

CORPORATE SOCIAL RESPONSIBILITY AND FOREIGN CONTRACTORS: CORPORATE ACCOUNTABILITY FOR WORKER SAFETY ABROAD

INTRODUCTION

Among the many ways in which globalization has radically altered the way people live is through how people work. As technology has enabled companies to globalize, manufacturing jobs seeking low-wage labor have been migrating to developing countries. Along with lower wages, workers in developing countries also face substandard working conditions, including forced labor and dangerous work environments. Since the 1980s, public opinion, particularly in western countries, has pushed companies producing goods abroad to ensure that their workers are not mistreated.¹ This impetus provided by customers, shareholders, and the community at large has developed into a new concept—Corporate Social Responsibility (“CSR”). CSR encourages companies to implement corporate policies not only to protect workers’ rights, but also to prevent environmental damage and to contribute to the improvement of society in general.² In response, some companies have adopted policies to integrate CSR into their corporate practices. In addition, governments and international organizations have recognized the importance of CSR not only in official statements and reports, but also in the implementation of legislation to enforce some measure of CSR. However, legal repercussions are limited against companies that have their goods produced by foreign contractors, which often have poor working conditions. This Paper aims to review the current methods used by various countries to hold such companies responsible and to consider possible legal alternatives for the United States.

This Paper begins by reviewing the effect of globalization on labor and the development of CSR. Next, the history of American labor law is discussed to demonstrate the legislation resulting from decades of concern regarding worker safety. The review extends to international standards in regards to workers’ rights and worker safety. Next, this Paper discusses the existing legal approaches to worker safety and CSR both in the United States and around the world. In the last section, the existing and potential legal approaches in the United States to hold companies accountable for labor rights violations of their foreign

1. Firuza S. Madrakhimova, *Evolution of the Concept and Definition of Corporate Social Responsibility*, GLOBAL CONF. BUS. & FIN. PROCS., May 2013, at 113, 113.

2. *What Is CSR?*, U.N. INDUS. DEV. ORG., <http://www.unido.org/csr/o72054.html> [<https://perma.cc/22C6-A7V8>].

contractors are analyzed. Finally, this Paper gives a recommendation as to how the United States can implement CSR in the American legal system.

I. BACKGROUND

A. *The Impact of Globalization*

Since the 1970s, the process of globalization has led to greater economic, social, and cultural interconnectedness around the world.³ The social, political, and legal implications of globalization significantly impact people around the world and the human rights they are accorded.⁴ Prompted by trade liberalization and cheaper and easier transportation, companies routinely operate in different parts of the world.⁵ In particular, business operations and supply chains now expand across multiple continents.⁶ Companies have moved parts of their business to countries with cheaper labor, fewer labor and environmental requirements, and lower taxes in order to increase profits and competitiveness.⁷ Since the rise of globalization, multinational corporations have become powerful players in the international sphere.⁸ In fact, some corporations are larger than the economies of some countries.⁹ The growing importance of corporations in the world means that corporations often have a role in the enjoyment of human rights. This is especially relevant in developing countries where many multinational corporations have brought their operations involving manufacturing, assembly, services, and have even developed new markets.¹⁰

3. Andrea Scozzaro, *Labor Standards in International Law: All States Should Have an Obligation to Punish Misconducts of Multinational Enterprises Under International Customary Law*, 19 CUNY L. REV. 59, 62 (2016), <http://www.cunylawreview.org/labour-standards-%E2%80%A8in-international-law-all-states-should-have-an-obligation-to-punish-misconducts-of-multinational-enterprises-under-international-customary-law/> [<https://perma.cc/FU4S-BK66>].

4. Lucien J. Dhooze, *Beyond Voluntarism: Social Disclosure and France's Nouvelles Régulations Économiques*, 21 ARIZ. J. INT'L & COMP. L. 441, 441 (2004).

5. Martín Rama, *Globalization and Workers in Developing Countries* 7 (World Bank Dev. Research Grp., Working Paper No. 2958, Jan. 2003).

6. M. Eric Johnson, *Supply Chain Management: Technology, Globalization, and Policy at a Crossroads*, 36 INTERFACES 191, 191 (2006).

7. Marié McGregor, *Globalization and Decent Work (Part 1)*, 14 JUTA'S BUS. L. 150, 150 (2006).

8. Claudia T. Salazar, *Applying International Human Rights Norms in the United States: Holding Multinational Corporations Accountable in the United States for International Human Rights Violations Under the Alien Tort Claims Act*, 19 ST. JOHN'S J. LEGAL COMMENT. 111, 156 (2004); see also John Spanier, *Who Are the "Non-State Actors"?*, in THE THEORY AND PRACTICE OF INTERNATIONAL RELATIONS 43, 50 (William C. Olson ed., 8th ed. 1991).

9. Erin Foley Smith, *Right to Remedies and the Inconvenience of Forum Non Conveniens: Opening U.S. Courts to Victims of Corporate Human Rights Abuses*, 44 COLUM. J.L. & SOC. PROBS. 145, 149 (2010).

10. OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 14 (2011), <https://www.oecd.org/corporate/mne/48004323.pdf> [<https://perma.cc/5TL2-2RNP>].

In particular, globalization has created a significant change in employment. Because skilled labor is more prevalent in developed countries and less so in developing countries, unskilled employment opportunities increasingly have migrated to developing countries.¹¹ Between 1970 and 1997, the developing world's share in manufacturing exports increased from twenty-three percent to thirty-eight percent of the total amount of manufacturing exports.¹² This trend has both positive and negative effects. The growth of employment opportunities in the developing world can have a significant impact on poverty levels.¹³ The availability of industrial jobs is a contributing factor to poverty reduction; poverty is more closely tied to rural agricultural jobs.¹⁴ Additionally, women have been able to take advantage of these opportunities and increase their earnings.¹⁵ Furthermore, foreign companies generally comply with domestic and international labor standards to a greater degree than their domestic counterparts.¹⁶ While lower working standards in developing countries are a problem, provisions in the law promoting workers' rights can reduce the cost of globalization for workers in developing countries.¹⁷

The outsourcing of unskilled labor, however, also has significant negative effects. While women are able to make an income, they are usually employed because they are paid less than men and are less likely to become involved in trade unions.¹⁸ Furthermore, the growth of unskilled labor opportunities in the developing world is associated with child labor.¹⁹ In 2013, the U.S. Department of Labor found 122 goods, including coffee, cotton, shoes, carpets, and furniture, that were believed to have involved child labor.²⁰ Labor violations due to globalized outsourcing disproportionately affect women, children, minority populations, and indigenous peoples.²¹

11. Rama, *supra* note 5, at 7.

12. Roger Blanpain, *The Globalisation of Labour Standards: The Soft Track Law*, 14 TILBURG L. REV. 10, 11 (2007).

13. Rama, *supra* note 5, at 16.

14. *Id.*

15. *Id.* at 15.

16. Cael Warren & Raymond Robertson, *Globalization, Wages, and Working Conditions: A Case Study of Cambodian Garment Factories* (Ctr. for Glob. Dev., Working Paper No. 257, June 2011).

17. MARY JANE BOLLE, CONG. RESEARCH SERV., 97-861 E, NAFTA LABOR SIDE AGREEMENT: LESSONS FOR THE WORKER RIGHTS AND FAST-TRACK DEBATE 15 (2001).

18. Rama, *supra* note 5, at 15.

19. *Id.* at 16.

20. KAMALA D. HARRIS, CAL. DEP'T. OF JUSTICE, THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT: A RESOURCE GUIDE 1 (2015), <https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf> [<https://perma.cc/T6Z8-ABTC>].

21. S.L. Bachman, *The Political Economy of Child Labor and Its Impacts on International Business*, 35 BUS. ECON. 30, 31, 35, 38 (2000); John McKenzie, *The Limits of Off-Shoring—Why the United States Should Keep Enforcement of Human Rights Standards “In-House,”* 83 IND. L.J. 1121, 1132–33 (2008).

In 2005, the International Labor Organization (“ILO”) expressed its concern about the winner-take-all mentality pervasive in the process of globalization.²² A major concern regarding globalization and employment is the “race to the bottom” theory about working standards.²³ In order to encourage corporations to operate in their countries, some governments will tolerate poorer working conditions.²⁴ Furthermore, the laws of many countries do not govern corporate behavior abroad,²⁵ so corporations often operate with “virtual impunity” for its human rights obligations outside its countries’ borders. Sweatshops often have ten-to-twelve hour workdays, compulsory overtime, unsafe working conditions, punishment, locked doors, low pay, abuse, and prevention from organizing.²⁶ One example is Foxconn, a Chinese company that produces electronics for Apple, Nokia, and Sony, as well as other companies.²⁷ Foxconn employees often work 100-hour workweeks in unsafe working conditions.²⁸ The lack of adherence to reasonable labor standards has significant negative effects on society, dampening productivity and instilling a cycle of poverty by depriving children workers of their education.²⁹ However, if companies can improve the poor working conditions in their businesses abroad, or those of the contractors they hire abroad, workers will benefit from the higher wages that globalizing companies can provide.³⁰ Some economists argue that imposing workers’ rights in developing countries would decrease economic growth in those countries.³¹ Others insist that, due to the ease of business relocation, sufficient labor standards need to be imposed in developing countries.³²

B. Corporate Social Responsibility

While globalization may result in worse labor standards, globalization has also prompted people in developed countries to raise their expectations for corporations and the corporations’ influence on the economy, society, and environment.³³ In response to campaigns against child labor, forced labor, and dangerous working conditions, companies began developing internal codes of

22. McGregor, *supra* note 7, at 152.

23. Scozzaro, *supra* note 3, at 61.

24. *Id.*; McKenzie, *supra* note 21, at 1138; Smith, *supra* note 9, at 150.

25. McKenzie, *supra* note 21, at 1138.

26. Scozzaro, *supra* note 3, at 62.

27. *Id.* at 63.

28. *Id.*

29. Blanpain, *supra* note 12, at 17.

30. McGregor, *supra* note 7, at 151.

31. MARY JANE BOLLE, CONG. RESEARCH SERV., 97-861 E, NAFTA LABOR SIDE AGREEMENT: LESSONS FOR THE WORKER RIGHTS AND FAST-TRACK DEBATE 2 (2001).

32. *Id.*

33. *Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility*, DOC/01/19 (July 18, 2001) [hereinafter *Green Paper*].

conduct.³⁴ In the late 1980s and early 1990s, Levi Strauss & Company and Reebok Corporation were forerunners, reviewing human rights instruments to craft their codes of conduct.³⁵ Furthermore, they demanded that the codes of conduct be applied to their global supply chain, including their suppliers.³⁶ Their codes of conduct involved monitoring and enforcement provisions, including surprise audits and company reviews.³⁷ Since these early codes of conduct, the concept of CSR has continued to grow, the pressure by civil society and the media has intensified, and expectations have risen.³⁸ Some corporations have exceeded expectations to ensure CSR in their actions abroad and recognized their ability to improve the lives of their workers abroad. In 2013, for example, Kate Spade & Company launched their “on purpose” initiative, which involved the creation and development of an independent supplier in Rwanda to be run as a “social enterprise.”³⁹ Although Kate Spade provided the financial means to create the company, the company is owned by the employees, artisans who make Kate Spade products.⁴⁰ The supplier pays its artisans a living wage, offers twenty-one days paid vacation, provides a clean work environment, and schedules an eight-to-five workday with stretch breaks and a one-hour lunch break.⁴¹ So far, Kate Spade’s independent supplier has been able to net a profit, with expectations for a greater margin in the coming years, while enabling workers to improve their quality of life.⁴² As the concept of CSR gains popular support worldwide, corporations are increasingly responding by implementing efforts to ensure that their operations—and those of their suppliers—are socially responsible.

CSR is “a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.”⁴³ Stakeholders are people who affect or are affected by the company in question, including customers, suppliers, shareholders, financiers, employees, and the local community.⁴⁴ CSR involves four layers: economic responsibility to be profitable, legal responsibility to obey

34. Lance Compa, *Corporate Social Responsibility and Workers’ Rights*, 30 COMP. LABOR L. & POLICY J. 1, 3 (2008).

35. *Id.*

36. *Id.*

37. *Id.* at 4; Scozzaro, *supra* note 3, at 63.

38. Compa, *supra* note 34, at 5.

39. EDWARD SOULE, CATHERINE TINSLEY & PIETRA RIVOLI, A SOCIAL ENTERPRISE LINK IN A GLOBAL VALUE CHAIN: PERFORMANCE AND POTENTIAL OF A NEW SUPPLIER MODEL 7–8 (2017) (first emphasis omitted), <http://womensleadershipinstitute.georgetown.domains/on-purpose-kate-spade/> [<https://perma.cc/HP6Q-GZ5D>].

40. *Id.*

41. *Id.* at 11.

42. *Id.* at 52.

43. *Green Paper*, *supra* note 33.

44. *Id.*

the law, ethical responsibility to act justly and fairly, and philanthropic responsibility to be a good corporate citizen and improve quality of life.⁴⁵ Importantly, studies have demonstrated that companies that internalize CSR principles can boost performance and profits.⁴⁶ While companies often receive negative publicity for ignoring CSR, they develop a more productive workforce and attract positive attention for complying with CSR principles.⁴⁷

Civil society, governments, and corporations themselves continuously encourage the growth of CSR.⁴⁸ In 2001, the European Union published a Green Paper about promoting CSR in Europe.⁴⁹ The Green Paper discussed both how European countries had already begun to promulgate CSR, and how the European countries should promote CSR not only within the European Union but also worldwide.⁵⁰ The European Union countries are obliged to ensure that labor standards are sufficient to promote its development policy.⁵¹ The Green Paper underscored the importance of laws and binding rules in promoting CSR.⁵²

In addition, many non-governmental organizations (“NGOs”) have developed techniques to hold corporations publicly accountable. For example, the nonprofit organization, B Corporation, certifies companies that achieve rigorous social and environmental standards. This certification encourages companies to compete to be the best for society.⁵³ B Corporation also aims to change the definition of success in business to include social improvement.⁵⁴ Another NGO is Social Accountability International, which established the SA8000 Standard for decent workplaces.⁵⁵ Corporations must meet the numerous requirements under the standards in order to become SA8000 certified.⁵⁶ Other NGOs, including the Fair Labor Association, Worker Rights Consortium, Ethical Trading Initiative, Clean Clothes Campaign, Worldwide

45. Andreas Thrasyvoulou, *Corporate Social Responsibility: Here to Stay*, 4 LEGAL ISSUES J. 69, 74 (2016).

46. *Green Paper*, *supra* note 33.

47. *Id.*

48. *See, e.g., About Fair Trade USA*, FAIR TRADE USA (2017), <http://fairtradeusa.org/about-fair-trade-usa> [<https://perma.cc/LC2H-KBFJ>].

49. *Green Paper*, *supra* note 33.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Why B Corps Matter*, B CORPORATION (emphasis omitted), <https://www.bcorporation.net/what-are-b-corps/why-b-corps-matter> [<https://perma.cc/W95L-LX6X>].

54. *What Are B Corps?*, B CORPORATION, <https://www.bcorporation.net/what-are-b-corps> [<https://perma.cc/7T6V-XFLR>].

55. *About SAI*, SOC. ACCOUNTABILITY INT’L, <http://www.saintl.org/index.cfm?fuseaction=Page.ViewPage&pageId=472> [<https://perma.cc/F9PC-UCH6>].

56. *SA8000 Standard*, SOC. ACCOUNTABILITY INT’L, <http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&PageID=937> [<https://perma.cc/TN99-EUNK>].

Responsible Apparel Production, and movements such as fair trade certification, reflect continuously growing support for CSR.⁵⁷

The implementation of CSR has provided some benefits, but relying on corporations to self-regulate has proven to have limited effect. In 2001, Nike and Reebok, together with workers' rights organizations, exerted pressure on their South Korean-owned sportswear supplier to accomplish a democratic workers' union at the factory in Mexico.⁵⁸ However, the reliance on companies and their corporate codes to enforce labor standards can lead to varied applications of labor standards.⁵⁹ CSR often works in conjunction with public pressure, which is limited due to the sporadic nature of media attention.⁶⁰

C. *The Rise of Independent Contractor Labor*

The process of globalization itself evolves, and the current trend has seen multinational enterprises increasingly rely on foreign contractors to source and produce their goods.⁶¹ The use of contractors has removed health and safety working standards from under the legal purview of developed countries.⁶² CSR has contributed in this area, as some corporations have obliged their contractors and suppliers to conform to corporate codes of conduct.⁶³ However, using contractors has also allowed corporations to deny responsibility and avoid liability for abuses of workers' rights.⁶⁴ The application of corporate codes of conduct on contractors and suppliers relies on implementation and subsequent verification by the corporations.⁶⁵ Therefore, CSR alone is not sufficient to ensure that corporations and the contractors involved in their supply chain and production respect workers' human rights and provide adequate working conditions.⁶⁶

57. *Compa*, *supra* note 34, at 5.

58. *Id.* at 1.

59. Aaron K. Chatterji & Siona Listokin, *A Comment on "Corporate Social Responsibility and Workers' Rights,"* 30 COMP. LAB. L. & POL'Y J. 11, 13 (2008).

60. McKenzie, *supra* note 21, at 1138.

61. *Green Paper*, *supra* note 33.

62. *Id.*

63. *Id.*

64. Philipp Wesche & Miriam Saage-Maaß, *Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers Before German Civil Courts: Lessons from Jabir and Others v KiK*, 16 HUM. RTS. L. REV. 370, 370–71 (2016); *Compa*, *supra* note 34, at 7.

65. *Green Paper*, *supra* note 33.

66. *Compa*, *supra* note 34, at 6.

II. LABOR LAW IN THE UNITED STATES

A. *Historical Development of Labor Law in the United States*

In the United States, the occupational hazards facing industrial workers became a public concern during the nineteenth century, when reports about health effects on workers were delivered to Congress.⁶⁷ The first statute regarding worker safety was passed in Massachusetts in 1877, setting an example subsequently followed by other states.⁶⁸ Initially these laws intended to compensate workers who were victims of industrial accidents.⁶⁹ Legal theories of contributory negligence and assumption of risk often shielded employers from liability.⁷⁰ In the early 1900s, however, states began passing laws assigning liability to employers.⁷¹

Federal legislation to protect workers appeared later. The first legislation requiring safety equipment for railroad cars and engines was passed in 1893.⁷² In 1916, Congress passed a child labor law, which was later declared unconstitutional.⁷³ In 1936, Congress passed the Walsh-Healey Public Contracts Act,⁷⁴ a weak attempt to set work safety standards as well as limit working hours.⁷⁵ The Fair Labor Standards Act⁷⁶ (“FLSA”) was passed in 1938.⁷⁷ Until 1970, Congress enacted piecemeal legislation to combat worker safety problems in specific industries.⁷⁸ Congress developed federal legislation setting health and safety standards by passing the Occupational Safety and Health Act of 1970 (“OSHA”).⁷⁹

B. *FLSA*

Congress enacted the FLSA in 1938 to combat the rampant poverty among the working class in the wake of the Great Depression.⁸⁰ The FLSA intended to ensure an adequate standard of living and to prevent competition among businesses from resulting in the perpetuation of poor labor conditions.⁸¹ The law

67. MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW 2 (2016).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. ROTHSTEIN, *supra* note 67, at 2.

73. *Id.* at 3.

74. 41 U.S.C. §§ 6501–6511 (2012).

75. ROTHSTEIN, *supra* note 67, at 3.

76. 29 U.S.C. §§ 201–219 (2012).

77. ROTHSTEIN, *supra* note 67, at 3.

78. *Id.* at 4.

79. 29 U.S.C. §§ 651–678 (2012); ROTHSTEIN, *supra* note 67, at 4.

80. Ann K. Wooster, Annotation, *Validity, Construction, and Application of Fair Labor Standards Act—Supreme Court Cases*, 196 A.L.R. Fed. 507 (2004).

81. *United States v. Darby*, 312 U.S. 100, 100 (1941); Wooster, *supra* note 80, at 507.

set minimum wage requirements and mandated overtime compensation for hourly workers.⁸² The FLSA has provisions prohibiting the use of child labor in commerce and the production of goods.⁸³

C. OSHA

Congress began contemplating more comprehensive worker safety legislation in 1970.⁸⁴ At the time, estimates assessed that every year 14,500 people were killed in industrial accidents, and 2.2 million workers became disabled while on the job.⁸⁵ Furthermore, nearly 400,000 new cases of work-based illness were reported annually.⁸⁶ Many states, however, had insufficient safety regulations and enforcement.⁸⁷ In response, Congress passed OSHA. The law not only sets a uniform standard for workplace safety across the nation, but also permits states to introduce legislation to set higher standards.⁸⁸ OSHA regulations apply in all states, the District of Columbia, Puerto Rico, and all U.S. territories.⁸⁹ Employers are required to ensure that the workers' area does not have any hazards recognized by OSHA as likely to cause serious harm or death.⁹⁰ OSHA standards require that all working areas be kept clean and sanitary.⁹¹ Furthermore, emergency action plans for fires, chemical spills, and inclement weather are obligated to be formed and disseminated.⁹² Safety equipment is required to protect workers from the effects of noise exposure, hazardous chemicals, and dangerous machines.⁹³ OSHA compliance officers enforce the regulations through inspections.⁹⁴

III. WORKERS' RIGHTS AND INTERNATIONAL LAW

A. *United Nations'* Guiding Principles on Business and Human Rights

The United Nations published the *Guiding Principles on Business and Human Rights* ("Guiding Principles") in 2011.⁹⁵ The *Guiding Principles* are to

82. Wooster, *supra* note 80, at 507.

83. 29 U.S.C. §§ 212(a), 212(c) (2012).

84. ROTHSTEIN, *supra* note 67, at 4.

85. *Id.* at 5.

86. *Id.*

87. *Id.* at 2.

88. *Id.* at 65.

89. ROTHSTEIN, *supra* note 67, at 8.

90. *Id.* at 8–9.

91. 29 C.F.R. § 1910.22(a)(1) (2017).

92. 29 C.F.R. § 1910.38(a)–(b).

93. 29 C.F.R. § 1910.95(a), 1910.132(a), 1910.212(a)(1)–(2).

94. ROTHSTEIN, *supra* note 67, at 9.

95. U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, at iv (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [<https://perma.cc/4JMA-TWGH>].

be interpreted so as to accomplish “tangible results” for the people affected by business practices and to promote sustainable development.⁹⁶ The United Nations urges countries to encourage businesses to respect human rights through corporate and securities law.⁹⁷ Countries should act in order to meet their international human rights obligations by ensuring that businesses likewise respect human rights.⁹⁸ The relevant human rights that countries should consider in legislating for businesses are instilled in the International Bill of Human Rights and the ILO’s *Declaration on Fundamental Principles and Rights at Work and Its Follow-Up*.⁹⁹ In their operations, businesses should refrain from committing human rights violations and mitigate violations that are related to their operations.¹⁰⁰ The United Nations describes the application of the Guiding Principles as an evolving process, as risks to human rights change over time with changes to the business.¹⁰¹ Where a business works with another entity that violates human rights, the business should work to mitigate the impact of the violation, or, if possible, end the business relationship.¹⁰² Businesses can avoid legal repercussions where their actions demonstrate complicity with human rights violations by practicing due diligence to prevent such violations.¹⁰³

B. ILO Declaration on Fundamental Principles and Rights at Work

In 1998, the ILO established four unassailable principles in the *Declaration on Fundamental Principles and Rights at Work and Its Follow-Up*.¹⁰⁴ The four fundamental principles are:

- (a) [F]reedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labour;
- (c) the effective abolition of child labour; and
- (d) the elimination of discrimination in respect of employment and occupation.¹⁰⁵

96. *Id.* at 1.

97. *Id.* at 5.

98. *Id.* at 8.

99. *Id.* at 13.

100. U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM’R, *supra* note 95, at 14–16.

101. *Id.* at 17–18.

102. *Id.* at 21–22.

103. *Id.* at 18–19.

104. ILO, ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK AND ITS FOLLOW-UP 1 (1998), <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang—en/in dex.htm> [<https://perma.cc/X7GP-4JFW>].

105. *Id.* at 7.

The ILO recognized that these principles are crucial to maintain social progress in conjunction with economic growth.¹⁰⁶ While these principles are enshrined in ILO Conventions and therefore binding for countries that ratified the documents, the ILO insists that ILO members that have not ratified are still required to respect and promote these principles.¹⁰⁷

C. North American Agreement on Labor Cooperation

The North American Agreement on Labor Cooperation (“NAALC”) was negotiated as a complementary document to the North American Free Trade Agreement (“NAFTA”).¹⁰⁸ The goal of the NAALC was to improve livelihoods and labor standards in NAFTA countries.¹⁰⁹ While the NAALC does not force any extra laws on the countries, it obligates them to enforce already existing workers’ rights.¹¹⁰ Among the principles that the NAALC requires are the prohibition on forced labor, overtime compensation rights, minimum wage, compensation for occupational injuries, prevention of occupational injuries, and labor protection for children.¹¹¹ Compliance is governed by the NAALC Council, which receives and responds to complaints regarding failure to comply.¹¹² However, the enforcement mechanisms are limited, as sanctions are available for violations of only three of the eleven principles, and countries are otherwise expected to self-enforce.¹¹³ The development of the NAALC has prompted cross-border communication and greater harmonization of labor standards measurements to permit easier comparison of productivity and wages.¹¹⁴

106. *Id.* at 5.

107. *Id.* at 2.

108. BUREAU OF INT’L LABOR AFFAIRS, U.S. DEP’T LABOR, NORTH AMERICAN AGREEMENT ON LABOR COOPERATION: A GUIDE (2005), <https://www.dol.gov/ilab/trade/agreements/naalcgd.htm#NAALC> [<https://perma.cc/68YZ-9VCK>].

109. BUREAU OF INT’L LABOR AFFAIRS, U.S. DEP’T LABOR, SUBMISSIONS UNDER THE NORTH AMERICAN AGREEMENT ON LABOR COOPERATION (NAALC), <https://www.dol.gov/ilab/trade/agreements/naalc.htm> [<https://perma.cc/3Y5X-JMFL>].

110. MARY JANE BOLLE, CONG. RESEARCH SERV., 97-861 E, NAFTA LABOR SIDE AGREEMENT: LESSONS FOR THE WORKER RIGHTS AND FAST-TRACK DEBATE 3 (2001).

111. *Id.* at 4.

112. BUREAU OF INT’L LABOR AFFAIRS, U.S. DEP’T LABOR, *supra* note 108.

113. MARY JANE BOLLE, CONG. RESEARCH SERV., 97-861 E, NAFTA LABOR SIDE AGREEMENT: LESSONS FOR THE WORKER RIGHTS AND FAST-TRACK DEBATE 5 (2001).

114. *Id.* at 11.

IV. EXISTING LEGAL APPROACHES

A. *Summary of Legal Approaches to Ensure CSR*

1. Denmark

In 2000, the Danish Ministry of Social Affairs introduced the Social Index to measure the social responsibility of companies.¹¹⁵ Company management and employee representatives meet and assess employee conditions, training, sick leave, dismissals, health and safety, and social responsibility of suppliers and customers.¹¹⁶ The assessment results in a score (0–100), which is useful for determining future improvement.¹¹⁷ A company achieves the right to use the “S-label” on its products for three years if the score is above sixty and is certified by an independent auditor.¹¹⁸ In addition, the Danish Ministry of Economics and Business Affairs created the CSR Compass in 2005 to help small and midsize companies determine their CSR in their global supply chain.¹¹⁹

2. United Kingdom

The U.K. Parliament introduced the Modern Slavery Act 2015 to force companies to disclose the extent of their efforts to ensure that their supply chains do not involve slavery.¹²⁰ Under the Modern Slavery Act 2015, businesses carrying on in the United Kingdom with annual turnover of £36 million or greater are required to make a statement disclosing the steps the business took to ascertain that no slavery was involved in its business or its supply chain.¹²¹ The purpose of the Modern Slavery Act 2015 is to make clear which businesses are doing “the right thing” by ensuring that they do not profit from slavery, and which businesses do not.¹²² The government believes that such transparency will serve to prevent slavery in business supply chains.¹²³ A business that qualifies under the Modern Slavery Act 2015 and fails to make the required statement could be subject to an injunction and, in failing to comply with the injunction, be held in contempt and accordingly receive an unlimited fine.¹²⁴ Consumers are

115. JOSEPH M. LOZANO ET AL., GOVERNMENTS AND CORPORATE SOCIAL RESPONSIBILITY: PUBLIC POLICIES BEYOND REGULATION AND VOLUNTARY COMPLIANCE 76 (2008).

116. *Id.*

117. *Id.*

118. *Id.*

119. LOZANO ET AL., *supra* note 115, at 77; *The Parties Behind the Initiative*, CSR COMPASS, <http://www.csrcompass.com/parties-behind-initiative> [https://perma.cc/V52E-RWVP].

120. United Kingdom Modern Slavery Act 2015, § 1, 42 (Eng.).

121. AMBER RUDD, TRANSPARENCY IN SUPPLY CHAINS ETC. A PRACTICAL GUIDE 5, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/649906/Transparency_in_Supply_Chains_A_Practical_Guide_2017.pdf [https://perma.cc/PL6W-VN98].

122. *Id.* at 3.

123. *Id.*

124. *Id.* at 6.

to play a role in the Modern Slavery Act 2015's goals by deciding with their buying power whether or not the steps taken by a business are sufficient.¹²⁵

3. India

By passing the Companies Act 2013,¹²⁶ the Parliament of India became the first country to require companies to take part in CSR.¹²⁷ The Companies Act 2013 obligates certain companies to include a Corporate Social Responsibility Committee Board with at least three directors.¹²⁸ The purpose of the committee is to promulgate CSR policies, such as poverty amelioration, education, health, environment, gender equality, and vocational skills, and the company must spend at least two percent of average net profits toward the policies.¹²⁹ If the company fails to spend the required two percent of profits toward accomplishing the CSR policies, then the Board must disclose the reasons for this failure.¹³⁰

4. California

In 2012, the California Transparency in Supply Chains Act of 2010 came into effect.¹³¹ Under the law, retailers and manufacturers that do business in California per their California tax returns and have annual gross receipts of over \$100 million are required to disclose the company's efforts (or non-efforts) to verify that human trafficking and slavery are not part of their supply chain.¹³² Companies must make clear and concise disclosures on their websites.¹³³ The business must disclose the degree to which the business conducts evaluations concerning human trafficking and slavery, and the extent to which it is verified by a third-party auditor.¹³⁴ In addition, the disclosure must detail how the business audits suppliers for compliance with the business's standards and whether or not the audit was independent.¹³⁵ Direct suppliers must certify that the products used were in accordance with the laws of the countries in which the suppliers do business.¹³⁶ Furthermore, the disclosure must include the procedures for contractors and employees that do not meet its standards.¹³⁷ Lastly, the business must disclose the extent to which management and

125. *Id.*

126. Companies Act, 2013, No. 18 of 2013, INDIA CODE (2013).

127. Thrasyvoulou, *supra* note 45, at 81–82.

128. *Id.* at 82.

129. *Id.*

130. *Id.*

131. CAL. CIV. CODE § 1714.43 (West 2012).

132. HARRIS, *supra* note 20, at i.

133. *Id.* at ii.

134. *Id.* at iii.

135. *Id.*

136. *Id.* at iv.

137. HARRIS, *supra* note 20, at v.

employees receive training regarding human trafficking and slavery, especially in the context of supply chain.¹³⁸ The California Franchise Tax Board is responsible for determining which companies are subject to the California Transparency in Supply Chains Act.¹³⁹ The attorney general has the authority to enforce California Transparency in Supply Chains Act by filing for injunctive relief.¹⁴⁰ The intent of the law is to give California consumers the requisite information to allow them to combat human trafficking and slavery through their purchase power.¹⁴¹

5. France

In early 2015, a bill was introduced in the French legislature regarding the duty of care of companies.¹⁴² The bill proposed a law requiring large companies to establish a “vigilance plan” instituting measures to prevent risks to human rights and fundamental freedoms, serious physical injury, environmental damage, and health hazards from the operations of the company, its subsidiaries, and its contractors.¹⁴³ The National Assembly adopted the text for the proposed law the following month.¹⁴⁴ The Senate rejected the bill in its first review.¹⁴⁵ The following year, the National Assembly modified parts of the law and passed it to the Senate for a second review.¹⁴⁶ The Senate added its own modifications

138. *Id.*

139. *Id.* at 3.

140. *Id.* at 4.

141. *Id.* at 5.

142. Proposition de loi 2578 du 11 février 2017 *proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* [Proposal for law 2578 of February 1, 2017 on the Proposal of Law for the Duty of Due Diligence of Parent Companies and Main Contractors], ASSEMBLÉE NATIONALE [NATIONAL ASSEMBLY], Feb. 1, 2015 (Fr.), <http://www.assemblee-nationale.fr/14/propositions/pion2578.asp> [<https://perma.cc/4THE-JENW>].

143. *Id.*

144. Texte adopté 501 du 30 mars 2015 *proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* [Adopted Text 501 of March 30, 2015 on the Proposal of Law for the Duty of Due Diligence of Parent Companies and Main Contractors], ASSEMBLÉE NATIONALE [NATIONAL ASSEMBLY], Mar. 30, 2015 (Fr.), <http://www.assemblee-nationale.fr/14/ta/ta0501.asp> [<https://perma.cc/NF3F-DZLV>].

145. Texte adopté 40 du 18 novembre 2015 *proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* [Adopted Text 40 of November 18, 2015 on the Proposal of Law for the Duty of Due Diligence of Parent Companies and Main Contractors], SÉNAT [SENATE], Nov. 18, 2015 (Fr.), <http://www.senat.fr/leg/tas15-040.html> [<https://perma.cc/778H-YNP9>].

146. Texte adopté 708 du 23 mars 2016 *proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* [Adopted Text 708 of March 23, 2016 on the Proposal of Law for the Duty of Due Diligence of Parent Companies and Main Contractors], ASSEMBLÉE NATIONALE [NATIONAL ASSEMBLY], Mar. 23, 2016 (Fr.), <http://www.assemblee-nationale.fr/14/ta/ta0708.asp> [<https://perma.cc/SCQ5-558V>].

in its second review.¹⁴⁷ The National Assembly largely rejected the Senate's modifications and proffered a version that was summarily rejected by the Senate.¹⁴⁸ The National Assembly adopted the definitive text of the law on February 21, 2017 to be enacted after a constitutionality review.¹⁴⁹ The Constitutional Council found some provisions of the law to be unconstitutional.¹⁵⁰

The final version of the law on the duty of care of parent companies provides:

The law applies to:

- (1) Companies that, after two consecutive financial years, employ at least 5000 employees in its head office and in its direct or indirect subsidiaries with its registered office in France, and
- (2) Companies that employ at least 10,000 employees in the parent company and in its direct or indirect subsidiaries with its registered office in France or abroad.

Requirements for companies to which the law applies:

- (1) Establish and implement an effective vigilance plan. The plan shall include reasonable vigilance measures to identify risks and prevent serious violations of human rights and fundamental freedoms, and the health and safety of persons and the environment resulting from the activities of society and those of the companies it controls directly or indirectly, as well as the activities of subcontractors or suppliers with whom an established

147. Texte adopté 1 du 13 octobre 2016 *proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* [Adopted Text 1 of October 13, 2016 on the Proposal of Law for the Duty of Due Diligence of Parent Companies and Main Contractors], SÉNAT [SENATE], Oct. 13, 2016 (Fr.), <http://www.senat.fr/petite-loi-ameli/2016-2017/11.html> [<https://perma.cc/9DFL-XHQY>].

148. Texte adopté 74 du 1 février 2017 *proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* [Adopted Text 74 of February 1, 2017 on the Proposal of Law for the Duty of Due Diligence of Parent Companies and Main Contractors], SÉNAT [SENATE], Feb. 1, 2017 (Fr.), <http://www.senat.fr/leg/tas16-074.html> [<https://perma.cc/23LX-ZAFY>]; Texte adopté 843 du 29 novembre 2016 *proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* [Adopted Text 843 of November 29, 2016 on the Proposal of Law for the Duty of Due Diligence of Parent Companies and Main Contractors], ASSEMBLÉE NATIONALE [NATIONAL ASSEMBLY], Nov. 29, 2016 (Fr.), <http://www.assemblee-nationale.fr/14/ta/ta0843.asp> [<https://perma.cc/965T-TDLQ>].

149. Texte adopté 924 du 21 février 2017 *proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* [Adopted Text 924 of February 11, 2017 on the Proposal of Law for the Duty of Due Diligence of Parent Companies and Main Contractors], ASSEMBLÉE NATIONALE [NATIONAL ASSEMBLY], Feb. 21, 2017 (Fr.), <http://www.assemblee-nationale.fr/14/ta/ta0924.asp> [<https://perma.cc/WQ2P-FCJX>].

150. Bettina Grabmayr, *Duty of Care Law: French Constitutional Council Gives the Green Light*, ECOVADIS (Apr. 20, 2017), <http://www.ecovadis.com/blog/duty-care-law-french-constitutional-council-gives-green-light> [<https://perma.cc/ZBW4-QRKT>].

commercial relationship is maintained, where these activities are related to that relationship.

- (2) The vigilance plan shall include:
 - a. A mapping of risks, intended for their identification, analysis, and ranking;
 - b. Procedures for the regular assessment of the situation of subsidiaries, subcontractors, or suppliers with whom an established commercial relationship is maintained with regard to risk mapping;
 - c. Actions to mitigate risks or prevent serious harm;
 - d. A mechanism for alerting and collecting alerts on the existence or the realization of risks;
 - e. A mechanism for monitoring the measures implemented and evaluating their effectiveness.
- (3) The vigilance plan shall be made public.

Enforcement procedures:

- (1) The Council of State can supplement the requirements of the vigilance plan.
- (2) A court of competent jurisdiction and the president of the court can force companies to comply and establish a vigilance plan.
- (3) For any harm caused by a failure to comply with the duties of this law, a company is obliged to make good on the harm that the execution of the law would have prevented. Any person justifying an interest can bring a cause of action against the company. The court can order the company to comply with its decision.¹⁵¹

The viability of the law is heavily debated. Detractors argue that the law applies to very few companies, many of which have already instituted these policies, and is too vague in its terminology.¹⁵² Furthermore, opponents of the law point out that companies already suffer significant harm in failing to police their supply chains, as they suffer reputational, financial, operational, and national and international civil and criminal penalties.¹⁵³ They insist that a

151. The author translated and paraphrased this passage from the following sources: Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-399 of March 27, 2017 Law on the Duty of Due Diligence of Parent Companies and Main Contractors], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017 (Fr.), <https://www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/jo/texte> [<https://perma.cc/J4PQ-S64P>], translated in EUROPEAN COALITION FOR CORP. JUST., <http://corporatejustice.org/duty-of-vigilance-bill-en-pdf> [<https://perma.cc/LSM4-SZNG>].

152. Stéphane Brabant, *Devoir de vigilance: « Une Proposition de Loi (Pas Vraiment) Raisonnable »*, LE MONDE (Jan. 1, 2017, 1:52 PM), http://www.lemonde.fr/idees/article/2017/01/17/devoir-de-vigilance-une-proposition-de-loi-pas-vraiment-raisonnable_5064114_3232.html [<https://perma.cc/S5JA-7396>].

153. *Id.*

weaker law would be more appropriate, emphasizing the viability of the U.K. Modern Slavery Act.¹⁵⁴ The law should ultimately have a pedagogical focus by encouraging companies to comply rather than punishing them with civil penalties for violations.¹⁵⁵ Furthermore, the law should aim to include companies that may not be large enough to be covered under the current law but operate in countries notorious for human rights abuses.¹⁵⁶ Detractors insist that a more practical approach—focusing on encouraging companies to be responsible rather than forcing them—will avert the legal uncertainty created by this law and avoid encumbering companies with burdensome requirements.¹⁵⁷

On the other hand, supporters hail the French law as the first bold step forward in encouraging companies to ensure that their operations are not involved in human rights violations and are not putting workers at risk.¹⁵⁸ They view the law not as a burden on companies, but as an advantage for them. In the modern world, companies are uniquely poised to defend human rights and work in favor of the common good.¹⁵⁹ Companies not only can appease the public's growing demand for satisfactory treatment of workers abroad, but they can also appeal to legislators in the countries in which they operate to provide sufficient protection for workers.¹⁶⁰ Furthermore, by preventing risks of harm, companies are more respected and become more profitable.¹⁶¹ Self-regulation is not a viable solution, particularly in light of the recent financial crisis as a result of financial self-regulation.¹⁶² In addition, supporters argue that the law is practical in its minimalist application.¹⁶³ The scope is limited, applying to only approximately 100 companies.¹⁶⁴ Those companies falling under the scope of the law are required to implement only *reasonable* measures to identify risks to human

154. *Id.*

155. *Id.*

156. Brabant, *supra* note 152.

157. *Legislation on Responsible Business Conduct Must Reinforce the Wheel, Not Reinvent It*, OECD INSIGHTS (Apr. 15, 2015), <http://oecdinsights.org/2015/04/15/legislation-on-responsible-business-conduct-must-reinforce-the-wheel-not-reinvent-it/> [https://perma.cc/PE97-YWXZ].

158. *France Adopts Corporate Duty of Vigilance Law: A First Historic Step Towards Better Human Rights and Environmental Protection*, EUR. COALITION FOR CORP. JUST. (Feb. 21, 2017), <http://corporatejustice.org/news/393-france-adopts-corporate-duty-of-vigilance-law-a-first-historic-step-towards-better-human-rights-and-environmental-protection> [https://perma.cc/3WVZ-RK7Q].

159. William Bourdon & Sandra Cossart, *Devoir de Vigilance : « La Proposition de Loi Reste à L'avantage des Entreprises »*, LE MONDE (Jan. 17, 2017, 1:49 PM), http://www.lemonde.fr/idees/article/2017/01/17/devoir-de-vigilance-la-proposition-de-loi-reste-a-l-avantage-des-entreprises_5064111_3232.html [https://perma.cc/4JE7-6XJT].

160. *Id.*

161. *Id.*

162. Michel Doucin, *Corporate Social Responsibility: Private Self-Regulation Is Not Enough*, PRIVATE SECTOR OPINION, 2011, at 1, 11.

163. Bourdon & Cossart, *supra* note 159.

164. *Id.*

rights, fundamental liberties, health, and security of persons.¹⁶⁵ Through this law, “France can lead the way in Europe” by legislating CSR.¹⁶⁶

V. POSSIBILITIES FOR CSR IN THE AMERICAN LEGAL SYSTEM

As CSR continues to grow in importance in the minds of consumers and companies around the world, the creation of laws implementing CSR is likely to occur. Information about human rights and worker abuses is more readily available than ever before, and consumers have taken notice.¹⁶⁷ Furthermore, self-regulation, while successful to some extent, is often considered insufficient in light of severe violations that come to the public’s attention. Therefore, a consideration of the current means of holding companies accountable for the actions of their foreign contractors is relevant. The goal in this review is to determine which method will be most effective to ensure that foreign workers do not suffer egregious violations of their rights and their safety while making products for American companies.

VI. EXISTING POSSIBILITIES UNDER AMERICAN LAW

A. *Self-Regulation*

The existing legal structure for CSR in the United States in regards to workers’ rights and worker safety at foreign contractors’ workplaces relies primarily on self-regulation of companies. As the public has increasingly demonstrated support for CSR, companies have worked with their contractors to ensure that workers are treated better.¹⁶⁸ Self-regulation gives companies the latitude to decide how to implement CSR and to spend an amount that the company can afford in terms of money and lost competitiveness. However, self-regulation relies largely on the arbitrary will of the public and the good will of companies. Media stories about workers’ rights and safety violations often prompt the public to push companies for CSR.¹⁶⁹ This leads to an unequal protection of workers and an unequal punishment of companies that remain deliberately indifferent to unsafe working conditions and rights violations. While self-regulation is not entirely without merit, relying on companies to police themselves is not adequate to protect workers abroad.

165. *Id.*

166. *Id.*

167. Thuy Tran, Corporate Social Responsibility and Profits: A Tradeoff or a Balance? 5 (May 2015) (unpublished thesis, Stanford University: Center on Democracy, Development, and the Rule of Law), <http://www.csringreece.gr/files/research/CSR-1443614838.pdf> [<https://perma.cc/M8GM-47HR>].

168. *Id.* at 23–24.

169. *Id.* at 7, 15.

B. Extraterritorial Application of FLSA and OSHA

The trend of external application of American laws has been a recent concern of the Supreme Court.¹⁷⁰ While Congress does have the power to make American laws apply extraterritorially, the Court's determination of extraterritoriality is dependent on the statutory construction.¹⁷¹ The Court begins its analysis with a presumption against extraterritoriality.¹⁷² To rebut the presumption, the statute in question must give a clear indication of its extraterritorial application.¹⁷³

Congress can pass or amend a law to apply extraterritorially. After the Supreme Court found that Title VII did not rebut the presumption against territorial application, Congress amended Title VII to cover American citizens who are employed abroad.¹⁷⁴ In addition, Congress designed the Foreign Corrupt Practices Act¹⁷⁵ to apply to bribes paid abroad by companies doing business in the United States.¹⁷⁶ These examples demonstrate the ways in which American laws can be extended to actions abroad.

Currently, the primary American laws that protect workers—the FLSA and OSHA—largely do not apply extraterritorially.¹⁷⁷ Should Congress add an extraterritorial provision to these laws, extending these protections to Americans and workers for American companies abroad, many workers would be afforded worker safety protections. However, such an amendment is not only unlikely, but probably infeasible. First, because the violations occur abroad, frequent trials in the United States are impractical and expensive. Second, both the FLSA and OSHA have investigatory bodies that monitor compliance.¹⁷⁸ To extend the review of those investigatory bodies abroad would be prohibitively expensive for the federal government. Furthermore, such an amendment would not address the role of contractors in the modern world. In fact, companies likely would rely more on contractors to avoid the extra expense of compliance. The extraterritorial application of the FLSA and OSHA would not only be highly unlikely, but would not effectively protect workers abroad.

170. See *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013).

171. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

172. *Kiobel*, 569 U.S. at 115–16.

173. *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184, 192 (5th Cir. 2017).

174. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 512 n.8 (2006).

175. 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3, 78m, 78ff (2012).

176. Robin Miller, Annotation, *Construction and Application of Foreign Corrupt Practices Act of 1977*, 6 A.L.R. Fed. 2d 351 (2005).

177. Bertrand C. Sellier & Stacy Ceslowitz, *Extraterritoriality & U.S. Employment Law*, in PROSKAUER ON INTERNATIONAL LITIGATION AND ARBITRATION, http://www.proskauerguide.com/law_topics/25/III [<https://perma.cc/5MMA-BHGF>].

178. WAGE & HOUR DIV., U.S. DEP'T LABOR, HANDY REFERENCE GUIDE TO THE FAIR LABOR STANDARDS ACT (Sept. 2016), <https://www.dol.gov/whd/regs/compliance/hrq.htm#15> [<https://perma.cc/K5NV-P2NY>]; U.S. DEP'T LABOR, AT-A-GLANCE OSHA, <https://www.osha.gov/Publications/3439at-a-glance.pdf> [<https://perma.cc/QYA8-GQKX>].

C. Alien Tort Statute

The Alien Tort Statute (“ATS”), also known as the Alien Tort Claims Act, was passed by Congress in 1789.¹⁷⁹ The ATS stipulates: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹⁸⁰ Between 1789 and 1980, the ATS was used on three occasions.¹⁸¹ In the 1980 case *Filártiga v. Peña-Irala*, the Second Circuit resurrected the ATS to find jurisdiction in federal courts over acts of torture that had taken place in Paraguay, under the analysis that torture qualified as a “violation of the law of nations.”¹⁸² Since *Filártiga*, plaintiffs have been using the ATS to bring human rights violations abroad under the purview of American federal courts. In 2004, the Supreme Court ensured that the scope of the ATS remained narrow in *Sosa v. Alvarez-Machain* by holding that only ATS claims that violate “a norm of international character accepted by the civilized world” and are “defined with a specificity” sufficiently similar to those already delineated (“violation of safe conducts, infringement of the rights of ambassadors, and piracy”).¹⁸³ Therefore, the ATS application is limited to specific violations of customary international law.¹⁸⁴

Dozens of lawsuits have been pursued under the auspices of the ATS against corporate defendants.¹⁸⁵ Courts have held that corporations can be liable for violations of customary international law under the ATS.¹⁸⁶ However, the Supreme Court reviewed the use of the ATS in light of complaints by foreign governments about the ATS application overseas and increased concern over judicial interference in foreign policy.¹⁸⁷ The Supreme Court significantly changed the ATS landscape in *Kiobel v. Royal Dutch Petroleum Co.* In *Kiobel*, the plaintiffs alleged that the subsidiary of Shell had used the Nigerian government to violently put down protests against the company.¹⁸⁸ The Second Circuit had dismissed the case, holding—contrary to other circuits—that the law of nations did not encompass corporate liability.¹⁸⁹ The issue of corporate liability was argued before the Supreme Court; however, the Supreme Court then ordered the case to be reargued in the next term on the issue of

179. John F. Savarese & George T. Conway III, *The Impact of Kiobel Curtailing the Extraterritorial Scope of the Alien Tort Statute*, WALL ST. LAW., July 2013, at 1.

180. 28 U.S.C. § 1350 (2012).

181. Savarese & Conway III, *supra* note 179, at 1.

182. 630 F.2d 876, 887 (2d Cir. 1980); Savarese & Conway III, *supra* note 179, at 1.

183. 542 U.S. 692, 724–25 (2004).

184. *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1016 (7th Cir. 2011).

185. Savarese & Conway III, *supra* note 179, at 2.

186. *See Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1021 (9th Cir. 2014).

187. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013).

188. *Id.* at 113.

189. *Id.* at 114.

extraterritoriality.¹⁹⁰ In its *Kiobel* decision published in 2013, the Supreme Court held that the ATS does not apply extraterritorially.¹⁹¹

While the *Kiobel* holding narrows the scope of ATS lawsuits, the decision left an opening for actions that “touch and concern” the United States.¹⁹² The case law interpreting the “touch and concern” test is not yet entirely clear. However, courts so far generally have found that the action has sufficient nexus with the United States where “it occurred domestically, was planned or directed domestically, or because it was directed at the United States.”¹⁹³ ATS claims for actions that occur abroad perpetrated by foreigners against foreign victims—the so-called “foreign-cubed” cases—have been dismissed.¹⁹⁴

The *Kiobel* decision reflects the Supreme Court’s growing concern regarding the extraterritoriality of American legislation. As other countries have complained about American “judicial imperialism,” the Supreme Court has responded by leaving the issue in the hands of Congress.¹⁹⁵ Therefore, Congress can restore extraterritoriality to the ATS by amending the statute. The actions of contractors likely are among the “foreign-cubed” cases, excluded from current post-*Kiobel* ATS jurisdiction. The contractor layer insulates American companies from liability. Even if Congress were to expand ATS jurisdiction, worker rights and worker safety violations currently are not covered under the ATS.¹⁹⁶ The ATS establishes jurisdiction of federal courts for violations of customary international law, which is determined by widespread state practice and case precedent.¹⁹⁷ In *Flomo v. Firestone National Rubber Co.*, the Seventh Circuit held that child labor was not a violation of customary international law.¹⁹⁸ The prohibition on child labor, as well as other workers’ rights recognized in the United States, have not achieved the same widespread recognition as other principles recognized under the ATS, such as the prohibition against torture.¹⁹⁹ However, workers’ rights are not precluded from joining the ranks of customary international law in the future. The ATS currently cannot be

190. Savarese & Conway III, *supra* note 179, at 2.

191. *Kiobel*, 569 U.S. at 124.

192. *Id.* at 124–25; *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1027 (9th Cir. 2014).

193. *Doe I v. Cisco Sys., Inc.*, 66 F. Supp. 3d 1239, 1245 (N.D. Cal. 2014).

194. *Id.*

195. Savarese & Conway III, *supra* note 179, at 2.

196. Bama Athreya & Brian Campbell, *No Access to Justice: The Failure of Ethical Labeling and Certification Systems for Worker Rights*, in *WORKERS’ RIGHTS AND LABOR COMPLIANCE IN GLOBAL SUPPLY CHAINS: IS A SOCIAL LABEL THE ANSWER?* 226, 229 (Jennifer Bair et al. eds., 2014).

197. Gwynne Skinner, *Customary International Law, Federal Common Law, and Federal Court Jurisdiction*, 44 VAL. U. L. REV. 825, 826 (2010).

198. 643 F.3d 1013, 1024 (2011).

199. Katie Wendle, *Establishing Liability for the Enslavement and Forced Labor of Children Under the Alien Tort Statute*, 41 SYRACUSE J. INT’L L. & COM. 447, 450, 456 (2014).

used to find liability of American companies for the violation of workers' rights by their foreign contractors.

D. Liability Under State Common Law

In some states, American companies can potentially be found liable for violations of workers' rights and worker safety. Although, as a general rule, companies that employ contractors are not liable for the negligence of their contractors, tort law has provided narrow exceptions.²⁰⁰ One such exception is that employers can be liable for negligently selecting or hiring careless, reckless, or incompetent independent contractors.²⁰¹ Courts have found employers liable for their contractors' negligence where the employer knew or could have inferred that the contractor was careless, reckless, or incompetent.²⁰² Likewise, courts have found employers liable for failing to use due care in selecting an independent contractor.²⁰³ In particular, larger companies that regularly employ independent contractors generally have a greater responsibility to ensure the competency of their independent contractors.²⁰⁴ If the independent contractor has a reputation for carelessness, recklessness, or incompetence, the employers are also more likely to be found liable for negligence in selecting them.²⁰⁵ In order to establish the employer's negligence, a plaintiff must prove that the employer knew or should have known that the independent contractor was careless, reckless, or incompetent.²⁰⁶ This can be proven through incidents of prior negligence of the contractor.²⁰⁷ The plaintiff also must establish that a relationship between the employer and contractor existed and that the employer's negligence in selecting the contractor was the proximate cause of the injury.²⁰⁸ In some states, employees of a contractor can sue the company that employs the contractor for injury caused to the employees from the contractor's negligence.²⁰⁹

The "negligent hiring" exception to the rule that employers are not liable for the negligence of their contractors likely can apply to foreign contractors. American companies that are aware of a contractor's or potential contractor's track record for negligence in the workplace and in the community can be held accountable for negligently selecting the contractor. Victims of the negligence—

200. Reuben I. Friedman, Annotation, *When is Employer Chargeable with Negligence in Hiring Careless, Reckless, or Incompetent Independent Contractor*, 78 A.L.R. 3d 910 (1977).

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. Friedman, *supra* note 200.

206. *Id.*

207. *Id.*

208. *Id.*

209. *See* Chen v. St. Beat Sportswear, Inc., 226 F. Supp. 2d 355, 361 (E.D.N.Y. 2002).

whether workers or other injured parties—will need to prove not only the American employer’s knowledge of the negligence, but also the employer-contractor relationship and the employer’s selection as the proximate cause of the injury.²¹⁰ The concern of applying state common law extraterritorially can be avoided where the decision to hire the contractor occurs in the United States.

Victims can use the “negligent hiring” exception to create a negligence chain between American companies and their foreign contractors. However, this exception applies narrowly. The injury must be caused by negligence—rather than a mere violation of workers’ rights—and, therefore, will likely apply only to the most egregious cases.²¹¹ Furthermore, plaintiffs probably will struggle to prove that the American companies knew of the contractor’s repeated negligence. The introduction of this type of lawsuit can also lead to avoidance tactics by American companies. If liability can be established, companies will probably try to maintain plausible deniability regarding the negligence of contractors by adding further layers of contractors. Despite this potential bad outcome, the “negligent hiring” exception can provide an avenue for victims to receive recognition and compensation for the American companies’ irresponsible use of negligent contractors.

VII. POTENTIAL CHANGES FOR LAW IN THE UNITED STATES

A. Supply Chain Check Plans

Statutes that require companies to review their supply chains in order to legislate CSR are a popular method. California, the United Kingdom, and France have each instituted some measure of supply chain review.²¹² In California and the United Kingdom, companies are required to publish reports of their efforts to ensure there is no slavery or human trafficking in their supply chains.²¹³ While these laws demonstrate some measure of enforced CSR, they are fairly weak. Companies to which the laws apply have no other obligations than to report what actions they take in regards to the narrow scope of slavery and human trafficking. These laws do not force the companies to take specific measures but instead rely on transparency to empower the public to exert pressure on offending companies. Therefore, the effect of the laws likely is not significant. Because the information is posted on the companies’ websites, the information is often removed from the customers at the time of the purchase. This distance between transparency and the customer likely weakens the power of the public

210. Friedman, *supra* note 200.

211. *Chen*, 226 F. Supp. 2d at 359–61.

212. See ELISE DUECK, DELANEY GREIG & KEVIN THOMAS, THE RISE OF SUPPLY CHAIN TRANSPARENCY LEGISLATION 8 (Norah Murphy ed., 2017), https://share.ca/documents/investor_briefs/Social/2017/Supply_Chain_Transparency_Legislation.pdf [<https://perma.cc/47TY-ZXLK>].

213. *See id.* at 8, 11.

in encouraging companies to act responsibly. Although these methods of supply chain checks recognize companies' responsibility in the whole of their operations, these methods rely on very motivated customers to pressure companies. However, the simplicity of the laws has its advantages; the laws utilize the will of the people—the driving force behind the development of CSR—rather than costly legal obligations to improve companies' dedication to CSR.

The French legislature has envisioned a more authoritative law requiring companies of a certain size to develop and implement “vigilance plans” that prevent human rights violations and risks to worker safety.²¹⁴ In addition, in the event of the occurrence of a harm, companies may be required to compensate for the harm. The vigilance plan law, although it applies to few companies, is relatively burdensome. Companies will have to not only create a plan to ensure that subsidiaries and contractors do not cause harm, but also implement that plan among the relevant foreign subsidiaries and contractors. This requirement is a significant leap in legislating CSR. This French version of a supply chain check is more robust. The dangers of this fervent dedication to instilling CSR principles in the law are the uncertainty surrounding its requirements and enforcement, as well as the greater expense and potentially reduced competitiveness forced on companies.

B. CSR Index and Product Labeling

Denmark has implemented a system to measure each company's dedication to CSR. The system creates an index to measure such dedication and rewards companies at a minimum level with the ability to market their CSR dedication to the public.²¹⁵ The index measures not only the company's internal social responsibility, but also that of its suppliers.²¹⁶ This system creates an incentive for companies to internalize CSR principles. The public's buying power is the impetus for companies to gravitate toward improving their standards on social responsibility. When buying products, people can choose to favor products that have achieved the S-label, certifying the socially-responsible development of the product. The certification is granted only if it is certified by an independent auditor.²¹⁷ This indexing and product labeling system provides an easily recognizable symbol that the public can incorporate into their daily buying habits. The ease of this system likely boosts the power of consumers. However, companies are only incentivized to be more socially responsible and are not

214. *See id.* at 10–12.

215. *See* EUROPEAN COMM'N, CORPORATE SOCIAL RESPONSIBILITY NATIONAL PUBLIC POLICIES IN THE EUROPEAN UNION 23 (2007), <http://ec.europa.eu/social/BlobServlet?docId=2036&langId=en> (last visited Feb. 18, 2017).

216. *See id.*

217. *See id.*

punished for their failures to ensure that they are responsible at every step in their operations. While the social index and product labeling is a simple yet important step toward legislating CSR, its effects are limited by its simplicity.

C. *Obligatory CSR Officers*

India has taken a unique approach to legislating CSR by obligating companies to create a CSR committee with at least three directors who develop CSR policies for the company and ensure that at least two percent of the company's net profits are devoted to these policies.²¹⁸ This law is one of the strongest positive obligations placed on companies by statutes. Companies are required to spend money creating and implementing CSR programs.²¹⁹ Importantly, this law is symbolic of the global development of CSR. The government has recognized a need for companies to consider CSR in their business practices. The law also gives companies the latitude to decide how to introduce CSR within their companies, rather than forcing external methods upon them.²²⁰ However, the independence of companies to decide their own standards can result in effective avoidance of the law's purpose. Companies are essentially their own oversight. Therefore, they do not have to vigorously pursue their CSR policies. Although the two percent spending requirement will help to ensure that companies genuinely try to implement CSR policies, companies are free to focus on the issues that are most beneficial financially rather than socially.²²¹ Despite the margin of discretion for companies, the spending requirement is a significant imposition. For some companies, two percent of net profits equates to a large dollar value, which may be excessive to achieve their CSR goals.

The Indian law does not focus on CSR demands on subsidiary and contractor behavior. This law can be bolstered to encourage companies in their CSR policies to address the rights and safety of workers employed by subsidiaries and contractors abroad. However, the lack of independent oversight and promotion of the company's discretion indicate that a company may not have much impetus to investigate its operations overseas. Furthermore, such investigation and implementation of CSR policies abroad is likely expensive and could decrease their profit margins. On the other hand, this law can encourage companies to take the time and spend the money on CSR throughout the company. The law insists that companies recognize and internalize CSR. Despite its weaknesses, this law also has the potential to introduce companies to CSR and encourage

218. Joya Banerjee, *India Mandates Corporate Social Responsibility: The 2 Percent Bill*, GBCHEALTH (2013), <http://archive.gbchealth.org/asset/india-mandates-corporate-social-responsibility-the-2-percent-bill> [<https://perma.cc/VC9U-JMCN>].

219. *Id.*

220. *Id.*

221. *Id.*

them to develop their own techniques, tailored to their businesses, to integrate CSR into their business practices, and even to those of their foreign contractors.

D. Direct Liability

The French legislature introduced the concept of compensation for harms occurring abroad as a result of the company's failure to adequately police its subsidiaries and contractors.²²² However, the circumstances and scope of this compensation are not clear. The French law contemplates liability for companies.²²³ A statute that establishes liability for harm to workers caused by foreign contractors is the strongest incentive for American companies to investigate and prevent such harms. However, such a statute is in many ways impractical. First, trials would need to take place in the United States, far away from the location where the harm occurred. The trials would not only be very expensive but also likely deficient in evidence. Second, the statutory liability would create a heavy burden on companies that use foreign contractors. They do not have significant control over the contractor's operations, and poor worker safety is often commonplace in those countries. Third, a statute demanding direct liability is contrary to the general rule that principals are not liable for the negligence of their independent contractors. Furthermore, contractors often have several customers, and it would be difficult to determine the company's level of liability in a particular incident. Although such a statute would heavily encourage companies to institute measures to ensure that their foreign contractors respect the rights and safety of their workers, the statute would be very unpopular and likely unworkable.

VIII. THE OPTIMAL METHOD FOR THE UNITED STATES

The French law on the duty of care of parent companies forges a new path in legislating CSR. Significantly, the law creates the concept of a "vigilance plan," which includes delineation of risks to workers, measures to prevent harms, and assessments of subsidiaries and subcontractors.²²⁴ Such a vigilance plan legislation would be beneficial in the United States. In fact, California has already implemented a similar law requiring companies to report the ways in

222. See French Corporate Duty of Vigilance Law: Frequently Asked Questions, EUR. COALITION FOR CORP. JUST. (Feb. 23, 2017), <http://corporatejustice.org/documents/publications/french-corporate-duty-of-vigilance-law-faq.pdf> [<https://perma.cc/Y82X-FX7D>].

223. See *id.*; Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-399 of March 27, 2017 Law About the Duty of Due Diligence of Parent Companies and Main Contractors], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017 (Fr.), <https://www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/jo/texte> [<https://perma.cc/J4PQ-S64P>], translated in EUR. COALITION FOR CORP. JUST., <http://corporatejustice.org/duty-of-vigilance-bill-en-.pdf> [<https://perma.cc/LSM4-SZNG>].

224. See *id.* at 4.

which they act to prevent slavery and human trafficking in their supply chains.²²⁵ However, a wider scope will better accomplish the goal to hold companies accountable for workers' rights violations that occur in the production and acquisition of their products.

Because OSHA and the FLSA adequately protect American workers, the American vigilance plan law need only require that the plans address the operations of the company, subsidiaries, and contractors outside the United States. Like the French "vigilance plan," the law should demand that the vigilance plans include: a listing of the risks, analyzed and ranked, to human rights and fundamental freedoms, physical safety of workers, and the environment; procedures for the regular assessments of company, subsidiary, and contractor operations; elucidated actions to mitigate risks or prevent serious harm; alert system to notify the company of the existence of risks; and a monitoring process to implement and evaluate the effectiveness of the plan. In addition, vigilance plans should be accompanied by a reporting component. Companies should be required to report worker safety incidents that occur in the company, its subsidiaries, and its contractors. This law should apply only to larger companies headquartered in the United States. In addition, these companies should be obligated to file their plans with the Department of Labor and also make them public on their websites. The advantages of the vigilance plan are that companies are forced to investigate their supply chains for worker safety and that the public can use their buying power to encourage companies to better protect workers. Furthermore, these reports can be used by potential plaintiffs who can sue American companies under a theory of negligent selection and hiring.

The most significant concern with the effectiveness of implementing vigilance plan legislation is enforcement. Companies can falsify reporting data. To combat this, a provision can be added requiring the vigilance plan to be checked by an independent auditor, at the expense of the company. Similar to the French law, any interested party should be able to bring an action against a company to which this law applies if the company has failed to file and publish a vigilance plan. The court can issue an injunction against the company. In addition, the effect of the law's vigilance plans and reporting requirements can be amplified with a certification system based on best worker safety records, similar to the Danish Social Index.

While the French law's vigilance plan can be adapted for the American legal context, the concept of liability and compensation for harm caused by failure to implement the vigilance plan is incompatible. In the context of American agency law, companies are not typically responsible for the negligence and fraud of their independent contractors.²²⁶ Therefore, such liability would be contrary to

225. See HARRIS, *supra* note 20, at 5.

226. See discussion *supra* Section VI.D.

existing American legal principles. However, the requirement of vigilance plans will encourage not only transparency but also compliance with better workers' rights and safety standards in companies' operations. Furthermore, such a law reflects the growing public support for CSR, particularly in corporate operations and supply chains abroad.

CONCLUSION

Even though workers' rights and worker safety legislation was first implemented in the United States over a century ago, many products sold to American consumers are created in violation of the principles set forth in those laws. American companies have been able to reduce production costs by moving their manufacturing operations abroad. Many developing economies and impoverished people have benefited from the income from these job opportunities, but workers still suffer from poor working conditions. However, companies have also been able to avoid the costs of providing adequate worker protections by relying on foreign contractors to manufacture their products. Concern for the welfare of these foreign workers is growing around the world, as evidenced in the rise of CSR and the new French legislation. While self-regulation is important, legislation will ensure that the public can make informed consumer decisions. By demanding that American companies be responsible for the safety of the people manufacturing their products, the concern for worker safety and the implementation of measures to protect them will continue to spread around the world.

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