corporate social responsibility, led primarily by NGOs, demands corporate accountability in the protection of ethical values, human rights, communities, and the environment.⁵⁶ This movement imposes a sense of ethical duty on MNCs in consideration of the incredible economic power that they possess.⁵⁷ Similarly, there is a notion that labor rights are

⁵⁴ Bunn, *supra* note 50, at 1301. For a discussion of labor advocates' arguments for enforcement of labor standards, see Lisa G. Baltazar, *Government Sanctions and Private Initiatives: Striking a New Balance for U.S. Enforcement of Internationally-Recognized Workers' Rights*, 29 COLUM. HUM. RTS. L. REV. 687, 696-98 (1998). Baltazar provides examples of international instruments to address labor rights that are unenforceable. *Id.* One such example is the International Covenant on Economic, Social and Cultural Rights ("ICESR"). *Id.* The ICESR

recognizes "the right of everyone to the enjoyment of just and favorable conditions of work," particularly: "fair wages and equal remuneration for work of equal value without distinction of any kind" and "safe and healthy working conditions." The Covenant further provided for "the right of everyone to form trade unions and to join the trade union of his choice."

Id. The ICESR may provide a basis for a human rights claim, but serves primarily as a statement of principle that has no enforcement power. *Id.* See generally Phillip R. Seckman, *Invigorating Enforcement Mechanisms of the International Labor Organization in Pursuit of U.S. Labor Objectives*, 32 DENV. J. INT'L L. & POL'Y 675 (2004).

⁵⁵ Bunn, *supra* note 50, at 1303. See generally TOM CANNON, CORPORATE RESPONSIBILITY 32-3 (Pitman Pub. 1994) (identifying the interdependence between society and business); MICHAEL ADDO ed., KLUWER LAW INT'L 2000 (providing a broad overview of the responsibilities multinational corporations have to protect human rights standards); Barbara Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 153 (1997) (reviewing the status of transnational corporations and their responsibility to protect international human rights).

⁵⁶ Lance Compa & Tashia Hinchliffe-Darricarrere, *Doing Business in China and Latin America – Developments in Comparative and International Labor Law: Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663, 668 (1995) (citing PAUL HAWKEN & WILLIAM McDONOUGH, SEVEN STEPS TO DOING GOOD BUSINESS, INC. (Nov. 1993)), <http://www.bemidjistate.edu/dsiems/courses/peoplenv/hawken.htm>. "The premise of the corporate social responsibility movement is that 'corporations, because they are the dominant institution of the planet, must squarely face and address the social and environmental problems that afflict humankind.'" *Id.* "[D]eteriorating social circumstances put at risk [a company's] ability to satisfy customers, provide a stable, progressive work environment, and meet our obligations to stockholders." George Harvey, *The Education of American Business*, 83 BUS. & SOC'Y REV. 62 (1992). Business "must actively continue to help ensure that the community has the economic policies to support business, the educational system to produce the workers of tomorrow, and the quality of life necessary to attract and retain employees." *Id.* at 63. See generally Bunn, *supra* note 50.

⁵⁷ See SARAH ANDERSON & JOHN CAVANAUGH, TOP 200: THE RISE OF CORPORATE GLOBAL POWER, INSTITUTE FOR POLICY STUDIES (2000), http://www.ips-dc.org/reports/top200_text.htm (n.d.). Of the largest 100 economies in the world, fifty-one are now corporations.

international human rights.⁵⁸ Core to the idea of labor rights is the idea

Id. “In many situations, states, especially developing ones, can be weaker than MNCs in terms of both economic and legal capacity.” Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 CONN. J. INT’L L. 1, 2 n.5 (2003). Additionally, “[MNCs] have acquired a great amount of power.” Nicola Jagers, *The Legal Status of the Multinational Corporation Under International Law*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 259-60 (Michael K. Addo ed., 1999). “Of the biggest concentrations of wealth in the world, 51% are owned by MNCs and 49% by states.” *Id.*; see Douglas M. Branson, *The Globalization of Corporate and Securities Law in the Twenty-first Century: The Social Responsibility of Large Multinational Corporations*, 16 TRANSNAT’L L. 121, 130-33 (2002) (discussing the enormous size of multinational corporations); Stephen Wood & Brett Scharffs, *American Law in a Time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law—Section IV. Applicability of Human Rights Standards to Private Corporations: An American Perspective*, 50 AM. J. COMP. L. 531, 539 (2002) (discussing the global wealth of MNCs). Wood and Scharffs provide the following statistics to illustrate the incredible wealth of MNCs:

TNCs or MNEs “control roughly one-fourth of the world’s assets[]” and arguably account for “as much as one-fourth of the U.S. economy[.]” One way in which to grasp the relative economic significance of TNCs or MNEs when compared with nation states is to construct a list on which nation states are ranked according to gross domestic product (“GDP”) and TNCs or MNEs are ranked according to gross sales. On a GDP/TNC-MNE list of the 50 largest ‘entities’ for 1999, all the TNCs-MNEs are clustered, beginning with General Motors, which had gross sales in 1999 of \$ 176.558 billion and ranked 38 on the list of 50. Four other TNCs or MNEs occupy the next four slots on the list of 50: Walmart (\$ 166.809 billion; 39); Exxon Mobil (\$ 163.881 billion; 40); Ford Motor (\$ 162.558 billion; 41); and Daimler Chrysler (\$ 159.986 billion; 42). These five TNCs or MNEs rank slightly behind Sweden (\$ 184 billion; 36) and Venezuela (\$ 182.8 billion; 37) and ahead of Hong Kong (\$ 158.2 billion; 43), Portugal (\$ 151.4 billion; 44) and Greece (\$ 149.2 billion; 45).

Wood & Scharffs, *supra*, at 57.

⁵⁸ Elissa Alben, *GATT and the Fair Wage: A Historical Perspective on the Labor-Trade Link*, 101 COLUM. L. REV. 1410, 1411 (2001) (pointing to an increasingly widely accepted definition of labor standards that is founded on human rights principles); Atleson, *supra* note 36, at 86-87; Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217, U.N. GAOR, available at <http://www.un.org/Overview/rights.html> [hereinafter Universal Declaration] (providing an overview of the labor rights that it believes should be considered basic human rights). The Declaration states:

Article 23.

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

that every person in the world is entitled to basic rights, and the place where most people spend the majority of their lives—the workplace—should be no exception.⁵⁹ Nonetheless, a basic question regarding globalization is whether it is realistic to expect MNCs to simultaneously respect human rights and aid in the economic growth of developing countries.⁶⁰

One view of advocates defending MNCs' activities in developing countries is that MNCs simply act on favorable business conditions in foreign countries, as is expected in a free market.⁶¹ In other words, MNCs find the least expensive means to operate and maximize profits.⁶²

(4) Everyone has the right to form and to join trade unions for the protection of his interests.

Universal Declaration, *supra*, at 65; see also Christiana Ochoa, *Advancing the Language of Human Rights in a Global Economic Order: Analysis of a Discourse*, 23 B.C. THIRD WORLD L.J. 57, 63 (2003) (discussing power of transnational corporations on international human rights due to impact on economic activity); Wood & Scharffs, *supra* note 57, at 538 (stating that "TNCs or MNEs 'control roughly one-fourth of the world's assets'").

⁵⁹ Atleson, *supra* note 36, at 87; see Ochoa *supra* note 58, at 66-67 (discussing the responsibility of transnational corporations to international human rights in light of their enjoyment of government economic institutions).

⁶⁰ See Michele D'Avolio, *Child Labor and Cultural Relativism: From 19th Century America to 21st Century Nepal*, 16 PACE INT'L L. REV. 109, 112-13 (2004). D'Avolio discusses the reasons why "seemingly humanitarian and progressive efforts to regulate core labor rights" are doomed to fail, namely cultural relativism. *Id.* at 111. D'Avolio avers that "the developing world vociferously opposes western attempts to impose labor standards on them" because it is "just another form of cultural imperialism." *Id.* Developing countries claim that the use of child labor is necessary for their economic development, just as the West used it in the early stages of its development. *Id.* Therefore, by imposing minimum labor standards on developing countries, they will be deprived of their comparative advantage, and thereby economic growth. *Id.*; see also Baltazar, *supra* note 54, at 695-96 (discussing the resistance of developing countries of efforts as labor rights enforcement); Bisom-Rapp, *Exceeding Our Boundaries*, *supra* note 17, at 305 (discussing America's propensity for export of its culture); Elisabeth Cappuyns, *Linking Labor Standards and Trade Sanctions: An Analysis of Their Current Relationship*, 36 COLUM. J. TRANSNAT'L L. 659, 669 (1998) ("Southern, developing countries fear that linkage would be detrimental to their economic development."); David Ziskind, *Cultural Bias in Labor Law Comparison*, 6 COMP. LAB. L. 275 (1984) (discussing cultural biases in comparative labor law and identifying five areas as possible sources of bias in comparative labor law: language, legal systems, economic factors, political factors, and ideational forces). *But see* Emmert, *supra* note 34, at 99-104, 145-67 (discussing supporters of minimum standards in developing countries and proposing measures to compensate developing countries for complying with minimum labor and environmental standards).

⁶¹ Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: International Economic Law: Adoption of Central American Free Trade Agreement*, 98 AM. J. INT'L L. 350, 398 (2004); see GILPIN, *supra* note 21; *supra* notes 36-37 (discussing neo-liberalism).

⁶² Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389, 400 (2005). "MNCs operating in developing countries have done what one would expect them to do in a free market: seek out the least expensive

Social activists, on the other hand, argue that host countries often lack resources to enforce local laws against MNCs.⁶³ Additionally, host countries may not have the resources to create better laws to contend with the newly-created social effects of the presence of MNCs, and the interests of the governments in host countries may not coincide with those of suffering workers.⁶⁴

Consumer awareness of MNCs' practices that diverge from social expectations have spurred backlash.⁶⁵ Many MNCs recognize this

means of conducting operations so as to maximize profits." *Id.*; see BARNET & MÜLLER, *supra* note 28, at 129, 152 (discussing the quest for global profit maximization). "The central strategy of the global corporation is the creation of a global economic environment that will ensure stability, expansion, and high profits for the planetary enterprise." BARNET & MÜLLER, *supra* note 28, at 152.

⁶³ Murphy, *supra* note 61, at 398; see BARNET & MÜLLER, *supra* note 28, at 124, 137-39 (discussing the lack of bargaining power of underdeveloped countries and attributing it to three institutional weaknesses: antiquated governmental structures, lack of a strong labor movement, and lack of competition from local business); *supra* note 64 (discussing the enormous power of MNCs).

⁶⁴ Murphy, *supra* note 61, at 398. "To date, many developing states and emerging democracies that are modernizing their commercial laws to attract foreign direct investment have adopted provisions on whether employees of the foreign investor are subject to the domestic labor laws of the investor or the host state." Janelle M. Diller and David A. Levy, *Child Labor, Trade and Investment: Towards the Harmonization of International Law*, 91 AM. J. INT'L L. 663, 693 (1997). However, little study has been done of provisions incorporating a host state's international obligations. *Id.* In rare instances, the laws of investors' home countries address the obligations of investors to their host markets. *Id.* But see Merritt Fox, *What's So Special About Multinational Enterprises?: A Comment on Avi-Yonah*, 42 COLUM. J. TRANSNAT'L L. 551, 567 (2004) (discussing the assumption that host country governments act in the best interest of their countries).

⁶⁵ Murphy, *supra* note 61, at 400.

As human rights, labor rights, and environmental rights continue to advance within the global consciousness, the practices of many MNCs in developing countries have been regarded as out of step with social expectations. This gap, in turn, has led to strident criticism of MNC activity, and sometimes to consumer backlash whereby MNCs are faced with demands for products certified as having been produced without adverse social consequences.

MNCs themselves recognize this divergence of MNC operations from social expectations, and consequently many have embraced the movement toward voluntary codes of conduct that inculcate key norms in the fields of labor, human rights, consumer protection, anticorruption, and the environment.

Id.; see John Christopher Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. PA. J. LAB. & EMP. L. 463, 471 (2000) (discussing the strain of consumer backlash); Neil Gunningham, Robert A. Kagan & Dorothy Thornton, *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 LAW & SOC. INQUIRY 307, 309 (2004) (discussing consumer backlash due to exploitive international practices by MNCs); Lu, *supra* note 38 (discussing the examination of labor practices by companies due

divergence, and have taken affirmative steps—such as creating corporate codes of conduct—to prevent future human rights violations.⁶⁶ Nonetheless, when enacting worker rights protections, proactive MNCs face difficulty in satisfying their own ideals, let alone the ideals of social activists.⁶⁷ Although international employment law will likely never satisfy idealists, a formal regulatory system may evolve in the future. International treaties and conventions that open trade barriers and

to fear of consumer backlash); David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901, 921 (2003) (discussing the fact that international standards should be clarified in order for MNCs to avoid consumer backlash). *See generally* Larry Rohter, *Hondurans in 'Sweatshops' See Opportunity*, N.Y. TIMES, July 18, 1996, at A1 (noting that while under Honduran law children may begin working at fourteen, but most garment factories dismissed all workers under sixteen due to a fear of U.S. consumer backlash). *But see* Robert J. Liubicic, *Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives*, 30 LAW & POL'Y INT'L BUS. 111, 148-49 (1998) (discussing the possible negative effects on workers in a developing country when MNCs react to United States' consumer backlash). In his article, Liubicic states:

Effective private initiatives may have undesirable indirect effects for the workers they are intended to benefit. Such effects may be both microeconomic and macroeconomic. For example, at the micro level, fourteen and fifteen year-old children who can no longer be employed by U.S. MNCs or their subcontractors due to a code of conduct prohibiting employment of children under age sixteen will simply find employment in other sectors of the economy, often at lower wages and under worse conditions. At the macro level, private initiatives may create disincentives for developing nations to enact stronger labor laws or improve enforcement of current standards. In a world of effective private initiatives that limit the ability to reduce costs by relaxing labor standards, governments of developing nations may attempt to compete with other nations for U.S. investment by offering undeserved subsidies to U.S. MNCs or by reducing enforcement of environmental and other standards. U.S. MNCs may use the fact that they operate pursuant to an effective code of conduct to justify their presence in developing nations with repressive political systems. Strengthening the economies of these nations through U.S. investment may increase the power of their current regimes.

Id.

⁶⁶ Murphy, *supra* note 61, at 400; *see infra* notes 90-112 and accompanying text for a full discussion of voluntary codes of conduct. "The most important contribution of the members of the socially responsible business movement . . . is that they are leading by trying to do something, to risk, to take a chance, to make a change—any change." Compa & Hinchliffe-Darricarrere, *supra* note 56, at 667.

⁶⁷ Compa & Hinchliffe-Darricarrere, *supra* note 56, at 686 (discussing the "perverse result of becoming the targets of criticism" when companies take proactive measures that claim to set a higher standard).

provide economic incentives and disincentives to practices in the global marketplace work towards a formal regulatory system.⁶⁸

B. International Treaties and Conventions

A new international employment system is developing in the context of the global economy, increasingly shaping the relations between multinational employers and their workers.⁶⁹ International treaties and conventions are fundamental to this system. They are often used in regulating international activity and usually involve economic incentives or disincentives to encourage desired behaviors by international actors.⁷⁰

1. The International Labor Organization

The ILO is a central point of reference for international employment lawyers.⁷¹ It has eight conventions, or core labor standards, that have

⁶⁸ See *infra* Parts II.B – II.E.

⁶⁹ Arthurs, *supra* note 33, at 286.

⁷⁰ *Id.*

⁷¹ Abdallah Simaika, *The Value of Information: Alternatives to Liability in Influencing Corporate Behavior Overseas*, 38 COLUM. J.L. & SOC. PROBS. 321, 325 (2005) (identifying the ILO as a basic reference point for labor lawyers). The ILO was created by the Treaty of Versailles in 1919 and adopted by the United Nations following World War II. *Developments in the Law—Jobs and Borders: Legal Tools for Altering Labor Conditions Abroad*, 118 HARV. L. REV. 2202, 2205 (2005) [hereinafter *Developments*]. It has been at the forefront of the development of international labor standards, primarily promoting the global community's acceptance of international labor standards by adopting conventions, guidelines, and recommendations after consultation with governments, labor unions, and employers. *Id.* Additionally, the ILO maintains a monitoring and reporting system and provides technical assistance. *Id.*; see Baltazar, *supra* note 54, at 690, 721 (explaining that the ILO is the best multilateral enforcement mechanism available for international labor standards); ILO, Alphabetical List of ILO Member Countries, <http://www.ilo.org/public/english/standards/realm/country.htm> (last visited Sept. 7, 2006) (listing the 178 member countries); ILO, The Role of International Labour Standards, <http://www.ilo.org/public/english/standards/norm/introduction/need.htm> (last visited Sept. 7, 2006); ILO, Technical Cooperation in the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, http://www.ilo.org/public/english/bureau/inf/download/brochure/pdf/broch_0904.pdf (last visited Sept. 7, 2006) [hereinafter *Technical Cooperation*]. On its website, the ILO offers the following commentary regarding technical cooperation:

Technical cooperation is one of the primary tools for translating the fundamental principles and rights at work into practice, thus ensuring that social progress accompanies economic growth. Set up in 1999, the ILO InFocus Programme on Promoting the Declaration spearheads new types of technical cooperation projects and is involved in identifying, designing and raising funds for the projects. This technical cooperation is funded largely through bilateral funds, and is run with the assistance of the relevant technical services provided by the Office, both at its headquarters and in the field. Assistance ranges

been identified by its governing body as “fundamental to the rights of human beings at work, irrespective of the levels of development of individual member States.”⁷² The core labor standards are a precondition for all rights by providing the necessary implements to

from advising on legislative reform and training government officials, to strengthening the capacity of the tripartite partners (i.e., governments, and employers’ and workers’ organizations).

Technical Cooperation, *supra*, at 78. “The ILO technical assistance programme for cooperative development focuses on policy and legal advice, capacity-building through human resource development, poverty alleviation through self-help, alternative delivery mechanisms for social services, and a special regional programme for indigenous and tribal peoples.” *Id.* The ILO’s Constitution may be accessed at ILO, Constitution, <http://www.ilo.org/public/english/about/iloconst.htm> (last visited Sept. 12, 2006); *see also* Cappuyns, *supra* note 60, at 678-79; Shelton, *supra* note 33, at 281 (identifying the ILO as an international human rights instrument). The ILO was specifically created for the promotion of labor standards. Cappuyns, *supra* note 60, at 678-79. It is a tripartite structure made up of full and active participating labor representatives, business representatives, and government officials. *Id.*

The ILO was established for the furtherance of social peace, motivated by the following considerations: first, humanitarian concerns for the large numbers of people negatively affected by poor labor conditions; second, political recognition that poor working conditions could create social unrest and political instability, possibly leading to revolution; and third, economic impetus to prevent unfair trade competition from countries failing to raise labor standards.

Id.

⁷² ILO, Conventions and Recommendations, <http://www.ilo.org/public/english/standards/norm/introduction/what.htm> (last visited Sept. 12, 2006) [hereinafter ILO Conventions]. The eight ILO conventions that have been identified as fundamental rights to workers cover the subjects of: “freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labor; the effective abolition of child labor; and the elimination of discrimination in respect of employment and occupation.” *Id.* They are:

- [(1)] Freedom of Association and Protection of the Right to Organise Convention of 1948 (No. 87);
- [(2)] Right to Organise and Collective Bargaining Convention of 1949 (No. 98);
- [(3)] Forced Labour Convention of 1930 (No. 29);
- [(4)] Abolition of Forced Labour Convention of 1957 (No. 105);
- [(5)] Minimum Age Convention of 1973 (No. 138);
- [(6)] Worst Forms of Child Labour Convention of 1999 (No. 182);
- [(7)] Equal Remuneration Convention of 1951 (No. 100); and
- [(8)] Discrimination (Employment and Occupation) Convention of 1958 (No. 111).

Id. Baltazar notes that, ILO conventions are adopted by governments, employers, and labor delegates at ILO annual conferences, but that the ILO has no power to enforce the conventions. Baltazar, *supra* note 54, at 688-89. Further, the ILO uses diplomatic persuasion, public embarrassment, and moral force against violators. Additionally, it provides technical assistance upon compliance with ILO standards. *Id.*

voluntarily strive for the improvement of work conditions.⁷³ Although the United States has not ratified most of the ILO's conventions, it has made repeated efforts to make compliance with the core labor standards a mandatory condition of World Trade Organization ("WTO") membership.⁷⁴ However, these proposals have been vigorously resisted by developing countries.⁷⁵ The fact is that MNCs create significant economic benefits to host countries by "provid[ing] jobs, produc[ing] goods and services, introduc[ing] technologies, and develop[ing] markets."⁷⁶ Thus, while the ILO has no real enforcement power, it serves as a central guidance system for multinational actors and is successful at improving global labor standards.⁷⁷

2. The North American Agreement on Labor Cooperation

As a member of the North American Free Trade Agreement ("NAFTA"), the United States has signed the North American Agreement on Labor Cooperation ("NAALC").⁷⁸ NAALC deals

⁷³ ILO Conventions, *supra* note 72.

⁷⁴ Arthurs, *supra* note 33, at 286; *Developments*, *supra* note 71 at 2208; Jonathan P. Hiatt & Deborah Greenfield, *The Importance of Core Labor Rights in World Development*, 26 MICH. J. INT'L L. 39, 42-43 (2004). See generally *Examination of the Relationship Between the United States and the International Labor Organization: Hearing Before the Senate Comm. on Labor and Human Resources*, 99th Cong. vol. 1 (1985).

⁷⁵ *Developments*, *supra* note 71, at 2208, 2218. This article notes that some scholars contend that the ILO core labor rights have attained such levels of consensus and specificity—as evidenced by their inclusion in international treaties, conventions, declarations, and agreements, including the Universal Declaration of Human Rights, the ICCPR, and the ICESCR—that they merit the status of binding norms of international law. *Id.* "For most of the developing world, multinational companies are now prized investors, not malfactors." Compa & Hinchliffe-Darricarrere, *supra* note 56, at 670.

⁷⁶ Murphy, *supra* note 61, at 397; see, e.g., GILPIN, *supra* note 21, at 172-78 (2000). But see PRAKASH SETHI, *SETTING GLOBAL STANDARDS 5-7* (2003) (asserting that the wealth created by MNCs operating in developing countries is largely skewed in favor of the MNCs and against workers).

⁷⁷ Atleson, *supra* note 36, at 94; Cappuyns, *supra* note 60, at 679; see, e.g., Lee Sweptson, *Human Rights Law and Freedom of Association: Development Through ILO Supervision*, 137 INT'L LAB. REV. 169, 174-94 (1998); Geraldo von Potobsky, *Freedom of Association: The Impact of Convention No. 87 and ILO Action*, 137 INT'L LAB. REV. 195 (1998).

⁷⁸ North American Agreement on Labor Cooperation, Sept. 1, 1993, U.S.-Can.-Mex. 32 I.L.M. 1499 [hereinafter NAALC]. The NAALC commits each NAFTA partner to adhere to its own labor laws, establishes a dispute resolution process to ensure compliance, and allows this process to be accessed not only by the other governments, but by their aggrieved citizens. Simaika, *supra* note 71, at 330; NAALC, Annex 1: Labor Principles, <http://www.naalc.org/english/agreement9.shtml> (last visited Sept. 12, 2006). There are eleven rights protected under the NAALC: freedom of association, collective bargaining rights, the right to strike, anti-discrimination rights/equal pay for men and women, migrant worker rights, prohibitions on forced labor, prohibitions on child labor, minimum wage guarantees, occupational safety and health requirements, compensation in case of

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specifically with labor issues associated with free trade between Mexico, Canada, and the United States.⁷⁹ Under NAALC, members are held to no higher legal standard than their own domestic laws.⁸⁰ Members are required to enforce their domestic labor laws, to provide aggrieved individuals with access to tribunals for vindication of rights, and “to ensure ‘fair, equitable, and transparent’ adjudicatory proceedings.”⁸¹

3. The United Nations’ Global Compact

As opposed to the aforementioned mechanisms, which promote external regulations, the United Nations’ Global Compact (“Global Compact”) is “the most significant initiative” in advancing self-regulation of international human and labor rights conduct.⁸² The

occupational injuries and illnesses, and protection of migrant workers. *Id.*; see also North American Agreement on Labor Cooperation, Sept. 13, 1993, Art. 3(1); Lance A. Compa, *The First NAFTA Labor Cases: A New International Labor Rights Regime Takes Shape*, 3 U.S.-MEX. L.J. 159 (1995).

⁷⁹ Simaika, *supra* note 71, at 330.

⁸⁰ *Id.* “Thus, each member state is obligated to implement its own laws, but is not held to a higher legal standard.” *Id.*

⁸¹ Jonathan Graubart, “Politicizing” a New Breed of “Legalized” Transnational Political Opportunity Structures: Labor Activists Uses of NAFTA’s Citizen-Petition Mechanism, 26 BERKELEY J. EMP. & LAB. L. 97, 107 (2005) (referring to NAALC, Articles 3, 4, and 5). “NAALC contains three general obligations: (1) to enforce the state’s domestic laws on labor rights; (2) to provide any aggrieved individual with ‘appropriate access to administrative . . . judicial or labor tribunals’ for vindicating one’s rights; (3) to ensure ‘fair, equitable, and transparent’ adjudicatory proceedings.” *Id.* Article 3 of NAALC states:

1. Each Party shall promote compliance with and effectively enforce its labor law through appropriate government action, subject to Article 42, such as:

1. appointing and training inspectors;
2. monitoring compliance and investigating suspected violations, including thorough on-site inspections;
3. seeking assurances of voluntary compliance;
4. requiring record keeping and reporting;
5. encouraging the establishment of worker-management committees to address labor regulation of the workplace;
6. providing or encouraging mediation, conciliation and arbitration services; or
7. initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor law.

Commission for Labor Cooperation, North American Agreement on Labor Cooperation Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, Sept. 13, 1993, available at <http://www.naalc.org/english/agreement3.shtm>.

⁸² VIRGINIA HAUFLE, CARNEGIE ENDOWMENT FOR INT’L PEACE, A PUBLIC ROLE FOR THE PRIVATE SECTOR: INDUSTRY SELF-REGULATION IN A GLOBAL ECONOMY 29 (2001). See generally Murphy, *supra* note 69, at 411-13 (discussing the 1999 UN Global Compact). But see Simaika, *supra* note 71, at 346-47. “As President George W. Bush remarked, ‘Self-

Global Compact advances “ten principles in the areas of human rights, labour, environment, and anti-corruption.”⁸³ Essentially, it promotes responsible corporate citizenship through collective action, with the goals of making its ten principles part of mainstream business practices around the world and catalyzing actions in support of the United Nations’ goals.⁸⁴ Furthermore, the Global Compact is not a regulatory instrument, relying instead on the public accountability and the “enlightened self-interest of companies” to pursue the principles on which it is based.⁸⁵ Conversely, treaties such as the Dominican Republic–Central America–United States Free Trade Agreement (“DR-CAFTA”) include requirements for covered companies and have stiff fines for noncompliance.

regulation [of companies] is important, but it is not enough.” *Id.* (citing INTERNATIONAL RIGHT TO KNOW: EMPOWERING COMMUNITIES THROUGH CORPORATE TRANSPARENCY, <http://www.intk.org/irtkreport.pdf>) (last visited Dec. 27, 2006); *see also* Maria Ellinikos, *American MNCs Continue To Profit from the Use of Forced and Slave Labor Begging the Question: Should America Take a Cue from Germany?*, 35 COLUM. J.L. & SOC. PROBS. 1, 28-29 (2001) (stating that “there are negative indirect microeconomic and macroeconomic effects of self-regulation, including, on a micro level, the shift of child labor from industries regulated by codes of conduct to those remaining unregulated, and, on a macro level, disincentives for developing nations to enact stronger labor laws or to improve enforcement of existing standards”).

⁸³ Global Compact—What Is the Global Compact?, <http://www.unglobalcompact.org/PortalAboutTheGC/TheTenPrinciples/index.html> (last visited Sept. 12, 2006) [hereinafter Global Compact]. The ten principles are:

Principle 1: The support and respect of the protection of international human rights;

Principle 2: The refusal to participate or condone human rights abuses;

Principle 3: The support of freedom of association and the recognition of the right to collective bargaining;

Principle 4: The abolition of compulsory labor;

Principle 5: The abolition of child labor;

Principle 6: The elimination of discrimination in employment and occupation;

Principle 7: The implementation of a precautionary and effective program to environmental issues;

Principle 8: Initiatives that demonstrate environmental responsibility;

Principle 9: The promotion of the diffusion of environmentally friendly technologies; and

Principle 10: The promotion and adoption of initiatives to counter all forms of corruption, including extortion and bribery.

Id.; *see also* Deva, *supra* note 57, at 15-16 (discussing the principles).

⁸⁴ Global Compact, *supra* note 83.

⁸⁵ *Id.*; *see also* Simaika, *supra* note 71, at 327.

4. The Labor Provisions of the Dominican Republic–Central America–United States Free Trade Agreement

The growing treaty-based regime of labor law reaches across national boundaries and will only continue to develop with the recent passing of DR-CAFTA.⁸⁶ DR-CAFTA makes greater strides than any

⁸⁶ Office of the United States Trade Representative, *CAFTA-DR Final Text*, http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html (last visited Sept. 12, 2006) (providing the final text of the labor provisions of DR-CAFTA). Article 16.1: Statement of Shared Commitment states:

1. The Parties reaffirm their obligations as members of the International Labor Organization (ILO) and their commitments under the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)* (ILO Declaration). Each Party shall strive to ensure that such labor principles and the internationally recognized labor rights set forth in Article 16.8 are recognized and protected by its law.

2. The Parties affirm their full respect for their Constitutions. Recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws, each Party shall strive to ensure that its laws provide for labor standards consistent with the internationally recognized labor rights set forth in Article 16.8 and shall strive to improve those standards in that light.

Id. Article 16.8: Definitions, which is referenced in Article 16.1, states:

For purposes of this Chapter: labor laws means a Party's statutes or regulations, or provisions thereof, that are directly related to the following internationally recognized labor rights:

- (a) the right of association;
- (b) the right to organize and bargain collectively;
- (c) a prohibition on the use of any form of forced or compulsory labor;
- (d) a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor; and
- (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

For greater certainty, the setting of standards and levels in respect of minimum wages by each Party shall not be subject to obligations under this Chapter. Each Party's obligations under this Chapter pertain to enforcing the level of the general minimum wage established by that Party. statutes or regulations means:

- (a) for Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua, laws of its legislative body or regulations promulgated pursuant to an act of its legislative body that are enforceable by action of the executive body; and
- (b) for the United States, acts of Congress or regulations promulgated pursuant to an act of Congress that are enforceable by action of the federal government.

Id. See generally Thomas J. Manley and Luis Lauredo, *International Labor Standards in Free Trade Agreements of the Americas*, 18 EMORY INT'L L. REV. 85, 111 (2004) (discussing the labor provisions of DR-CAFTA); Murphy, *supra* note 61, at 350-52 (discussing the labor

previous trade agreement in protecting workers' rights and improving labor conditions.⁸⁷ The provisions reaffirm each country's commitment to the ILO's core labor standards and local labor laws, create a Labor Affairs Council, establish a Labor Cooperation and Capacity Building Mechanism, and implement a plan for the labor scheme.⁸⁸ However, a

provisions of DR-CAFTA); Mary Jane Bolle, *DR-CAFTA Labor Rights Issues*, <http://www.au.af.mil/au/awc/awcgate/crs/rs22159.pdf> (last visited Sept. 13, 2006) (discussing the concerns with the labor provisions of DR-CAFTA as the eighth free trade agreement to include labor provisions).

⁸⁷ Trade Resource Center-DR-CAFTA and Labor, http://trade.businessroundtable.org/trade_2005/cafta_dr/labor.html (last visited Sept. 13, 2006); see Office of the United States Trade Representative, *Labor Laws in Central America/Dominican Republic and Morocco: Similar Laws, in Line with ILO Core Labor Standards*, http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/Briefing_Book/asset_upload_file375_7190.pdf (last visited Sept. 13, 2006) (comparing the labor laws in Central America/Dominican Republic to the ILO Core Labor Standards to show that they are similar). *But see* AFL-CIO, *USTR Misleads Congress on CAFTA Labor Provisions*, http://www.aflcio.org/issues/jobseconomy/globaleconomy/upload/USTR_Misleads_Congress_on_CAFTA.pdf (last visited Sept. 13, 2006) (arguing that Central America/Dominican Republic labor standards are not as high as the United States Trade Representative claims); *Levin Says NGO Reports Show CAFTA Laws Fall Short of ILO Standards*, *INSIDE US TRADE* (2005), http://www.laborrights.org/press/levin_050605.htm (arguing that Central America/Dominican Republic labor laws do not meet ILO Core Labor Standards).

⁸⁸ Office of the U.S. Trade Representative, *CAFTA Facts: CAFTA's Strong Protections for Labor Rights: A Comprehensive Strategy*, (Feb. 2005), http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/Briefing_Book/asset_upload_file652_7187.pdf (explaining the 3-track strategy in CAFTA's design to improve labor law enforcement).

Track One: Require Effective Enforcement, Backed By Monetary Fines

- The CAFTA's labor provisions require that countries not fail to effectively enforce their labor laws, and back this requirement through an innovative dispute settlement system.
- A country failing to effectively enforce its labor laws in a manner affecting trade could be subject to a stiff monetary fine, up to \$15 million (per year, per violation) or the potential loss of trade benefits if the fine is not paid.
- The monies from these fines would be paid into a fund and would be used, only in a manner that the U.S. approved, to remedy the specific labor problems identified.

Track Two: Identify Specific Ways to Improve Labor Enforcement

- Labor issues have been a key part of the U.S.-Central American dialogue since well before the start of negotiations. As a direct result of this dialogue, Central American countries and the Dominican Republic have already made a number of improvements.
 - Costa Rica created a center for alternative dispute resolution, and appointed 37 new labor court judges.
 - El Salvador raised the budget for its Labor Ministry by 20%, raised the number of labor inspectors by 55%, and cut the average time to hear a labor complaint in half.

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- Guatemala threatened to revoke the export licenses of companies in export processing zones that weren't complying with labor laws, resulting in the first-ever collective bargaining agreement with trade unions in an export processing zone.
 - Honduras is working on a significant re-write of its labor code, issued regulations to strengthen access of labor inspectors to employer premises, cut the time for processing labor cases in half, and increased the number of labor inspectors.
 - Nicaragua amended the regulations on Trade Union Organizations, and removed the requirement for elected union leaders to be Nicaraguan citizens. This decree also allows federations and confederations to participate in any procedures in order to resolve labor disputes, including strikes. Created a special labor prosecutor, and issued an important court ruling to protect union leaders from dismissal.
 - The Dominican Republic passed a series of laws to address trafficking in persons and unfair practices against the most vulnerable workers and instituted a work permit program that allows Haitian laborers to work without risk of deportation and protects the payment of fair wages.

Going beyond the steps already taken, a cooperative effort of Central American Labor Ministries and the Inter-American Development Bank (IDB) is developing recommendations for additional specific improvements in labor law administration and enforcement, and will identify the resources required to make those improvements.

Track Three: Build the Capacity to Enforce Labor Laws

- In the FY05 Foreign Operations Appropriations bill, Congress provided \$20 million specifically for Central America and the Dominican Republic] directed toward "labor cooperation, capacity building on fundamental labor rights and the elimination of child labor, and improvement in labor administration."
- The Administration will work with the IDB and others to target these funds toward the areas of greatest need identified in the forthcoming study and through other needs assessments.
- In addition, the Department of Labor awarded \$7.75 million in grants in 2003-2004 to:
 - Improve workers' awareness of their rights under the law;
 - Strengthen the inspection services of Labor Ministries through training;
 - Develop alternative dispute resolution mechanisms for workers and employers.

Id.

number of groups believe that labor provisions of DR-CAFTA are insufficient in the recognition and enforcement of fundamental international labor standards.⁸⁹

C. *Voluntary Codes of Conduct*

In addition to external regulations, the practices of MNCs are instrumental in the construction of the global labor law.⁹⁰ MNCs adopt voluntary codes of conduct that are abided by throughout their operations.⁹¹ Many of the codes adopted by corporations provide for

⁸⁹ Marisa Anne Pagnattaro, *The "Helping Hand" in Trade Agreements: An Analysis of and Proposal for Labor Provisions in U.S. Free Trade Agreements*, 16 FLA. J. INT'L L. 845, 890-91 (2004); see Edward Alden and Christopher Swann, *New Democrats Deal Blow to CAFTA Approval*, FIN. TIMES, May 5, 2005, at 4 (reporting criticisms by the House New Democrat Coalition that DR-CAFTA "reduces our ability to enforce labour standards"); Elizabeth Becker, *Free Trade Pact in Americas Faces Trouble*, N.Y. TIMES, May 10, 2005, at C1 (reporting that United States labor unions criticize DR-CAFTA for demanding "better enforcement of existing labor laws in Central America without imposing real sanctions"); see, e.g., Alliance for Responsible Trade, *Central Americans Speak Out Against DR-CAFTA: Major Issues and Mobilizations*, http://www.art-us.org/docs/DR_CAFTA_0503.pdf (last visited Sept. 13, 2006) (stating reasons for opposition to DR-CAFTA); Campaign for Labor Rights, *Oppose the FTAA & Corporate Globalization*, <http://www.clrlabor.org/campaigns/FTAA/ftaa.htm> (last visited Sept. 13, 2006) (discussing its opposition to CAFTA's labor provisions); Citizens Trade Campaign, *CAFTA & Labor*, <http://www.citizenstrade.org/caftalabor.php> (last visited Sept. 13, 2006) (opposing labor provisions of CAFTA); Kimberly Ann Elliot, *Labor Standards, Development, and CAFTA*, <http://www.iie.com/publications/pb/pb04-2.pdf> (last visited Sept. 13, 2006); Human Rights Watch, *Failure To Protect International Labor Rights Standards*, <http://hrw.org/backgrounders/arms/hearing0405/2.htm> (last visited Sept. 13, 2006); *Labor Rights Protection in CAFTA, A Human Rights Watch Briefing Paper*, <http://hrw.org/backgrounders/usa/cafta1003.pdf> (last visited Sept. 13, 2006); Polianna, *Wal-Mart & CAFTA*, <http://www.polianna.com/2005/07/15.Wal-Mart.and.CAFTA.shtml> (last visited Sept. 13, 2006) (opposing CAFTA's effect on employees); Testimony of Thea M. Lee, Assistant Director for International Economics (AFL-CIO) (Nov. 19, 2002), <http://www.aflcio.org/mediacenter/prspmt/tm11192002.cfm>. But see Nicolas Brulliard, *Ministers Say CAFTA Helps Labor Rights*, WASH. TIMES, July 13, 2004, available at <http://washingtontimes.com/upi-breaking/20040713-080445-1146r.htm>.

⁹⁰ Ochoa, *supra* note 58, at 63 (citing Barbara Frey, *The Legal and Ethical Responsibilities of Transnational Corporations on the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 158 (1997)). "Some of the most significant non-state actors in the world today are private corporations, particularly TNCs." *Id.*

⁹¹ Lu, *supra* note 44, at 611; see also Compa & Hinchliffe-Darricarrere, *supra* note 56, at 688; Murphy, *supra* note 69, at 393 (making the distinction between public welfare codes of conduct and transactions-codes); Simaika, *supra* note 78, at 341. Compa and Hinchliffe-Darricarrere provide the following suggestions for creating a code of conduct:

Drafting the content of such codes is relatively easy. Good models exist in United Nations human rights instruments, in International Labor Organization conventions, in codes drafted by multilateral governmental or economic coordinating bodies, and in the formulations adopted by the companies studied here. Effective

“vendor standards, civil and political rights advocacy in host countries, and/or foreign investment criteria.”⁹² Some privately created codes of

implementation is the real test of such codes. Companies sincerely interested in making them work will have to create credible enforcement regimes to back them up, characterized by such elements as:

- assigning responsibility for attaining compliance to a named, on-site individual manager;
- ongoing auditing and reporting on labor rights and labor conditions in company operations, either by independent examiners or, if by company officials, with results subject to independent verification;
- surprise visits to production facilities by independent auditors and by senior management officials;
- creating avenues of recourse for workers to invoke the code of conduct, with guarantees of non-reprisal;
- no-nonsense enforcement of the code, including cancellation of contracts, termination of responsible managers, withdrawal from offending countries and similar sanctions;
- a willingness to accept trade union representation and collective bargaining where workers desire them, even if the firm’s preference is to remain non-union;
- adding an independent human rights and labor (or environmental, in the case of an environmental code) advocate to the corporation’s board of directors, or otherwise opening the board to independent advocacy; and
- regular public reporting on labor rights progress, and continuing dialogue with labor and human rights advocacy groups.

Compa & Hinchliffe-Darricarrere, *supra* note 56, at 688.

⁹² Lu, *supra* note 38, at 611 (providing an example of Reebok’s code, adopted in November 1990, which includes provisions for advocacy of civil and political rights). One provision “includes a commitment to withdraw if a country violates political rights and to simultaneously take active steps toward promoting those rights in host countries.” *Id.* Lu also provides the example of Levi Strauss & Co.’s code, which includes investment standards based on the human rights violations of the host country. *Id.*; see, e.g., Lena Ayoub, *Nike Just Does It – and Why the United States Shouldn’t: The United States’ International Obligation To Hold MNCs Accountable for Their Labor Rights Violations Abroad*, 11 DEPAUL BUS. L.J. 395, 410 (1999) (discussing Nike’s Code of Conduct); Baltazar, *supra* note 54, at 718-21 (discussing Levi-Strauss & Co.’s and Timberland Co.’s codes of conduct); Compa & Hinchliffe-Darricarrere, *supra* note 56, at 675-85 (providing examples of Levi Strauss & Co.’s, Reebok’s, and Starbucks’s codes of conduct); Dara O’Rourke, *Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring*, 31 POL’Y STUD. J. 1, 3 (2003) (providing examples of corporate codes of conduct adopted by companies such as The Gap, Levi’s, Disney, Walmart, H&M, and Nike); Diane F. Orentlicher & Timothy A. Gelatt, *Public Law, Private Actors: The Impact of Human Rights on Business Investors in China*, 14 NW. J. INT’L L. & BUS. 66 (1993) (discussing codes of conduct on worker rights and working conditions for foreign subsidiaries and suppliers); Simaika, *supra* note 71, at 342; Ryan P. Toftoy, *Now Playing: Corporate Codes of Conduct in the Global Theater. Is Nike Just Doing It?*, 15 ARIZ. J. INT’L & COMP. L. 905, 915-16, 920 (1998) (discussing the corporate codes of conduct adopted by Reebok, Levi Strauss & Co., and Nike).

conduct are proposed by entities external to corporations and may include a compliance mechanism.⁹³ Corporations can then choose to “sign-up” and pledge to abide by the external code.⁹⁴ However, other privately created codes of conduct are strictly for internal use by the corporation that created the code.⁹⁵ In particular, privately created codes may have internal enforcement mechanisms, external enforcement mechanisms, or no enforcement mechanisms.⁹⁶ Some companies prefer a strictly internal code of conduct so that they can tailor the code to their company’s unique personality.⁹⁷ In addition, those companies do not want compliance mechanisms administered by parties external to the corporation.⁹⁸ Although codes of conduct are usually only internally enforceable by the corporations that adopt them, they are often implemented under pressure from consumers, human rights advocates, labor unions, national governments, the Organization for Economic Co-operation and Development (“OECD”), the ILO, NGOs, and other international organizations.⁹⁹

⁹³ Baltazar, *supra* note 54, at 699; Murphy, *supra* note 61, at 402; *see, e.g.*, Compa & Hinchliffe-Darricarrere, *supra* note 56, at 671-74 (providing examples of “privately-drawn ‘sign-up’ codes of conduct”).

⁹⁴ *See, e.g.*, Compa & Hinchliffe-Darricarrere, *supra* note 56, at 671-74 (providing examples of “privately-drawn ‘sign-up’ external codes of conduct”).

⁹⁵ *See, e.g., id.* at 674-75.

⁹⁶ Sonia Gioseffi, *Corporate Accountability: Achieving Internal Self-Governance Through Sustainability Reports*, 13 CORNELL J.L. & PUB. POL’Y 503, 528 (2004) (discussing external enforcement of codes of conduct); *see* Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 IND. J. GLOBAL LEGAL STUD. 401, 411-12 (2001) (arguing that an external enforcement mechanism is essential for an external code of conduct to be successful); Lu, *supra* note 38, at 617 (discussing the necessity of an external enforcement mechanism in order for an external code of conduct to be successful).

⁹⁷ Compa & Hinchliffe-Darricarrere, *supra* note 56, at 674; *see* Bisom-Rapp, *Exceeding Our Boundaries*, *supra* note 17, at 288-89 (discussing the custom-tailoring of corporate codes of conduct); Gioseffi, *supra* note 103, at 518 (identifying a lack of tailoring as a problem with Unocal); Note, *The Good, the Bad and Their Corporate Codes of Ethics: Enron, Sarbanes-Oxley, and the Problems with Legislating Good Behavior*, 116 HARV. L. REV. 2123, 2135 (2003) (discussing the tailoring of corporate codes of conduct).

⁹⁸ Compa & Hinchliffe-Darricarrere, *supra* note 56, at 674.

⁹⁹ Shelton, *supra* note 33, at 315. The OECD represents a group of 33 countries committed to democratic government and the market economy. *Id.* It plays a prominent role in promoting positive governance in corporate activity and produces internationally agreed standards to make progress in a globalized economy. *Id.* at 316. The member states adopted the Declaration on International Investment and Multinational Enterprises. Ochoa, *supra* note 58, at 73. “When the Guidelines were adopted in 1976, they represented the first international agreement on multinational enterprises accepted by both business and labor representatives of the OECD member states. As such, they represent an innovative approach to encouraging responsible behavior from multinational enterprises.”

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Corporate codes of conduct vary widely in their coverage.¹⁰⁰ Historically, however, voluntary codes of conduct have been successful—the best example being the Sullivan Principles adopted in opposition to the apartheid regime in South Africa.¹⁰¹ Voluntary codes of conduct are commonly found in those industries most often subject to

Id.; see OECD, ANNUAL REPORT ON THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: ENHANCING THE ROLE OF BUSINESS IN THE FIGHT AGAINST CORRUPTION 25 (2003) (stating that the guidelines “now rank among the world’s foremost corporate responsibility instruments”); OECD, *Declaration on International Investment and Multinational Enterprises*, in DUNCAN CAMPBELL & RICHARD ROWAN, MULTINATIONAL ENTERPRISES AND THE OECD INDUSTRIAL GUIDELINES 243 (1983) (the Declaration was originally written in 1976 and revised in 1979); Murphy, *supra* note 69, at 408-11 (discussing the OECD guidelines for multinational enterprises); see also Compa & Hinchliffe-Darricarrere, *supra* note 56, at 670-71 (1995) (discussing OECD Guidelines for Multinational Enterprises); Deva, *supra* note 57, at 10-11 (same). The ILO adopted a code of conduct for MNCs, “Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy” which “requires that the Conference delegation from each state party be comprised of two governed representatives, one labor representative, and one representative from the business sector.” Ochoa, *supra* note 58, at 73; see Compa & Hinchliffe-Darricarrere, *supra* note 56, at 671 (discussing the ILO code for multinational enterprises); ILO, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, <http://www.ilo.org/public/english/standards/norm/sources/mne.htm> (last visited Oct. 8, 2005). See generally B. GLADE & E. POTTER, U.S. COUNCIL FOR INT’L BUS., TARGETING THE LABOR PRACTICES OF MULTINATIONAL COMPANIES, FOCUS ON ISSUES (1989) (discussing cases arising under the ILO code). But see Murphy, *supra* note 61, at 406 (discussing the ineffectiveness of the ILO’s Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy). NGOs are private organizations whose memberships and activities are international in scope. Bunn, *supra* note 50, at 1266. Examples of NGOs are Amnesty International, Human Rights Watch, and the Organisation for Economic Cooperation and Development. *Id.* NGOs do not possess the legal status of national governments. *Id.* However, the UN and other international forums recognize many NGOs as important political institutions. *Id.*; see also Arthurs, *supra* note 33, at 289.

¹⁰⁰ Lu, *supra* note 38, at 611-12; see also Arthurs, *supra* note 33, at 290.

¹⁰¹ Lu, *supra* note 38, at 612 (discussing The Sullivan Principles, a voluntary code of conduct created by General Motors advocating non-discrimination in the South African workplace). There were over 150 signatories to the code, creating a measurable impact on the lives of apartheid victims. *Id.* The positive effects of the Sullivan Principles represent the powerful consequences the adoption of voluntary codes of conduct by multinational corporations can have on the human rights practices of the host country. *Id.*; see also Baltazar, *supra* note 54, at 688-89 (providing examples of companies that have pulled out of Burma due to human rights violations); Beth Stephens, *The Amoralism of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT’L L. 45, 79 (2002). “NGOs, together with the United Nations, the ILO, and individual governments, have found codes of conduct to be a successful means to influence the activities of TNCs.” Ochoa, *supra* note 58, at 70. “Over the past thirty years, with the rise of MNC activities in the developing world, these codes have proliferated.” Murphy, *supra* note 61, at 394, 402. But see Leon Sullivan, *The Sullivan Principles and Change in South Africa*, in BUSINESS IN THE CONTEMPORARY WORLD 175 (Herbert L. Sawyer ed., 1988) (declaring the Sullivan Principles ineffectual in overcoming apartheid); Karen Paul, *The Inadequacy of Sullivan Reporting*, 57 BUS. & SOC. R. 61 (1986) (discussing the ineffectiveness of the Sullivan Principles as an audit mechanism).

criticism.¹⁰² “For example, companies in the extractive industries (i.e., oil extraction) have had enormous impacts on the communities in which they operate.”¹⁰³ Such companies developed an industry-wide voluntary code of conduct to encourage other companies to meet certain minimum operations standards.¹⁰⁴

¹⁰² Murphy, *supra* note 61, at 417 (providing examples of industries that “have been susceptible to sharp criticism of their activities”).

¹⁰³ *Id.* at 417-20 (providing an example of Royal Dutch/Shell and discussing the Voluntary Principles on Security and Human Rights developed by the U.S. government, United Kingdom, companies in the extractive industry, and NGOs in December of 2000).

¹⁰⁴ *Id.*; see David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT’L L. 931, 954 (2004) (discussing corporate codes of conduct in high-profile industries such as extractive industries).

The White House initiated the Apparel Industry Partnership (AIP) in 1996 with the aim of working collectively with the apparel industry to protect garment workers worldwide. Its members are apparel and footwear companies, human rights groups, labor unions, consumer groups, and universities. The Fair Labor Association (FLA) is a nonprofit organization that grew out of the AIP.

Lee, *supra* note 13, at 707-09.

The FLA has promulgated a Workplace Code of Conduct that prohibits child labor (younger than age 15) and forced labor, prohibits physical, sexual, psychological or verbal harassment or abuse; provides for nondiscrimination in employment, requires a safe and healthy work environment; provides for freedom of association and collective bargaining; provides for wages and benefits that at least comply with minimum standards under local law; and places limits on hours of work and overtime hours except in extraordinary business circumstances. The Code of Conduct also provides that any corporation that adopts it must allow for independent monitoring of its factories in accordance with FLA’s Principles of Monitoring and also shall require its licensees, suppliers and contractors to comply with local laws, the Code and the Principles of Monitoring. According to FLA’s website, participating companies include Adidas-Saloman, GEAR for Sports, Levi Strauss & Co., Liz Claiborne, Nike, Patagonia, Reebok, Eddie Bauer, Phillips-Van Heusen, Kathie Lee Gifford and L.L.Bean.

Id. Worldwide Responsible Apparel Production (“WRAP”) is another garment industry organization that has issued a recommended global workplace code of conduct. Worldwide Responsible Apparel Production Homepage, <http://www.wrapapparel.org/> (last visited Sept. 13, 2006). WRAP states the following at its “Apparel Certification Program Principles”:

The objective of the Apparel Certification Program is to independently monitor and certify compliance with the following standards, ensuring that a given factory produces sewn goods under lawful, humane, and ethical conditions. Note that it is not enough to subscribe to these principles; WRAP monitors the factory for compliance with detailed practices and procedures implied by adherence to these standards.

Compliance with Laws and Workplace Regulations—Manufacturers of Sewn Products will comply with laws and regulations in all locations where they conduct business.

Prohibition of Forced Labor—Manufacturers of Sewn Products will not use involuntary or forced labor—indentured, bonded or otherwise.

Prohibition of Child Labor—Manufacturers of Sewn Products will not hire any employees under the age of 14, or under the age interfering with compulsory schooling, or under the minimum age established by law, whichever is greater.

Prohibition of Harassment or Abuse—Manufacturers of Sewn Products will provide a work environment free of harassment, abuse or corporal punishment in any form.

Compensation and Benefits—Manufacturers of Sewn Products will pay at least the minimum total compensation required by local law, including all mandated wages, allowances and benefits.

Hours of Work—Manufacturers of Sewn Products will comply with hours worked each day, and days worked each week, shall not exceed the legal limitations of the countries in which sewn product is produced. Manufacturers of sewn product will provide at least one day off in every seven-day period, except as required to meet urgent business needs.

Prohibition of Discrimination—Manufacturers of Sewn Products will employ, pay, promote, and terminate workers on the basis of their ability to do the job, rather than on the basis of personal characteristics or beliefs.

Health and Safety—Manufacturers of Sewn Products will provide a safe and healthy work environment. Where residential housing is provided for workers, apparel manufacturers will provide safe and healthy housing.

Freedom of Association & Collective Bargaining—Manufacturers of Sewn Products will recognize and respect the right of employees to exercise their lawful rights of free association and collective bargaining.

Environment—Manufacturers of Sewn Products will comply with environmental rules, regulations and standards applicable to their operations, and will observe environmentally conscious practices in all locations where they operate.

Customs Compliance—Manufacturers of Sewn Products will comply with applicable customs law and, in particular, will establish and maintain programs to comply with customs laws regarding illegal transshipment of apparel products.

Security—Manufacturers of Sewn Products will maintain facility security procedures to guard against the introduction of non-manifested cargo into outbound shipments (e.g. drugs, explosives, biohazards, and/or other contraband).

Id. The Ethical Trading Initiative (“ETI”) states the following on the home page of its website:

The Ethical Trading Initiative (ETI) is an alliance of companies, non-governmental organisations (NGOs) and trade union organisations. We exist to promote and improve the implementation of corporate codes of practice which cover supply chain working conditions. Our

MNCs increasingly adopt corporate codes of conduct in light of their proven success.¹⁰⁵ Adopting such codes provides a public relations benefit, as consumers, employees, and investors become more aware of international labor conditions and the standards used by the companies exporting products to the United States.¹⁰⁶ Moreover, the benefits to MNCs often outweigh the costs.¹⁰⁷ In fact, some companies, particularly those with widely-recognized brands, use corporate code initiatives as an advertising campaign to create public goodwill.¹⁰⁸ In addition, the

ultimate goal is to ensure that the working conditions of workers producing for the UK market meet or exceed international labour standards.

ETI, <http://www.ethicaltrade.org/> (last visited Sept. 13, 2006). The ETI's corporate code of conduct is known as the Base Code. *Id.* It contains the following labor standards: employment is freely chosen and forced labor is prohibited; freedom of association and bargaining are respected; working conditions are safe and hygienic; child labor (under age eighteen) shall not be used; wages paid to employees shall meet local legal standards or industry benchmark standards, whichever is higher; workers shall not be required to work in excess of forty-eight hours in a workweek on a regular basis and shall be given at least one day off per week; no discrimination based on sex or sexual orientation, race, political affiliation, religion, age, disability, marital status or union affiliation; regular employment is provided; and, no harsh or inhumane treatment is allowed. *Id.*

¹⁰⁵ Lu, *supra* note 38, at 613; see *Developments*, *supra* note 71, at 2222 (discussing shareholder resolutions in relation to developing corporate codes of conduct).

¹⁰⁶ Lu, *supra* note 38, at 613; Ochoa, *supra* note 58, at 77 (discussing pressure by consumer boycotts for corporations to adopt corporate codes of conduct); O'Rourke, *supra* note 92, at 3. "Companies that are the most vulnerable to such exposes are those whose sales depend heavily on brand image and company goodwill. . . ." Compa & Hinchliffe-Darricarrere, *supra* note 56, at 674-75. In addition, it is difficult for companies to hide practices that violate human rights with the increasing presence of media in the international marketplace. *Id.*; see Claire Moore Dickerson, *Transnational Codes of Conduct Through Dialogue: Leveling the Playing Field for Developing-Country Workers*, 53 FLA. L. REV. 611, 653-55 (2001) (discussing "market-driven, optional codes of conduct").

¹⁰⁷ Murphy, *supra* note 61, at 402. "The costs include the basic expenses involved in altering internal corporate rules and policies, training personnel regarding the new policies, pursuing any associated internal or external monitoring, verification, audits, or certification, and internalizing costs that had previously been externalized (e.g., paying higher wages)." *Id.* Benefits may include savings on previously wasted resources, savings on insurance, leveling the playing field with competitors if they decide to adopt the code, and enjoying an enhanced public image. *Id.* "Drafting the content of such codes is relatively easy." Compa & Hinchliffe-Darricarrere, *supra* note 56, at 688. "Good models exist in United Nations human rights instruments, in International Labor Organization conventions, in codes drafted by multilateral governmental or economic coordinating bodies, and in the formulations adopted by the companies [that have already adopted codes]." *Id.* Cappuyns describes the ABA's support of voluntary compliance with ILO standards as "sharp trade sanctions would harm consumers more than they would help and protect workers" and "to prevent any suggestion of protectionism[.]" Cappuyns, *supra* note 60, at 666.

¹⁰⁸ Joshua A. Newberg, *Corporate Codes of Ethics, Mandatory Disclosure, and the Market for Ethical Conduct*, 29 VT. L. REV. 253, 290-91 (2005). "Corporate codes of conduct have been

United States government has encouraged corporate codes of conduct as globalization increases.¹⁰⁹

Adoption of voluntary codes is a more attractive option for MNCs than governmental regulation, as they have greater control over the implementation and enforcement.¹¹⁰ However, government enforcement of codes of conduct may not be far off, as the adoption of a code of conduct was mandated as part of a settlement agreement in a claim by Asian sweatshop workers in Saipan.¹¹¹ In addition to corporate codes of

employed, in part, as a type of brand-level social marketing; exemplified by the cases of Nike, The Gap, Levi Strauss, Reebok, and Mattel. Each of these companies markets widely-recognized consumer brands." *Id.*; see, e.g., Compa & Hinchliffe-Darricarrere, *supra* note 56, at 683-85 (discussing Starbucks's corporate initiative on labor rights).

¹⁰⁹ Lu, *supra* note 38, at 613-14 (2000). Lu describes the "Clinton Administration's policy of encouraging corporate codes as the pillar of its international human rights policy." *Id.* It published the Model Business Principles, which is a voluntary code promoting fair labor practices, workplace health and safety standards, freedom of political expression in the workplace, and ethical standards. *Id.* The criticisms of the Model Business Principles are also discussed, mostly concerning the lack of implementation and enforcement and the dangers of self-regulation. *Id.*; see Wood & Scharffs, *supra* note 57, at 560-63 (discussing the six clusters of the Clinton Model Business Principles); see also O'Rourke, *supra* note 99, at 3 (discussing consumer awareness of human rights violations by multinational corporations); Simaika, *supra* note 71, at 343-44.

¹¹⁰ Simaika, *supra* note 71, at 341.

¹¹¹ Nikki F. Bas, Sweatshop Watch et al., *Saipan Sweatshop Lawsuit Ends with Important Gains for Workers and Lessons for Activists*, <http://www.cleanclothes.org/legal/04-01-08.htm> (last visited Sept. 13, 2006); Michael Rubin, *Summary of the Saipan Sweatshop Litigation*, <http://www.globalexchange.org/campaigns/sweatshops/saipan/update031102.html> (last visited Sept. 13, 2006). The following is a synopsis of the Saipan Sweatshop litigation:

[Chinese factories set up operations in Saipan to allow United States retailers to avoid import quotas and duties.] Saipan is the largest of a chain of fourteen islands in the Pacific Ocean known as the U.S. Commonwealth of the Northern Mariana Islands. It is home to a \$1 billion garment industry, with about 30 garment factories employing more than 10,000 workers, almost all young women from China, the Philippines, Thailand, Vietnam, Bangladesh and other Asian countries.

Bas, *supra*, at 118.

[In 1999], Sweatshop Watch, Global Exchange, Asian Law Caucus, Unite, and Saipan garment workers filed three separate lawsuits against dozens of big-name retailers and Saipan garment factories alleging violations of U.S. labor laws and international human rights standards. . . . Plaintiffs in the lawsuit alleged that these workers live and toil in deplorable conditions, working up to 12 hours a day, seven days a week, and earning \$3.05 an hour or less, often without overtime pay. With promises of high pay and quality work in the U.S., workers agreed to repay recruitment fees of thousands of dollars. Many workers also claimed that they signed "shadow contracts" waiving basic human rights, including the freedom to join unions, attend

conduct, NGOs are an informal regulatory element of international employment law.¹¹²

D. Non-Governmental Organizations

Social activists interested in the advancement of international labor standards are instrumental to the development of global labor standards.¹¹³ Unions also contribute, “whether through national unions and labor congresses, international labor bodies . . . , or ad hoc union alliances.”¹¹⁴ Additionally, a variety of other interest groups are working to advance labor standards.¹¹⁵

There are hundreds of NGO-suggested codes of conduct, including: labor standards, self-assessment mechanisms, and varying combinations of the two.¹¹⁶ One example is the “Principles for Global Corporate

religious services, quit or marry. These circumstances, plaintiffs contended, trap Saipan garment workers in a state of indentured servitude. The retailers were also charged with misleading advertising by, among other things, using the “Made in the U.S.A” label and promoting their goods as sweatshop-free.

By the Fall of 2002, 26 retailers and 23 Saipan garment factories settled the lawsuit, leaving Levi’s as the only hold-out. A federal judge approved the settlement in April 2003. The settling retailers include: Abercrombie & Fitch, Brooks Brothers, Brylane L.P., Calvin Klein Inc., Cutter & Buck Inc., Donna Karan International, Dress Barn, Gap Inc. (Banana Republic, Old Navy), Gymboree Corp., J.C. Penney Company Inc., J. Crew Group Inc, Jones Apparel Group, Lane Bryant Inc., The Limited Inc., Liz Claiborne Inc., May Department Stores Company, Nordstrom Inc., Oshkosh B’Gosh Inc., Phillips-Van Heusen, Polo Ralph Lauren, Sears Roebuck and Company, Talbots Inc., Target Corp. (Target, Mervyn’s, Marshall Fields, Dayton-Hudson), Tommy Hilfiger USA Inc., Warnaco Inc. and Woolrich, Inc. [The settlement was for a reported \$20 million dollars and included an agreement to a code of conduct].

Id. (emphasis omitted); *see also* Arthurs, *supra* note 33, at 290; Lu, *supra* note 38, at 617-19 (discussing the possibility of using the Federal Trade Commission Act as a means of enforcing codes of conduct).

¹¹² *See infra* notes 113-21 and accompanying text.

¹¹³ Arthurs, *supra* note 33, at 291; Bunn, *supra* note 50, at 1266; Ochoa, *supra* note 58, at 68.

¹¹⁴ Arthurs, *supra* note 33, at 290; Compa & Hinchliffe-Darricarrere, *supra* note 56, at 667.

¹¹⁵ Arthurs, *supra* note 33, at 291 (providing several examples of guidelines developed by NGOs). “[W]omen, consumers, university students, religious communities, environmentalists, aboriginal peoples, anti-poverty and anti-child labor activists, and human rights groups” are “working with unions in both advanced and developing economies” to advance labor standards. *Id.*; *see* Shelton, *supra* note 33, at 298-99 (discussing the formation of transboundary religious, tribal, corporate, or associational groups and the groups’ effects on global human rights).

¹¹⁶ Arthurs, *supra* note 33, at 291.

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Responsibility: Benchmarks for Measuring Business Performance," issued and revised by the Interfaith Center on Corporate Responsibility, which includes principles considered fundamental to corporate social responsibility.¹¹⁷ Another example is the SA8000, a system of voluntary standards modeled after the International Standards Organization system (e.g., ISO 9000 and ISO 14000) and created by a United States NGO.¹¹⁸ Some governments and social activists prefer nongovernmental strategies to state regulations because of their flexibility and responsiveness.¹¹⁹ Specifically, NGO guidelines combine the benefits of corporate codes of conduct with monitoring and accreditation systems to increase consumer awareness.¹²⁰ However, NGOs increasingly attempt to have American courts apply United States employment laws extraterritorially.¹²¹

E. Domestic Enforcement Mechanisms

The United States government can directly regulate MNCs by extraterritorially applying United States law to their activities in other countries.¹²² However, the extraterritorial application of United States

¹¹⁷ Ilias Bantekas, *Corporate Social Responsibility in International Law*, 22 B.U. INT'L L.J. 309, 321-22 (2004).

¹¹⁸ O'Rourke, *supra* note 92, at 14. "The SA8000 standard is administered by Social Accountability International (SAI), with an advisory board made up of representatives from multinational firms, international unions, and NGOs." *Id.* It seeks to encourage members to implement the SA8000 code of conduct and be accredited by auditors. *Id.*; see Lee, *supra* note 13, at 710 (explaining the Social Accountability 8000 standard).

¹¹⁹ O'Rourke, *supra* note 92, at 3.

¹²⁰ *Id.*

¹²¹ Lee, *supra* note 13, at 710-11.

¹²² *Developments*, *supra* note 78, at 2217 (discussing the Alien Tort Claims Act ("ATCA") as a popular tool used in recent years to address international labor standards in federal courts). However, the Supreme Court's decision in *Sosa v. Alvarez-Machain* significantly limits the use of the ATCA to enforce international labor standards. *Id.*; see Baltazar, *supra* note 54, at 690, 714-15 (providing the example of the Foreign Corrupt Practices Act ("FCPRA") as United States law applied extraterritorially); Lee, *supra* note 13, at 712-14 (discussing the application of ATCA to international employment law); *supra* note 39 (discussing the extraterritorial application of United States employment laws and providing examples); see, e.g., *Filartigia v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). In *Filartigia*, appellants were citizens of Paraguay. 630 F.2d at 878. They filed an action in the United States against appellee, also a citizen of Paraguay, for wrongfully causing the death of a family member. *Id.* Appellants alleged that appellee tortured and killed the man in retaliation for his father's political actions and beliefs. *Id.* The district court dismissed the action for want of subject matter jurisdiction. *Id.* Appellants challenged the district court's decision. *Id.* Official torture had been prohibited by the law of nations. *Id.* at 880. The prohibition was clear and unambiguous and admitted no distinction between treatment of aliens and citizens. *Id.* at 884. As a result, the court determined that deliberate torture perpetuated under color of official authority violated universally accepted norms of the

employment laws often depends upon the nationality of the company.¹²³

international law of human rights, regardless of the nationality of the parties. *Id.* at 878. Whenever an alleged torturer was found and served with process by an alien within the borders of the United States, federal jurisdiction was appropriate. *Id.* The court determined that its jurisdiction was appropriate, and reversed the decision of the district court, dismissing appellants' complaint for want of subject matter jurisdiction. *Id.* But see *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003). The issue in *Dole* was whether federal courts had jurisdiction over a class action brought by plaintiffs, Latin American banana workers, against defendants, multinational fruit and chemical companies, alleged to have exposed the workers to a toxic pesticide. *Id.* at 471. The Court held that a subsidiary of an instrumentality was not entitled to instrumentality status under the Foreign Sovereign Immunities Act ("FSIA"). *Id.* at 474. In *Tel-Oren v. Libyan Arab Republic*, the plaintiffs, foreign citizens who were survivors and representatives of persons murdered in a foreign country, filed suit against defendants seeking compensatory and punitive damages. 726 F.2d 774, 775 (D.C. Cir. 1984). Plaintiffs alleged defendants were responsible for multiple tortious acts resulting from violations of the law of nations, United States treaties, United States criminal law and the common law. *Id.* The trial court dismissed plaintiffs' actions for lack of subject matter jurisdiction and as being time barred under the applicable statute of limitations, and the court affirmed the decision of the trial court. *Id.* Similarly, the appellate court held that subject matter jurisdiction was not proper. *Id.*

¹²³ See Lee, *supra* note 13, at 689-94 (explaining the way in which the nationality of employers is determined and defenses employers have for violating applicable United States employment laws). The initial question in determining the applicability of United States employment laws is whether the allegedly discriminatory company is an American employer or controlled by an American company. *Id.* at 689. The EEOC provided guidance for determining an entity's nationality in EEOC Enforcement Guidance on Application of Title VII and the ADA Conduct Overseas and to Foreign Employers Discriminating in the United States, No. 915.002 (Oct. 20, 1993). *Id.*

The nationality of the entity is determined on a case-by-case basis taking into consideration the following factors concerning that entity, among others, with no single factor determinative:

- Place of incorporation: An entity incorporated in the U.S. "will typically be deemed to be an American employer because an entity that chooses to enjoy the legal and other benefits of being incorporated here must also take on the concomitant obligations." EEOC Guidance No. 915.002; see also Restatement (Third) of the Foreign Relations Law of the United States, § 213 (1987) (for the purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized). Where the discriminating entity is incorporated outside the U.S. but has numerous contacts here, the EEOC will review the totality of that company's contacts with the U.S. to make a nationality determination.
- Principal place of business: This factor considers the place where the primary factories, offices, or other facilities are located.
- Contacts within the U.S.
- Nationality of dominant shareholders and/or those holding voting control.
- Nationality and location of management: i.e., location of the entity's officers and directors.

Id. at 689-90.

MNCs may be exempt from the extraterritorial application of United States employment laws if those laws conflict with local employment laws.¹²⁴ As another domestic enforcement mechanism, the United States

Even if the entity abroad is not deemed a U.S. company under the above criteria, the entity will be covered if it is “controlled” by a U.S. entity. Title VII and the ADA, whose “control” provisions are identical to the ADEA, provide that the determination of whether a U.S. employer “controls” a foreign corporation will be based on the following factors regarding the relationship of two entities:

- interrelationship of operations;
- common management;
- centralized control of labor relations; and
- common ownership and financial control of the employer and the corporation. 42 U.S.C. §§ 2000e-1(c)(3), 12112(c)(2)(C); 29 U.S.C. § 623(h)(3).

Id. at 690; *see, e.g.,* *Lavrov v. NCR Corp.*, 600 F. Supp. 923 (S.D. Ohio 1984) (discussing the integrated enterprise in relation to a Title VII claim against a foreign subsidiary of a United States parent company). The court in *Lavrov* held that there was a genuine issue of material fact whether the interrelationship of the parent company and the foreign subsidiary justified a trial on the Title VII claim. 6 F. Supp. at 928. *But cf. Mas Marques v. Digital Equip. Corp.*, 637 F.2d 24 (1st Cir. 1980) (rejecting extraterritorial jurisdiction over a Title VII national origin discrimination claim upon finding that a wholly owned foreign subsidiary was not sufficiently controlled by its American parent company); *Moreno v. John Crane, Inc.*, 963 F. Supp. 72 (D.P.R. 1997).

¹²⁴ 42 U.S.C. §§ 2000e-1(b), 12112(c)(1) (providing a defense for violations of Title VII or the ADA if compliance with those statutes, with respect to an employee in a foreign country, would cause a covered entity to violate the law of the foreign country in which the workplace is located); *see Lee, supra* note 13, at 692. Lee outlines the following requirements an employer must meet in order to invoke the defense:

To invoke the foreign laws defense, the employer must show that:

- the action is taken with respect to an employee in a workplace in a foreign country;
- compliance with U.S. antidiscrimination laws would cause the employer to violate the law of the foreign country; and
- the law is that of the country in which the employee’s workplace is located. EEOC Enforcement Guidance, N-915.002.

To invoke the defense, compliance with U.S. law must “cause” a violation of the law of the foreign country in which the employee works. To satisfy this prong of the foreign laws defense, it must be impossible to comply with both the U.S. antidiscrimination law and the law of the foreign country. The EEOC does not regard the following as “foreign law:”

- an employer’s corporate charter registered with a foreign governmental agency;
- a bill passed by only one house of a foreign legislature where the Constitution of the foreign country requires bicameral passage before being given the force and effect of law;
- an employer’s rules, regulations, and employment policies; and
- preferences or customs of the host country. Customs and preferences do not justify discrimination against U.S. citizens.

can pass legislation regulating activities of MNCs in specific countries.¹²⁵ Further, by implementing trade embargoes on goods produced in violation of human rights standards, the United States government can ban investments into specific countries where serious human rights violations go unchecked, including third party countries trading with a specific country.¹²⁶

Lee, *supra* note 13, at 692-93; *see, e.g.*, Mahoney v. RFE/RL, Inc., 47 F.3d 447 (D.C. Cir. 1995) (examining the scope of the foreign laws defense); Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1995) (“holding that the practice of South American clients to disapprove of female executives is insufficient to support a Bona Fide Occupational Qualification (BFOQ) defense in a sex discrimination action”); *see also* EEOC v. Kloster Cruise, Ltd., 939 F.2d 920 (11th Cir. 1991) (holding that the “EEOC is entitled to use its authority to issue subpoenas while investigating claims with extraterritorial elements so long as it can allege a possible means of attaining jurisdiction”); Lee, *supra* note 13, at 694 (discussing the applicability of the foreign laws defense in relation to federal government contractors under Executive Order 11246).

¹²⁵ Davis, *supra* note 39, at 1169-70. An example of this is the Comprehensive Anti-Apartheid Act, legislating a code of code for all United States nationals with more than twenty-five employees in South Africa. *Id.*; *see* Jerome Levinson, *Certifying International Worker Rights: A Practical Alternative*, 20 COMP. LAB. L. & POL’Y J. 401 (1999) (arguing that the United States should take unilateral action to protect worker rights); Jorge Perez-Lopez, *Conditioning Trade on Foreign Labor Law: The U.S. Approach*, 9 COMP. LAB. L.J. 253, 285-86 (1988) (explaining that, under the Comprehensive Anti-Apartheid Act of 1986, United States companies operating in South Africa are required to adhere to a code that includes respect for worker rights).

¹²⁶ Lu, *supra* note 38, at 609 (discussing the shortcomings of direct government regulation of multinational corporations); *see Developments, supra* note 71, at 2209-10 (discussing the United States’ inclusion of five fundamental workers rights in domestic trade laws since 1984). The inclusion of the right of association, the right to organize and bargain collectively, a prohibition on the use of any form of forced or compulsory labor, a minimum age for the employment of children, and acceptable work conditions of work with respect to minimum wages, hours of work, and occupational safety and health, were named as prerequisites to receiving trade benefits under the Generalized System of Preferences (“GSP”) created by the Trade Act of 1974. *Developments, supra* note 71, at 2209-10; *see also* Baltazar, *supra* note 54, at 690, 707-14 (discussing the unilaterally linking of human rights standards to trade policies); Compa & Hinchliffe-Darricarrere, *supra* note 56, at 674-75; Ochoa, *supra* note 58, at 76 (discussing the U.S. government’s use of economic sanctions and embargoes to encourage foreign nations to meet basic human rights standards and to regulate transnational activity).

[I]ncreasingly companies are being pressured to better protect human and labor rights in their international operations. First, companies face potentially damaging enforcement of unilateral U.S. labor rights legislation, a new North American labor rights regime under the NAFTA side agreement on labor, the emergence of worker rights in the new GATT/WTO system, innovative litigation by foreign employees claiming worker rights violations and other developments that can affect relations with employees and governments in countries where they do business.

But one serious problem with applying United States laws extraterritorially is vociferous opposition in the developing world to the imposition of United States labor standards.¹²⁷ Additionally, practical realities and forum nonconveniens arguments limit application of United States laws in foreign countries.¹²⁸ Almost any direct regulation by the United States has proven to be ineffective in enforcing international labor standards without global support.¹²⁹ However, Congress has recognized that international labor rights cannot be separated from the financing of international economic development.¹³⁰ Consequently, the United States

Compa & Hinchliffe-Darricarrere, *supra* note 56, at 674-75; see also Claire Moore Dickerson, *Transnational Codes of Conduct Through Dialogue: Leveling the Playing Field for Developing-Country Workers*, 53 FLA. L. REV. 611, 653-55 (2001) (discussing top-down, mandatory or optional, codes of conduct).

¹²⁷ Lu, *supra* note 38, at 609-10; see Baltazar, *supra* note 54, at 709 (arguing that a unilateral approach by the United States to impose foreign labor standards would impose its subjective values of acceptable domestic policies on other countries); see, e.g., Bisom-Rapp, *Exceeding Our Boundaries*, *supra* note 17, at 301.

¹²⁸ Lu, *supra* note 38, at 610. *But see* Iragorri v. United Techs. Corp., 274 F.3d 65, 75 (2d Cir. 2001) (“The District Court should determine the degree of deference to which plaintiffs” are entitled in choice of forum, balancing the “hardships to the respective parties as between the competing fora, and the public interest factors involved.”).

¹²⁹ Lu, *supra* note 38, at 610. “[T]he recognition and protection of collective action is critical to the advancement of many kinds of rights, especially work related rights.” Atleson, *supra* note 36, at 86 (discussing the necessity of collective action in developing global labor law); see also U.S. Dep’t of Labor, Bureau of Int’l Labor Affairs, <http://www.dol.gov/ILAB/> (last visited Nov. 17, 2005) [hereinafter ILAB]. ILAB provides the following description of its functions:

The Bureau of International Labor Affairs (ILAB) carries out the international responsibilities of the Department of Labor under the direction of the Deputy Under Secretary for International Labor Affairs. ILAB conducts research on and formulates international economic, trade, immigration, and labor policies in collaboration with other U.S. Government agencies and provides international technical assistance in support of U.S. foreign labor policy objectives. ILAB is working together with other U.S. Government agencies to create a more stable, secure, and prosperous international economic system in which all workers can achieve greater economic security, share in the benefits of increased international trade, and have safer and healthier workplaces where the basic rights of workers and children are respected and protected.

ILAB, *supra*.

¹³⁰ See Levinson, *supra* note 125, at 405.

In the 1995 legislation relating to U.S. participation in the international financial institutions (IFIs)—the World Bank, the IMF, and the regional development banks—Congress passed the Sanders/Frank Amendment. That amendment required the U.S. Treasury to direct the U.S. executive directors (USEDs) in these institutions to use the ‘voice and vote’ of the United States to persuade these institutions, and their borrowing member countries, to respect core worker rights as an

legislature has extended the application of several United States discrimination statutes extraterritorially.¹³¹

The transnational labor system is complex, relatively new, and in a state of constant evolution.¹³² Therefore, United States-based MNCs need a basic framework through which to understand the system, to minimize risks, and to foster improved labor standards world-wide.¹³³

III. ANALYSIS

The expansion of United States-based companies abroad is risky.¹³⁴ Accordingly, risks must be evaluated before going abroad and companies must develop appropriate risk-management strategies.¹³⁵

integral part of the development program of both the institutions and the policies and practices of the member countries.

Id.

¹³¹ See *supra* note 39 (providing examples of American employment laws applied extraterritorially).

¹³² See FRIEDMAN, *supra* note 34, at 339-67 (discussing the rapid changes in business due to globalization); Lee, *supra* note 13, at 722 (discussing the complexities of employing workers abroad).

¹³³ See *infra* Part III.A-III.D.

¹³⁴ Bisom-Rapp, *Exceeding Our Boundaries*, *supra* note 17, at 294.

[O]pening an office abroad is a very costly and risky undertaking and carries with it the potential to disturb a firm's existing referral networks. A foreign jurisdiction's practitioners may view a non-indigenous firm's efforts to gain a local toehold as a competitive invasion and sever their ties with the intruder.

Id.

¹³⁵ See MORAN, *supra* note 17, at 112-15. Moran discusses the development of strategies to offset political risk. *Id.* Additionally, Moran discusses three elements that may be used to provide protection against political risk. *Id.* at 112. These elements are:

(1) the sourcing of inputs to local operations and the disposition of the output of local operations elsewhere in the corporate system; (2) the sequencing of the investment process so as to dispel nationalistic pressures over time; and (3) the construction of project financing with the objective of raising the cost of irresponsible economic nationalism.

Id. However, Moran recognizes that analysis of these elements does not displace the need to examine political and social variables. *Id.* at 115; see also FRIEDMAN, *supra* note 34, at 339-67. Friedman discusses seven rules that companies have developed to cope with the globalized world.

Rule #1: When the world goes flat - and you are feeling flattened - reach for a shovel and dig inside yourself. Don't try to build walls. . . .

Rule #2: And the small shall act big ... One way small companies flourish in the flat world is by learning to act really big. And the key to being small and acting big is being quick to take advantage of all the new tools for collaboration to reach farther, faster, wider, and deeper. . . . Rule #3: And the big shall act small ... One way that big

Specifically, employment disputes are one of the primary risks facing multinational employers.¹³⁶ Such disputes drain a company's resources.¹³⁷ Therefore, MNCs must adopt dispute avoidance tactics to succeed in global business.¹³⁸

Successful dispute avoidance requires an understanding of the advantages and disadvantages of operating within the current system.¹³⁹ Thus, Part III analyzes the international system of employment law through a basic framework, which includes the employment challenges

companies learn to flourish in the flat world is by learning how to act really small by enabling their customers to act really big. . . .

Rule #4: The best companies are the best collaborators. In the flat world, more and more business will be done through collaborations within and between companies, for a very simple reason: The next layers of value creation - whether in technology, marketing, biomedicine, or manufacturing - are becoming so complex that no single firm or department is going to be able to master them alone. . . .

Rule #5: In a flat world, the best companies stay healthy by getting regular chest X-rays and then selling the results to their clients. . . .

Rule #6: The best companies outsource to win, not to shrink. They outsource to innovate faster and more cheaply in order to grow larger, gain market share, and hire more and different specialists-not to save money by firing more people. . . .

Rule #7: Outsourcing isn't just for Benedict Arnolds. It's also for idealists.

FRIEDMAN, *supra* note 34, at 339-67 (emphasis removed).

¹³⁶ See Jean-Michel Servais, *Universal Labor Standards and National Cultures*, 26 COMP. LAB. L. & POL'Y J. 35, 53 (2004) (discussing the risk of employment disputes when operating internationally).

An exercise in globalization of the spirit, the international regulation of labor relations is a necessary but perilous undertaking: it is indispensable because the elimination of borders leads to internationalization of the law, and risky because the path to international regulation is rife with cultural and economic pitfalls, and mistrust waiting round every corner. It is easy for the skeptics to sneer about the shortcomings of acculturation.

Id.

¹³⁷ See Bisom-Rapp, *Exceeding Our Boundaries*, *supra* note 17, at 281-84 (discussing the demand of preventative strategies by employer clients and why American employers embrace prevention, including costs, risk management, flexibility in charting a course for their organizations, political circumstances, sense of social obligation, and cultural and reputation concerns).

¹³⁸ See Douglas A. Kysar, *Sustainable Development and Private Global Governance*, 83 TEX. L. REV. 2109, 2143 (2005) (discussing the value of disciplining regulatory standards according to cost-benefit analysis lying in standardizing and rendering predictable the results of regulation).

¹³⁹ See *infra* Parts III.A-III.D.

in an informal regulatory system, core labor standards, social and political circumstances, and self-regulation.¹⁴⁰

A. Employment Challenges in an Informal Regulatory System

The current international employment law system makes it confusing, unwieldy, and costly for companies to forecast the probability of employment disputes.¹⁴¹ United States employment law is difficult to grasp, let alone the employment law systems of other nations. In addition to national employment law systems, United States-based MNCs operating abroad must understand the labor requirements of the treaties under which they function.¹⁴² Added to this complexity, MNCs face pressure from NGOs, consumers, the ILO, the OECD, labor unions, human rights groups, and national governments.¹⁴³ The directions and requests of these various stakeholders are often inconsistent.¹⁴⁴ This informal system may prove confusing to United States-based companies, which are accustomed to the law speaking with only one voice.¹⁴⁵

International employment disputes are occurring with greater frequency as the world becomes more globalized.¹⁴⁶ As a result, United States-based companies suffer from tarnished images, inter-cultural confusion, and the specter of a formal, binding system of international employment regulations.¹⁴⁷ The end result is inefficient and costly,

¹⁴⁰ See *infra* Parts III.A–III.D.

¹⁴¹ See Eric A. Posner, *International Law and the Disaggregated State*, 32 FLA. ST. U. L. REV. 797, 839 (2005) (discussing the confusing nature of international law).

¹⁴² See *supra* notes 78, 81, 86 and accompanying text (explaining the labor requirements of NAALC and DR-CAFTA).

¹⁴³ See *supra* notes 65, 99 and accompanying text.

¹⁴⁴ See *supra* note 99 and accompanying text.

¹⁴⁵ See Lorelle Londis, *The Corporate Face of the Alien Tort Claims Act: How an Old Statute Mandates a New Understanding of Global Interdependence*, 57 ME. L. REV. 141, 195 (2005) (discussing the “one voice” with which the American legal system speaks). “The law which governs daily living in the United States is a single system of law: it speaks, in relation to any particular question with only one ultimately authoritative voice.” HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 159 (William N. Eskridge, Jr. & Philip P. Fricky, eds., Foundation Press, Inc. 1994).

¹⁴⁶ See Dowling, *Practice, supra* note 48, at 815 (discussing the increasing prevalence of international employment disputes).

¹⁴⁷ See Ronald K.L. Collins & David M. Skover, *The Landmark Free-Speech Case that Wasn't: The Nike v. Kasky Story*, 54 CASE W. RES. L. REV. 965, 984 (2004) (discussing the negative corporate image of Nike in the context of the social implications of employing low-cost foreign labor); Jenness Duke, *Enforcement of Human Rights on Multi-National Corporations: Global Climate, Strategies and Trends for Compliance*, 28 DENV. J. INT'L L. & POL'Y 339, 351 (2000) (“Image troubles have forced some major name corporate players, like Michael

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which may cause United States-based MNCs to lose the competitive advantage they initially sought through operating abroad.¹⁴⁸ Accordingly, dispute-avoidance tactics are essential. MNCs can appropriately utilize simple techniques, such as employee training and record keeping, to predict and circumvent international employment disputes.¹⁴⁹

International employers need not start from scratch. Properly tailored techniques follow from established and well-supported standards within the system.¹⁵⁰ In this respect, the ILO core labor standards are an excellent starting point.¹⁵¹

B. Core Labor Standards as a Starting Point for MNCs

Most of what comprises the current system of international employment law, particularly the core labor standards, is based on international human rights law.¹⁵² In fact, there is a notion, supported by the ILO, that human rights include basic labor rights.¹⁵³ Therefore, MNCs and international employment lawyers look to established

Jordan, Nike, and Kathie Lee Gifford into accepting social responsibility for labor standards held by the overseas plants that manufacture their products.”); *see also* Dowling, *Practice*, *supra* note 48, at 792-95 (discussing intercultural problems in international employment law); Paul Frantz, *International Employment: Antidiscrimination Law Should Follow Employees Abroad*, 14 MINN. J. GLOBAL TRADE 227, 231 (2005) (discussing cultural changes in international employment); Lee, *supra* note 13, at 710-11 (discussing the probable imposition of formal regulations on United States based MNCs operating abroad).

¹⁴⁸ See Investorwords.com, *Competitive Advantage*, http://www.investorwords.com/998/competitive_advantage.html (last visited Sept. 13, 2006) (defining competitive advantage as a “[c]ondition which enables a company to operate in a more efficient or otherwise higher-quality manner than the companies it competes with, and which results in benefits accruing to that company”); *see also* David A. Cathcart, Marcellus A. McRae & Tamareeshi S. Snowden, *Employment Termination Litigation: 2005 Update*, SL021 ALI-ABA 761, 826-27 (2005) (discussing the high-costs of employment disputes).

¹⁴⁹ See Erika C. Collins, *International Employment Law*, 39 INT’L LAW. 449, 462 (2004) (discussing the retraining of employees in the international employment context); Dowling, *Practice*, *supra* note 48, at 813 (discussing the increasingly common task of international employment lawyers to advise multi-national clients on international employee training programs); Andre R. Jaglom, *Managing Distribution: How To Develop a Corporate Legal Compliance Program*, SK068 ALI-ABA 1065, 1073 (2005) (discussing the training of employees dealing with international commerce); John T. Miller, Jr., *Extraterritorial Effects of Trade Regulation*, 111 U. PA. L. REV. 1092, 1094 (1963) (discussing the necessity of record keeping in avoiding international employment disputes).

¹⁵⁰ See, e.g., *supra* note 72 (providing the ILO core labor standards); *supra* note 83 (providing the United Nations Global Compact principles); *supra* note 99 (providing information about the OECD principles).

¹⁵¹ See *supra* notes 71-77 and accompanying text.

¹⁵² See *supra* notes 56, 58.

¹⁵³ See *supra* notes 56, 58.

international human rights law for guidance on international employment issues, especially when confronting uncharted international employment law matters.¹⁵⁴ The enforcement of ILO core labor standards is essential to the advancement of strong middle classes in developing countries, as these standards improve human conditions worldwide.¹⁵⁵

MNCs have a dual identity in the globalized world.¹⁵⁶ On one hand, United States-based MNCs are perceived as foreigners invading countries to take advantage of favorable economic conditions, thereby offering products and services to Americans at reduced prices.¹⁵⁷ On the other hand, MNCs offer economic benefits to developing countries in which they operate, and thereby improve conditions in those countries.¹⁵⁸ Although MNCs may treat employees abroad with lower employment standards than United States employees, such treatment may exceed the treatment of employees by local companies in developing countries.¹⁵⁹ Yet the political power MNCs enjoy in developing countries comes with great social responsibility.¹⁶⁰ Simply because MNCs treat employees better than local companies does not make that practice responsible. Human rights advocates believe that labor rights should not be violated at any level.¹⁶¹

¹⁵⁴ See *supra* note 65 and accompanying text.

¹⁵⁵ See Brulliard, *supra* note 89 (quoting Julia E. Sweig, Latin America expert at the Council on Foreign Relations, saying, "If you want to develop strong middle classes, the way to start is by enforcing core labor standards."); see also FRIEDMAN, *supra* note 34, at 420-21. Friedman illustrates the political power of MNCs and the stability resulting from improved human conditions. FRIEDMAN, *supra* note 34, at 420-21. First, he offered the Golden Arches Theory of Conflict Prevention that says, "when a country reached the level of economic development where it had a middle class big enough to support a network of McDonald's, it became a McDonald's country. And people in McDonald's countries didn't like to fight wars anymore." *Id.* at 420. Next, Friedman made a similar illustration through the Dell Theory of Conflict Prevention, "the essence of which is that the advent and spread of just-in-time global supply chains in the flat world are an even greater restraint on geopolitical adventurism than the more general rising standard of living that McDonald's symbolized." *Id.* "The Dell Theory stipulates: No two countries that are both part of a major global supply chain, like Dell's, will ever fight a war against each other as long as they are both part of the same global supply chain." *Id.* at 421.

¹⁵⁶ See *supra* note 60 and accompanying text.

¹⁵⁷ See *supra* notes 61-62.

¹⁵⁸ See *supra* note 64 and accompanying text.

¹⁵⁹ See Sandesh Sivakumaran, *The Rights of Migrant Workers One Year On: Transformation or Consolidation?*, 36 GEO. J. INT'L L. 113, 120 (2004) (discussing the poor treatment of workers in developing countries).

¹⁶⁰ See *supra* note 66.

¹⁶¹ See Fabrizio Cafaggi, *Organizational Loyalties and Models of Firms: Governance Design and Standard of Duties*, 6 THEORETICAL INQUIRIES L. 463, 505 (2005) (discussing the duty of organizations to make sure labor rights are not violated at any level).

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Enforcement of core labor standards is the middle ground between exporting United States labor standards and adopting the sub-par standards of local companies. Mandatory compliance with core labor standards is supported by the ILO, the United States, and other developed countries.¹⁶² In addition, the United States continues to push for adherence to core labor standards as a requirement for WTO membership.¹⁶³ Thus, these minimum standards may be enforced in the near future. Nonetheless, companies continue to resist mandatory compliance with core labor standards, and compliance is strongly opposed by developing countries.¹⁶⁴ Further, organizations such as the World Bank and the International Monetary Fund (“IMF”) are more concerned with poverty reduction in developing countries than structural improvements like labor standards.¹⁶⁵ Consequently, employees in developing countries are often treated with substandard employment practices, as MNCs are chiefly motivated by the economics of cheap labor.¹⁶⁶

However, many MNCs already comply with the core labor standards, primarily through corporate codes of conduct.¹⁶⁷ Such an approach has a number of advantages. Voluntary compliance with labor

¹⁶² See *supra* note 74 and accompanying text.

¹⁶³ See *supra* note 74 and accompanying text (discussing the United States’ repeated efforts to make compliance with the ILO’s core labor standards a mandatory condition of WTO membership).

¹⁶⁴ See *supra* note 75 and accompanying text; see also Lance Compa, *International Labor Rights and the Sovereignty Question: NAFTA and Guatemala, Two Case Studies*, 9 AM. U. J. INT’L L. & POL’Y 117, 134 (1993) (looking at the question of whether countries should limit themselves to a uniform set of minimum labor standards to be enforced separately by each government, or to a supranational enforcement regime like that envisioned for the trade rules under NAFTA); Robert F. Housman and Paul M. Orbuch, *Integrating Labor and Environmental Concerns into the North American Free Trade Agreement: A Look Back and a Look Ahead*, 8 AM. U. J. INT’L L. & POL’Y 719, 805 (1993) (arguing for the formal enforcement of minimum labor standards through NAFTA); *International Trade and Social Welfare: The New Agenda*, 17 COMP. LAB. L.J. 338, 344-45 (1996) (Transcript of January 7, 1995 Meeting of the Section of International Law of the American Association of Law Schools).

¹⁶⁵ Shelton, *supra* note 33, at 291; see Supachai Panitchpakdi, *The Evolving Multilateral Trade System in the New Millennium*, 33 GEO. WASH. INT’L L. REV. 419, 444 (2001) (observing that the WTO’s budget constraints make it less able to assist developing countries in the areas of “[i]nstitution[al] building, capacity building, and human resource training” than other international institutions, such as the World Bank and the IMF).

¹⁶⁶ See *supra* note 69 and accompanying text; see also Joshua M. Chanin, *“The Regulatory Grass Is Greener”: A Comparative Analysis of the Alien Tort Claims Act and the European Union’s Green Paper on Corporate Social Responsibility*, 12 IND. J. GLOBAL LEGAL STUD. 745, 748 (2005) (discussing the motivation for companies to expand abroad created by the lure of cheap labor).

¹⁶⁷ See *supra* note 91 and accompanying text.

standards may prevent the appearance of political imperialism and protectionism that results from the imposition of Western regulations on developing countries, thereby reducing political strife.¹⁶⁸ Voluntary compliance also gives MNCs the flexibility to comply with the standards in the most efficient manner for their business.¹⁶⁹ MNCs employ market-based tools of compliance, rather than having to work with unwieldy blanket regulations.¹⁷⁰ Also, voluntary conformity with the core labor standards may be less costly than government imposed regulations and allows a company to enjoy an enhanced public image.¹⁷¹ Further, MNCs that already comply with the core labor standards would have a smooth and less costly transition to the probable imposition of formal enforcement of core labor standards.¹⁷²

The ILO core labor standards are a good starting point for MNCs to understand basic employment rights in the globalized world. However, MNCs must consider the social and political circumstances of their employees when incorporating these standards into employment practices.

¹⁶⁸ See *supra* notes 75, 127 and accompanying text; see also VERNON, *supra* note 13, at 15 (discussing the political leadership of MNCs); Harry G. Hutchison, *The Semiotics of Labor Law, Trade Unions and Work in East Asia: International "Labor Standards" in the Mirror of Culture*, 14 EMORY INT'L L. REV. 1451, 1516 (2000) (reviewing LAW AND INDUSTRIAL RELATIONS: CHINA AND JAPAN AFTER WORLD WAR II (Kluwer Law Int'l 1999)) (making an argument against the imposition of Western labor standards that are unrelated to the cultural context).

[D]eveloping economies are beginning to voice strong objections to the imposition of Western labor standards. The leaders of developing nations are concerned that forcing them to uphold Western labor standards may keep them from ever progressing to the point of being able to afford such standards. Hence, the premature imposition of such terms could have detrimental effects on developing nations, and, as Malaysian Prime Minister Mahathir Mohamad stated, "when a worker is jobless, the right to strike is meaningless." The leaders of developing nations are therefore concerned that, along with labor standards, Western industrial nations may export cultural values to their countries.

Karen Vossler Champion, *Who Pays for Free Trade? The Dilemma of Free Trade and International Labor Standards*, 22 N.C. J. INT'L L. & COM. REG. 181, 211-12 (1996).

¹⁶⁹ See *supra* note 97 and accompanying text.

¹⁷⁰ See *supra* note 98.

¹⁷¹ See *supra* notes 98-99, 101, 108 and accompanying text (discussing the cost-benefit and public-relations benefit of voluntary compliance with international labor standards).

¹⁷² See *supra* note 111.

C. Consideration of Social and Political Circumstances

Social and political circumstances permeate all international law, including international employment law.¹⁷³ These circumstances can be analyzed from two perspectives. One perspective is the effect of social and political circumstances on United States-based MNCs that expand abroad. It is sometimes too risky for MNCs to expand to particular countries due to the volatile political situations in those countries.¹⁷⁴ There are many factors in developing countries that MNCs are unable to control.¹⁷⁵ Moreover, creating employment policies that conform to international labor standards is particularly difficult when the

¹⁷³ See Graham Mayeda, *Developing Disharmony? The SPS and TBT Agreements and the Impact of Harmonization on Developing Countries*, 7 J. INT'L ECON. L. 737, 745 (2004) (discussing the permeation of social circumstances in trade law). "[I]f we are to use a procedural justice approach to harmonization in international trade law by examining the impact of social, economic and political institutions on developing countries, we must consider how these institutions are determined by the particular circumstances of each developing country." *Id.*

¹⁷⁴ See Tawny Aine Bridgeford, *Imputing Human Rights Obligations on Multinational Corporations: The Ninth Circuit Strikes Again in Judicial Activism*, 18 AM. U. INT'L L. REV. 1009, 1024-25 (2003) (describing the situation in Myanmar's Tenasserim region as an area populated with insurgents who vehemently opposed the State Law and Order Restoration Council, the military government that overthrew Burma's elected government, in relation to Unocal's investment in Myanmar); Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (Michelle Everson trans., 2004) (discussing global law when there is internal conflict between regimes in a country); Don Mayer, *Community, Business Ethics, and Global Capitalism*, 38 AM. BUS. L.J. 215, 225-26 (2001). The world's multinationals, which include most of the Fortune 500, dominate international trade and business and, increasingly, make major impacts on the cultural-social and natural environments. Mayer, *supra*, at 185.

We are evolving-or have arguably already evolved-into an economy where the largest corporations comfortably control the direction of global business. In 1995, nearly 70 percent of world trade was controlled by just 500 corporations and one percent of all multinationals own half the total stock of foreign direct investment. . . . Moreover, about a "third of the \$3.3 trillion in goods and services traded internationally in 1990 consisted of transactions within a single firm." . . . [A] few multinationals are consolidating their hold on the global economy.

Id.; see, e.g., *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000) (providing an example of the problems a company can run into when investing in a country experiencing internal conflict, particularly in relation to labor standards); Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44, 91 (1990) (discussing what laws applied in a case, arising out of an employment dispute, in a situation where there was territorial occupation).

¹⁷⁵ See FRIEDMAN, *supra* note 34, at 391; VERNON, *supra* note 13, at 1, 103.

developing country does not have a fundamental belief in the same basic level of human rights and labor standards as the United States.¹⁷⁶

Another perspective through which to examine social and political circumstances is the effect of the MNCs on the countries in which they operate. Given the vast power of MNCs, individuals often accommodate their lives to fit corporate values.¹⁷⁷ Furthermore, local companies may oppose the entrance of MNCs into the local economy, as they cannot compete with these much larger corporations.¹⁷⁸

Another obstacle to improved international labor standards is that developing countries are concerned that linking trade agreements to minimum labor standards will diminish their comparative advantage in the world market and cripple their economic growth.¹⁷⁹ This indicates that the governments of some developing countries are willing to sacrifice the well-being of their citizens for economic growth.¹⁸⁰ Unfortunately, citizens of developing countries are often politically

¹⁷⁶ See VERNON, *supra* note 13, at 154. For example, a MNC may end up in a situation where, although it conforms to transnational labor standards within its own company, its vendors in the country do not conform to those standards in the treatment of their employees. Involvement with companies that commit atrocities against its employees may not only create bad publicity, but will attract the attention of human rights advocates, which may lead to litigation. Another problem is the "race to the bottom" in the industry. If some competitors do not comply with basic labor standards, and thereby have cheaper operation costs, compliant MNCs in the industry will not be able to compete. This scenario is particularly problematic in countries where there is not a fundamental belief in labor rights as basic human rights. Another factor that aggravates this situation is when the industry sells products that consumers purchase strictly based on cost. Market demands and lack of consumer concern motivate MNCs to seek out the cheapest means of operation.

¹⁷⁷ See S. PRAKASH SETHI, *SETTING GLOBAL STANDARDS* 15-38 (2003) (discussing a study regarding adverse societal effects of MNC activities in developing states); William H. Meyer & Boyka Stefanova, *Human Rights, the UN Global Compact, and Global Governance*, 34 CORNELL INT'L L.J. 501, 503 (2001) (recounting conflicting empirical studies regarding MNC concern for civil-political rights and socioeconomic welfare in developing states); Patricia Romano, *Sustainable Development: A Strategy that Reflects the Effects of Globalization on the International Power Structure*, 23 HOUS. J. INT'L L. 91, 107 (2000).

¹⁷⁸ See VERNON, *supra* note 13, at 110; Kenneth J. Vandeveld, *The Political Economy of a Bilateral Investment Treaty*, 92 AM. J. INT'L L. 621, 626 (1998).

¹⁷⁹ See *supra* note 60 (discussing the use of child labor in developing countries as a necessity for economic growth within the current system of transnational labor law). See generally Stephen S. Golub, *Are International Labor Standards Needed To Prevent Social Dumping?*, <http://www.worldbank.org/fandd/english/1297/articles/041297.htm>. (last visited Jan. 28, 2006).

¹⁸⁰ See generally United Nations, *Economies Should Be Geared Towards People's Well-being, Not Vice Versa, Brussels Conference Told*, During Thematic Session on Employment, Third UN Conference on LDCs (May 18, 2001), <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/90420DF2F4DA75BFC1256A5300280F3E?opendocument>.

powerless to protect themselves in the same way as citizens in the United States.¹⁸¹ Consequently, MNCs are called upon to act in a socially responsible manner as they self-regulate in the international employment law system.¹⁸²

D. Self-Regulation as a Solution

Local employment laws and treaties provide parameters for the employment relationship between MNCs and their employees. However, these mechanisms are frequently insufficient in regulating the employment practices of MNCs.¹⁸³ Governments in developing countries often tailor their laws for MNCs to reap the economic benefits of capital investment.¹⁸⁴ Treaties do not help this situation.¹⁸⁵ NAALC, for instance, requires no higher employment standards than local laws.¹⁸⁶ Consequently, self-regulation is required by MNCs to comply with informal labor standards set forth by the ILO, the United Nations, NGOs, and consumers.

Self-regulation is consistent with the neo-liberal idea that market forces will create global law.¹⁸⁷ A number of market factors drive MNCs to self-regulate, including consumer backlash, pressure from non-state actors, the inefficiency of employment disputes, and initiatives by industry leaders.¹⁸⁸ Many MNCs are also driven to self-regulate by a sense of social obligation.¹⁸⁹ For example, the United Nations' Global Compact promotes self-regulation and views such action as promoting corporate citizenship.¹⁹⁰ However, there is no formal enforcement

¹⁸¹ See *supra* note 63; see also VERNON, *supra* note 13, at 19.

¹⁸² See *supra* note 65 and accompanying text.

¹⁸³ See *supra* note 66 (discussing the insufficiency of these mechanisms).

¹⁸⁴ See *supra* notes 64-65 and accompanying text.

¹⁸⁵ See *supra* notes 81, 86 (discussing the labor provisions of NAFTA and DR-CAFTA).

¹⁸⁶ See Jane Dwasi, *Kenya: A Study in International Labor Standards and Their Effect on Working Women in Developing Countries: The Case for Integration of Enforcement Issues in the World Bank's Policies*, 17 WIS. INT'L L.J. 347, 420 (1999); *supra* notes 80, 81.

NAALC does not protect all internationally recognized worker rights but merely lists labor law matters for attention. Moreover, it does not provide for the establishment of an international labor dispute settlement tribunal, leaving aggrieved parties to a complex dispute channeling procedure which, at best, only serves to give publicity to their complaints.

Dwasi, *supra*, at 197.

¹⁸⁷ See *supra* notes 36-37.

¹⁸⁸ See *supra* note 65.

¹⁸⁹ See *supra* note 50.

¹⁹⁰ See *supra* notes 82-85 and accompanying text.

mechanism requiring companies to self-regulate. In fact, it can be difficult for MNCs to place restrictions on employment practices when there is fierce cost competition in the industry. Nonetheless, self-regulation becomes necessary as international employment disputes become commonplace.¹⁹¹ For example, aggrieved employees abroad have attempted to apply United States laws extraterritorially and pursue litigation in United States courts.¹⁹²

As a part of self-regulation, companies comply with a corporate code of conduct.¹⁹³ Implementation of an industry-wide code levels the playing field among competitors, while upholding employment rights. Industry standards prevent the challenges of self-regulating in a highly cost competitive industry.¹⁹⁴ As another approach to industry-wide employment standards, MNCs encourage self-regulation within their industries by implementing minimum labor standards.¹⁹⁵ This approach allows companies to benefit from the flexibility of their own code of conduct, with the public relations benefit of incorporating industry-wide minimum labor standards – all while leveling the playing field.

Similarly, some MNCs have an enforcement mechanism to impose these corporate standards within the company to prevent the code from appearing to be an image-enhancing façade, or from being ineffective.¹⁹⁶ Internal enforcement mechanisms offer flexibility and confidentiality. However, external enforcement mechanisms give the code an appearance of legitimacy, and may actually improve effectiveness. External enforcement mechanisms created through collaboration of similarly situated actors furthers efficiency, as one board can be assembled to handle issues from several different companies.¹⁹⁷

Corporate codes of conduct are proactive and put the company in a more controlling position. In advance of their occurrence, codes predict employment situations and present coping mechanisms in accordance with the company's values. The code of conduct thereby minimizes employment risks.

¹⁹¹ See *supra* note 24 and accompanying text.

¹⁹² See *supra* note 39 (providing examples of cases where the extraterritorial application of United States employment laws has been sought).

¹⁹³ See *supra* notes 90-112 and accompanying text (providing a full discussion of corporate codes of conduct).

¹⁹⁴ See Lee, *supra* note 13, at 714.

¹⁹⁵ *Id.*

¹⁹⁶ See *supra* notes 96-99.

¹⁹⁷ See *supra* notes 100-04 (discussing external enforcement mechanisms).

IV. CONTRIBUTION

Flowing from this analysis are eight tactics that MNCs can utilize to effectively navigate the complex international employment law system.¹⁹⁸ These tactics are based on the past experiences of MNCs, particularly within the more recent history of the globalized world, and the current state of international employment law as a constantly evolving patchwork of international treaties and conventions, voluntary codes of conduct, NGOs, and domestic enforcement mechanisms.¹⁹⁹ In addition, the tactics take into consideration the kinds of transnational projects with which international employment lawyers assist MNC clients.²⁰⁰

A number of factors must be taken into account when developing a risk-avoidance strategy, many of which are industry-specific. Furthermore, any such strategy will be more successful in the globalized world when the company collaborates with other similarly situated companies, local experts, government officials, and international organizations.²⁰¹ These tactics focus on dispute avoidance, as disputes can quickly drain any company's resources, and follow from the embracing of prevention policies by American employers.²⁰²

¹⁹⁸ See Bisom-Rapp, *Exceeding Our Boundaries*, *supra* note 17, at 275-76. "[A]mong the most notable characteristics of American management-side lawyering is its emphasis on dispute avoidance and litigation prevention." *Id.* Management attorneys provide their clients with a competitive advantage in the market-place by assisting them in "taming formal law through the adoption of strategies, like employee grievance procedures, mandatory pre-dispute arbitration agreements, or corporate codes of conduct, rooted in the notion of private ordering." *Id.*

¹⁹⁹ See *supra* Parts II.A-II.E (providing a synopsis of the current international system of employment law).

²⁰⁰ Dowling, *Escort*, *supra* note 30. The following are some of the projects that international employment lawyers assist in: Global Legal Compliance Audits; Global Policies and Handbooks; Global Labor Relations; Human Rights, Civil Rights, and Codes of Conduct; Global Employee Benefits, Compensation, and Stock Options; Data Privacy and Global Human Resources Information Systems; Global Mergers and Acquisitions; Global Mergers and Acquisitions; and Global Layoffs and Plant Shutdowns. *Id.*; see also Dowling, *Practice*, *supra* note 48, at 779 (discussing common international employment law projects).

²⁰¹ See *supra* notes 46, 100-04.

²⁰² See Bisom-Rapp, *Exceeding Our Boundaries*, *supra* note 17, at 281-84 (discussing the demand of preventative strategies by employer clients and why American employers embrace prevention, including risk management, flexibility in charting a course for their organizations, political circumstances, sense of social obligation, and cultural and reputation concerns).

A. Tactic #1: Know and Abide by the Core Labor Standards

Every MNC needs to be familiar with the ILO core labor standards and incorporate them into its employment practices. Ideally, MNCs should embrace the opportunity to voluntarily comply with standards in a flexible manner and should not abuse that freedom.²⁰³ Further, voluntarily abiding by core labor standards is a manifestation of corporate social responsibility.²⁰⁴

The benefits of voluntary compliance outweigh the potential conflicts that may arise if compliance does not occur. Specifically, the greater the atrocities committed by MNCs against employees in the countries in which they operate, the harder human rights and labor rights groups push for enforcement mechanisms in the international employment law system.²⁰⁵ From an evidentiary standpoint, MNCs faced with disputes should at least point to compliance with the ILO core labor standards.²⁰⁶ Compliance with core labor standards is a simple action that an MNC can take to avoid international employment disputes.

B. Tactic #2: Recognize and Be Sensitive to Local Social and Political Circumstances

Understanding the social and political circumstances of the region in which they operate will allow MNCs to make well-informed risk assessments in labor policy-making, foster the continual discovery of common ground, and eliminate ethnocentric mistakes.²⁰⁷ MNCs can research the social and political circumstances in a country through the ILO, NGOs, international employment lawyers who are familiar with that country, and local actors.²⁰⁸

²⁰³ See *infra* Part IV.C (discussing voluntarily compliance with core labor standards as a part of a comprehensive self-regulation regime).

²⁰⁴ See *supra* notes 50, 56.

²⁰⁵ See *supra* notes 99, 143, 188 and accompanying text.

²⁰⁶ See *supra* note 79 (providing the ILO core labor standards).

²⁰⁷ Some American companies assume that American cultural ideas will automatically export to the country in which they operate. Furthermore, MNCs sometimes make the mistake of assuming that a culture's belief about basic human rights and labor standards align with Western values.

²⁰⁸ Companies can point to advice from these organizations as evidentiary support in the event of disputes.

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Further, companies need to understand the effects of their presence on social and political circumstances in different countries.²⁰⁹ If MNCs recognize these circumstances, they can maximize predictable factors, thereby reducing the risks of operating abroad. Although the regional circumstances of employees, business, and government are intertwined, MNCs should evaluate them individually.

This understanding also furthers international employment standards. Foreign workers tend to view Western-based corporations as ethnocentric.²¹⁰ Creating employment practices that are sensitive to the social and political circumstances of employees will effectively improve the corporate treatment of employees.²¹¹ This does not necessarily entail greater expense, but rather the understanding of basic cultural information. In fact, minor adjustments of ethnocentric employment practices may actually improve production.²¹² Such adjustments may also improve the image of United States-based MNCs, which are often viewed as running sweatshops in poor countries and abusing helpless workers.²¹³ Moreover, consideration of the local circumstances in which a company's employees exist will lead to informed employee policies and minimize the risk of employment disputes.²¹⁴ Overall, accounting for local circumstances creates stability in the operation of MNCs and is a manifestation of corporate social responsibility.

C. *Tactic #3: Self-Regulation*

Self-regulation is the key to operating in an informal regulatory system. MNCs must create policies that manifest internal expectations in employment practices. As with employment policies in general, pre-determined mechanisms assist in handling difficult situations, thereby preventing employment disputes. Self-regulation effectively implements prevention policies designed to avoid disputes.

²⁰⁹ See *supra* notes 173-82 and accompanying text.

²¹⁰ See John Tasioulas, *International Law and the Limits of Fairness*, 13 EUR. J. INT'L L. 993, 997 (2002) (discussing ethnocentrism in relation to international human rights).

²¹¹ See Brady Coleman, *Pragmatism's Insult: The Growing Interdisciplinary Challenge to American Harassment Jurisprudence*, 8 EMP. RTS. & EMP. POL'Y J. 239, 282 (2004) (discussing the importance of cultural sensitivity in the workplace).

²¹² For example, MNCs, aware of their employees' social circumstances, may adjust break times in accordance with the prayer schedules of Muslim workers.

²¹³ See *supra* notes 106-07, 147 (addressing corporate image).

²¹⁴ See Harry W. Arthurs, *Where Have You Gone, John R. Commons, Now that We Need You So?*, 21 COMP. LAB. L. & POL'Y J. 373, 388 (2000) (discussing the need for consideration of cultures in labor policies).

The United Nations is a good resource for MNCs to look to in developing employment policies that are compliant with informal international standards.²¹⁵ MNCs must also look at the applicable treaties and local laws to self-regulate in accordance with the standards they set forth.²¹⁶ As a part of self-regulation, MNCs should have a corporate code of conduct. Specifically, the code should set forth internal expectations as to employment practices and expectations for companies that work with the MNC, such as vendors. Establishing a corporate code of conduct is particularly important for MNCs operating in industries under great scrutiny pertaining to labor practices.²¹⁷ Furthermore, corporate codes of conduct should extend to a company's external dealings with parties.²¹⁸ Doing business with other companies that comply with a company's code of conduct not only protects that company against litigation and bad publicity, but also provides economic incentives for local businesses to comply with basic international employment standards.

MNCs must also have enforcement mechanisms for their codes of conduct.²¹⁹ Whether the enforcement is internal or from an external source, it legitimizes the code. This kind of self-regulation is historically effective and provides public relations benefits.²²⁰ Further, self-regulation promotes stability within an organization, especially when it effectively reduces employee hostility and turnover.

MNCs experience pressure from many external forces to create codes of conduct and advance global labor standards.²²¹ Instead of being forced to take a defensive position, MNCs can proactively cooperate with these organizations to understand their employment policy options. Self-regulation is more effective and furthers the avoidance of disputes if MNCs collaborate with governments and other industry actors.²²² Self-regulation may also ensure that formal regulations are not imposed via

²¹⁵ See *supra* note 83 and accompanying text (listing the ten principles that the United Nations' hopes will become part of mainstream global business practices).

²¹⁶ See *supra* notes 78, 81 (discussing NAALC); *supra* notes 86-89 (discussing the labor provisions of DR-CAFTA).

²¹⁷ See *supra* notes 103-04 (providing examples of industries subject to the most criticism, such as the extractive industries).

²¹⁸ See *supra* note 126.

²¹⁹ See *supra* note 196.

²²⁰ See *supra* note 101 (discussing the success of the Sullivan Principles); *supra* note 92 (discussing the proven success of codes of conduct); *supra* note 106 (discussing the public relations benefit of codes of conduct).

²²¹ See *supra* notes 99, 143, 188.

²²² See *supra* note 201 (discussing the necessity of collaboration of global actors).

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external enforcement mechanisms. In this respect, it may be wise for industry leaders to pro-actively impose high self-regulatory standards, thereby putting pressure on competitors and avoiding a “race to the bottom.”²²³

In self-regulating, MNCs should not be discouraged by the inability to meet idealistic expectations and must forge ahead in creating and continually reexamining their internal employment policies. Self-regulation in international employment law creates a coherent response to socially irresponsible labor activities.

D. *Tactic #4: Collaborate*

Creating value in employees is essential to survival in a globalized economy. MNCs can collaborate with governments and industry to develop efficient and effective international employment practices, thereby increasing value in employees.²²⁴ In a globalized economy, high quality, low-priced work is more accessible than in a national economy.²²⁵ Consequently, the pressure is on companies to add value to products, services, and employees.²²⁶ Through collaboration, companies

²²³ See *supra* note 194 (discussing the “race to the bottom”); see also Aaron A. Hayes, *La Frontera Olivadra: An Examination of the Relationship Between NAFTA, School Finance, and the Legacy of Inattention to the Needs of Border Communities*, 15 BERKELEY LA RAZA L.J. 145, 158 (2004) (discussing the tendency for companies to “race to the bottom”).

²²⁴ See David Kennedy, *Speaking Law to Power: International Law and Foreign Policy Closing Remarks*, 23 WIS. INT’L L.J. 173, 177 (2005). “Policy making is less a struggle between a good law and a bad politics than a process through which specialists collaborate in devising solutions to problems.” *Id.*; see also FRIEDMAN, *supra* note 34, at 352-55 (arguing that collaboration is a necessity for success in the globalized world, stating, “[t]he best companies are the best collaborators”); Slaughter, Tulumello & Wood, *supra* note 29, at 370-73 (discussing the importance of collaboration in the advent of globalization); Jerome I. Levinson, *Global Dreams: Imperial Corporations and the New World Order* by Richard J. Barnett and John Cavanagh, 27 LAW & POL’Y INT’L BUS. 513, 536-37 (1996) (book review).

²²⁴ See Donald C. Dowling, Jr., *Forum Shopping and Other Reflections on Litigation Involving U.S. and European Businesses*, 7 PACE INT’L L. REV. 465, 465 (1995). “A key part of international law practice is resolving international disputes.” *Id.*

An exercise in globalization of the spirit, the international regulation of labor relations is a necessary but perilous undertaking: it is indispensable because the elimination of borders leads to internationalization of the law, and risky because the path to international regulation is rife with cultural and economic pitfalls, and mistrust waiting round every corner.

Jean-Michel Servais, *Universal Labor Standards and National Cultures*, 26 COMP. LAB. L. & POL’Y J. 35, 53 (2004).

²²⁵ See *supra* notes 33-35 and accompanying text.

²²⁶ See *Working Borders: Linking Debates About Insourcing and Outsourcing of Capital and Labor*, 40 TEX. INT’L L.J. 691, 788 (2005).

can provide opportunities for employees to use multiple skills in one job, thereby creating value in employees through collaboration.²²⁷

Collaboration not only increases efficiency, but is effective at normalizing employment standards and developing best practices.²²⁸ In particular, collaboration with other companies within a specific industry creates benchmarks for measuring business performance.²²⁹ MNCs must also collaborate with local regional actors when creating employment policies.²³⁰ Such alliances will allow MNCs to predict the behavior of such local actors, thereby decreasing risk, increasing efficiency, and promoting mutual understanding of cultures.

E. Tactic #5: Look to the International Labor Organization for Guidance

The ILO itself is a unique collaboration of state stakeholders.²³¹ MNCs should look to the ILO for guidance on international employment law issues because it is the central guidance system for multinational actors.²³² Furthermore, the ILO has created core labor standards, which are supported by the United States and have been fundamental to the improvement of world-wide labor standards.²³³

In addition to being a fundamental international actor in transnational labor, the ILO maintains a reporting and monitoring system, providing an external check on MNCs' compliance with basic labor standards.²³⁴ Further, the ILO provides technical assistance to many multinational actors, which includes legal and policy advice for

²²⁷ See FRIEDMAN, *supra* note 34, at 353. One example of value creation in employees is a salesperson selling bundled services. If a telephone service company, Internet service provider, and a cable service company collaborate and provide a bundled service plan to customers, they can use one salesperson to sell the packaged services rather than three different sales people to sell the services individually. Further, the salesperson has the opportunity to use multiple skills. He or she has to have a knowledge of all three services, as opposed to just one service, and know the techniques for selling all of the services. In addition, the salesperson has to develop skills in relation to how bundling services work and how to sell them.

²²⁸ See *supra* notes 41-44 (discussing best practices).

²²⁹ See *supra* notes 104, 197.

²³⁰ See *supra* note 46.

²³¹ Shannon R. Wilson, *Sustainable Aquaculture: An Organizing Solution in International Law*, 26 T. JEFFERSON L. REV. 491, 515-16 (2004). "The International Labor Organization ("ILO"), founded in 1919, and later integrated as a specialized agency of the UN, is a unique model of international State-stakeholder collaboration." *Id.*

²³² See *supra* note 71.

²³³ See *supra* notes 72-74 and accompanying text.

²³⁴ See *supra* notes 71, 77.

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MNCs.²³⁵ The ILO is a particularly valuable resource for MNCs that do not wish to employ the services of an international employment lawyer to address all of their issues and concerns.

F. *Tactic #6: Keep Accurate and Detailed Records of all Employment Practices*

One principle every business is familiar with is record-keeping. It is always good practice for an employer to keep accurate and detailed employment records to safeguard employment practices from litigation.²³⁶ Such practices create evidentiary records that may be used defensively, if required.²³⁷ American courts put great stock in this kind of responsible practice by employers.²³⁸ In fact, in some cases, documented grievance procedures are actually an affirmative defense for employers in the United States.²³⁹

Furthermore, records of employment practices are necessary to make MNCs accountable under internal codes of conduct.²⁴⁰ Some external enforcement mechanisms may require the employer to provide reports regarding employment practices thus making record-keeping essential to comply with reporting requirements.²⁴¹ In addition, some treaties

²³⁵ See *supra* notes 71, 77.

²³⁶ See *supra* notes 48, 81 and accompanying text (discussing the necessity of personnel records in dispute avoidance and the record keeping requirements under NAALC); see also Rudolph L. Rose, *Insurance Fraud and Workers' Compensation*, 723 PLI/LIT 473, 491 (2005) (discussing the importance of having employment records to assert a defense to certain claims).

²³⁷ See Pearl Zuchlewski & Geoffrey A. Mort, *Privacy Considerations in Sexual Harassment Cases: Evidentiary and Discovery Issues from the Plaintiffs' Perspective*, 693 PLI/LIT 671, 679-80 (2003) (providing an example of the need for employment records in the defense of employee complaints). "Discovery of third party personnel records has two primary purposes: (i) to obtain information showing that an accused harasser has engaged in similar sexual misconduct with other employees or (ii) to test an employer's defense." Zuchlewski & Mort, *supra*, at 247.

²³⁸ See Sarah D. Bruce, *Project Life, Inc. v. Glendening: Seeking Sanctuary for Women Recovering from Substance Abuse Problems*, 33 U. BALT. L. REV. 257, 264-65 (2004) (discussing employment practices in relation to Title VII litigation); Richard S. Gruner, *Developing Judicial Standards for Evaluating Compliance Programs: Insights from EEOC Litigation*, 1291 PLI/CORP 155, 169-70 (2002) (discussing the importance of the court's determination of Circuit City's employment practices in one case).

²³⁹ See Bisom-Rapp, *Exceeding Our Boundaries*, *supra* note 17, at 277-80 (discussing the importance of record-keeping in safeguarding the employment decision-making process).

²⁴⁰ See *supra* notes 90-112 and accompanying text.

²⁴¹ See Andrew L. Strauss, *Overcoming the Dysfunction of the Bifurcated Global System: The Promise of a Peoples Assembly*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 489, 489 n.37 (1999) (discussing ILO reporting requirements); Cynthia A. Williams & John M. Conley, *An*

require employers to keep employment records.²⁴² NGOs have also developed regulatory mechanisms in which member companies have to comply with certain reporting requirements, and NGOs may also audit companies as part of its enforcement mechanism.²⁴³

G. *Tactic #7: Employee Training*

Similar to record-keeping, employee training is generally considered a responsible employer practice that promotes dispute avoidance.²⁴⁴ Training employees can eliminate decisions based on the arbitrary discretion of supervisors, thus reducing risk in the employment decision-making process.²⁴⁵ When training employees, it is essential to avoid ethnocentric mistakes.²⁴⁶ Understanding the cultural intricacies of employees ensures clear communication and mutual respect. Such understanding will lessen friction between management and employees, leading to stability and heightened productivity. Similarly, management must be trained to avoid ethnocentric mistakes as the benefits of proper training far outweigh the costs.

Additionally, training employees provides similar evidentiary advantages to record-keeping and is required under several NGO compliance programs and under some countries' local laws.²⁴⁷ Further-

Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct, 38 CORNELL INT'L L.J. 493, 529 (2005) (discussing ILO reporting requirements).

²⁴² See *supra* note 81.

²⁴³ See *supra* notes 113-21 and accompanying text.

²⁴⁴ See *Eight Easy Steps to Employee Discipline and Termination*, 02-3 LAW OFF. MGMT. & ADMIN. REP. 5 (2002).

Provide training. It's better to train than to take punitive steps. One reason: Courts expect employers to "meet people halfway." Offering employees ways to improve via training not only helps them correct the problem, it also shows that you are a responsible employer that is willing to rehabilitate. You also must document your willingness to recognize and reward the employee's success.

Id.; see, e.g., *Bryant v. Aiken Reg'l Med. Ctrs., Inc.*, 333 F.3d 536, 548-49 (4th Cir. 2003) (holding that a hospital could not be liable to African-American employees for punitive damages because the hospital undertook widespread antidiscrimination efforts, including a diversity training program).

²⁴⁵ See Paul E. Starkman, *Discovery and Expert Issues in Employment Cases*, SL021 ALI-ABA 71, 73 (2005).

²⁴⁶ See *supra* notes 211, 214.

²⁴⁷ See Ilias Bantekas, *supra* note 117, at 329. "[T]he constant monitoring of human rights practices at the investment phase involves employee training." *Id.*; see also Lucien J. Dhooge, *Beyond Voluntarism: Social Disclosure and France's Nouvelles Régulations Economiques*, 21 ARIZ. J. INT'L & COMP. LAW 441, 450 (2004) (discussing the human resources and labor disclosure requirements of French regulations, including employee training); Stephanie F. Dyson, *The Clash Between Corruption and Codes of Conduct: The Corporate Role in Forging a*

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more, training is essential to comply with a wide variety of international labor standard programs that have been developed to promote social responsibility, improve world-wide labor standards, and enhance the reputation of companies with responsible international employment practices.

H. Tactic #8: Commissioning International Employment Lawyers

Finally, MNCs must understand international labor standards in order to comply with treaties and local laws. In this respect, it is wise to commission the services of an international employment lawyer.²⁴⁸ As discussed in relation to collaboration, MNCs must work with specialists in the increasingly complex globalized world.²⁴⁹

MNCs should commission attorneys that are well-versed in international employment law and that have a global network of employment lawyers with whom they can consult.²⁵⁰ Similar to MNCs conducting business abroad, international employment lawyers must collaborate with other lawyers, as international labor markets vary in individual character.²⁵¹ The expertise of an international employment lawyer can go a long way in sparing MNCs from disputes and the resulting loss of resources.²⁵² Therefore, an MNC should seek the advice

Human Rights Standard, 17 CONN. J. INT'L L. 335, 339 (2002) (listing the ten areas of ethical business conduct included in the U.S.-Russia Code, including employee training).

²⁴⁸ See Bisom-Rapp, *Exceeding Our Boundaries*, *supra* note 17, at 260 (explaining the hallmarks of the emerging practice of international employment law). "What the international employment lawyers actually aspire to, however, is the coordination of multinational clients' employment law projects across national jurisdictions." *Id.*; see Dowling, *Escort*, *supra* note 30, at 4-13 (providing examples of transnational projects and the assistance transnational corporations need from international employment lawyers in executing them).

²⁴⁹ See *supra* note 228 and accompanying text.

²⁵⁰ See Bisom-Rapp, *Exceeding Our Boundaries*, *supra* note 17, at 261.

²⁵¹ See *supra* note 46.

²⁵² See Bisom-Rapp, *Exceeding Our Boundaries*, *supra* note 17, at 330.

To the extent that U.S. multinationals perceive less risk from foreign employment law . . . , they may be less inclined to seek, and their legal representatives may be less likely to advocate, preventive policies. On the other hand, wherever they do business, U.S. employers are likely to continue to seek flexibility, and to be motivated by reputational concerns. And, as noted in the conclusion below, U.S. international employment lawyers will likely try to help them achieve their goals through practices perfected on home turf.

Id.

of an attorney specializing in international employment law as soon as it contemplates involvement in a transnational project.²⁵³

Working with an international employment attorney is essential to success in navigating the international employment law system. Although this developing system of law is complex and constantly evolving, these tactics can be employed by any United States-based MNC to successfully navigate international employment law and avoid disputes.

V. CONCLUSION

With the liberalization of world trade, international employment law develops to facilitate global employment relationships. In the future, this may result in a formal regulatory regime. For now, the informal nature of the system presents its own challenges. MNCs are pulled in all directions by self-interest, the interests of employees, and the demands of third-party stakeholders. They should not attempt to please everybody. Instead, MNCs must adopt international employment practices that find a middle ground between the imposition of unworkable United States employment standards and sub-par employment standards based purely on economics. MNCs can work towards this middle ground by adopting the eight tactics presented in this Note.

Jennifer L. Hagerman*

²⁵³ See *supra* note 46; see also Bisom-Rapp, *Exceeding Our Boundaries*, *supra* note 17, at 260-61, listing examples of transnational projects:

- The multinational client wants to know if all of its overseas operations comply with local employment laws and orders a worldwide employment law compliance audit.
- The multinational client wants to globalize its human resources policies and needs to articulate the company's philosophies and goals and then implement them in compliance with the local laws of many national jurisdictions.
- The multinational client wants a Code of Conduct drafted that guarantees minimum labor standards in its operations around the world.
- The multinational client needs to implement company layoffs (known in Europe as collective redundancies) on a global scale and comply with legal variations across borders.
- In the context of global mergers and acquisitions, the purchasing multinational client wants an employment expert to participate in due diligence to reveal the employment ramifications of the deal.

* J.D. Candidate 2007, Valparaiso University School of Law; B.B.A., University of Houston, 2001. Special thanks to Jonathan Halm for his unwavering support in the creation of this piece. As always, thank you to my family for their support in my endeavors.