

1-1-2001

ANDREW P. VANCE MEMORIAL WRITING COMPETITION WINNER: Corporate Factory/Supplier Monitoring Programs and the Failure of International Law in Regulating Indian Factory Conditions

Marc J. Monte

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

Recommended Citation

Marc J. Monte, *ANDREW P. VANCE MEMORIAL WRITING COMPETITION WINNER: Corporate Factory/Supplier Monitoring Programs and the Failure of International Law in Regulating Indian Factory Conditions*, 26 Brook. J. Int'l L. (2001).
Available at: <https://brooklynworks.brooklaw.edu/bjil/vol26/iss3/27>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

CORPORATE FACTORY/SUPPLIER MONITORING PROGRAMS AND THE FAILURE OF INTERNATIONAL LAW IN REGULATING INDIAN FACTORY CONDITIONS

*Marc J. Monte**

I. INTRODUCTION

In recent years, allegations of “sweatshop”¹ conditions in factories which produce garments for clothing and athletic footwear lines endorsed by celebrities such as Kathy Lee Gifford and Michael Jordan have called national attention to the global issues of workers’ rights, factory conditions and child labor.² In response to these revelations, the Union of Needletrades, Industrial and Textile Employees (“UNITE”)³ and watchdog groups such as Sweatshop Watch,⁴ have campaigned nationally to draw public awareness to these concerns and have applied pressure to United States Federal⁵ and State legislative bodies⁶ and the garment industry⁷ to address these conditions. These national campaigns spurred the recent decision of Guess, Inc. to pay a \$1 million out of court settlement of a 1996 lawsuit filed by garment workers who earned less

* The author will be receiving his J.D. from Brooklyn Law School in June, 2001. He would like to thank Professor Claire Kelly and Professor Samuel Murumba for their insightful comments during the writing and publication process. Additionally, he is grateful to his wife, Lauren, and his family, for their support—emotional, spiritual, and otherwise—throughout his education.

1. For purposes of this Note, a “sweatshop” is defined as “a business that regularly violates both wage or child labor laws and safety or health regulations.” U.S. GEN. ACCT. OFF., “SWEATSHOPS” IN NEW YORK CITY: A LOCAL EXAMPLE OF A NATIONWIDE PROBLEM 1 (GAO/HRD-89-101BR, June 1989) [hereinafter GAO, NEW YORK CITY].

2. See Steven Greenhouse, *A Crusader Makes Celebrities Tremble: Image is New Weapon in Sweatshop War*, N.Y. TIMES, June 18, 1996.

3. See Ron Blackwell, *Globalization and the American Labor Movement*, in AUDACIOUS DEMOCRACY, at 100 (1997).

4. See Sweatshop Watch - Sweatshop Accountability Campaign, at <http://www.sweatshopwatch.org/swatch/industry/cal.htm> (last visited Sep. 18, 2000).

5. Robin Jaffin, *Dignity on Saipan*, MONITOR, Winter 1999, at 6.

6. See Sweatshop Watch, California’s Bill to Stop Sweatshops, at <http://www.sweatshopwatch.org/swatch/industry/cal.htm> (last visited Sep. 18, 2000).

7. See Blackwell, *supra* note 3, at 101.

than the legal minimum wage⁸ and, more significantly, prompted the decision by four major clothing retailers to settle a class-action suit stemming from charges of abusive working conditions (including involuntary servitude).⁹ The settlement resulted in the defendants paying \$1.25 million for a monitoring program to ensure that these alleged abusive conditions do not continue.¹⁰

However, despite these victories against sweatshop operators and the western corporations that contract with them, the problem of illegally operated garment factories persists throughout the developing world, particularly in nations such as India, that traditionally have inexpensive labor and production costs. Highly progressive labor laws that have existed in India since the earliest days of its independence from Great Britain,¹¹ have not prevented the on-going problems of widespread bonded labor,¹² child labor¹³ and violations of its regional minimum wage laws¹⁴ from continuing unabated.¹⁵ International responses to this problem, including efforts by the International Labor Organization ("ILO")¹⁶ to address the

8. See Nancy Cleeland, *Guess to Pay Up to \$1 Million to End Suit*, L.A. TIMES, July 21, 1999, at B2.

9. Doe I et al. v. The Gap, Inc. et al., C.D. Cal. No. CV-99-00329-CAS (AJWx) (1999).

10. See *id.* See also Steven Greenhouse, *4 Companies Gain Accord in Labor Suit*, N.Y. TIMES, Aug. 10, 1999.

11. See, for example, the Factories Act of 1948, the Minimum Wages Act of 1948, the Industrial Disputes Act of 1947, and the Maternity Benefit Act of 1961, collectively addressing all matters concerning the working conditions of garment workers in India. See generally A. VINCENT ARPUTHOM, *LABOUR AND INDUSTRIAL LAWS* (1995).

12. Bonded labor is defined by the United States Department of State as "the result of a private contractual relationship whereby a worker incurs or inherits a debt to a contractor and then must work off the debt plus interest." U.S. Department of State India Country Report on Human Rights Practices for 1998 (1999), at http://www.state.gov/www/global/human_rights/1998_hrp_report/india.html (last visited January 31, 2001) [hereinafter "India Country Report"]. According to the State Department, "[s]ome press reports indicate that Tamil Nadu [a state in India] alone has an estimated 25,800 bonded laborers." *Id.*

13. The United States State Department defines child labor as "[w]ork by children under 14." India Country Report, *supra* note 12. The International Labor Organization (ILO) estimates that there are 44 million child laborers in India. *Id.*

14. Minimum wage laws in India are set by and enforced by the state governments. However, the "large number of industries [are] covered by a small cadre of factory inspectors and their limited training and susceptibility to bribery result in lax enforcement." India Country Report, *supra* note 12.

15. See *id.*

16. Declaration Concluding the Aims and Purposes of the ILO, adopted May

plight of garment workers within nations, such as India, have been rendered "marginal"¹⁷ and "in a slumbering condition"¹⁸ by adherence to Article 2(7) of the United Nations Charter.¹⁹ Article 2(7) emphasizes the sovereignty of individual states by placing specifically domestic matters outside the jurisdiction of the United Nations (hereinafter U.N.).²⁰

As the garment industry has undergone an aggressive increase in international sourcing,²¹ the failure of individual states and the international community to police working conditions in these factories has become far more visible in western media. Reports of deplorable working conditions in garment factories have forced western clothing corporations that contract with these factories, such as The Gap²² and Levi Strauss & Company,²³ to protect their reputations from negative publicity and potential legal liability by instituting independent factory monitoring programs and preparing codes of conduct with which their licensees must comply.²⁴ For example, clothing retailers such as The Gap have responded to public interest group pressure by vowing to "recognize and accept responsibility for the conditions under which their clothes are produced . . . translate and post the . . . code of conduct with all of its offshore contractors [and] develop a system of independent monitors to ensure that the terms of its code are en-

10, 1944, 3554, T.I.A.S. No. 1868 at 80, 5 U.N.T.S. 104.

17. DAVID J. SAARI, *GLOBAL CORPORATIONS AND SOVEREIGN NATIONS: COLLISION OR COOPERATION?* 154 (1999).

18. *Id.*

19. United Nations Charter, Article 2(7) reads "Nothing contained in the . . . Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the . . . Charter . . ." U.N. CHARTER art. 2, para. 7.

20. *See id.*

21. *See* Margaret A. Emmelhainz & Ronald J. Adams, *The Apparel Industry Response to 'Sweatshop' Concerns: A Review and Analysis of Codes of Conduct*, JOURNAL OF SUPPLY CHAIN MANAGEMENT, Summer, 1999. For the purposes of this Note, "international sourcing" is defined as the production of apparel "by foreign suppliers for U.S. manufacturers and retailers." *Id.*

22. *See* Blackwell, *supra* note 3, at 101.

23. *See* International Forum on Clean Clothes: Workers' and Consumers' Rights in the Garment Industry, Brussels, April 30 - May 5, 1998, Case File: Levi Strauss & Company Corporate Profile and Case Material, available at <http://www.cleanclothes.org/companies/levi5-5-98.htm> (last visited Mar. 21, 2000).

24. *See* Blackwell, *supra* note 3, at 101.

forced."²⁵ Many industry players have adopted this approach and successfully employed market forces to improve labor conditions of factories in the developing world.²⁶ This Note will examine the failures of statutory approaches to the sweatshop problem and the market mechanics behind the potential for success in the garment industry's efforts to police itself. Additionally, this Note will propose a means of making the industry's self-policing efforts more effective by introducing monitoring programs that operate increasingly independent of the licensing corporations. Finally, this Note will recommend improvements in the application of independent monitoring programs that will make the reporting system more reliable and encourage more western companies to use them without fear of "ideological blackmail."²⁷

II. THE GARMENT INDUSTRY IN INDIA

A. India's Progressive Legal Framework to Protect Workers' Rights.

India's regulation of its garment manufacturing industry centers around the Factories Act of 1948.²⁸ The Act's main objectives are to:

- (a) protect the interests of workmen;
- (b) ensure better conditions of work to the workmen;
- (c) prevent employers from taking advantage of the weaker bargaining powers of the workmen;
- (d) regulate conditions of employment of young persons and females;
- (e) provide for safe and healthy working conditions inside the factories;
- (f) require the employer to take certain minimum steps for the welfare of the workers;
- (g) bring about uniformity in the number of working hours and leave with wages; and,

25. *Id.*

26. See Emmelhainz & Adams, *supra* note 21.

27. The lack of competing monitoring programs can lead to the imposition of demands on western companies that exceed those of workers' rights groups, and reflect specific cultural biases that may exceed the scope of the monitoring programs' contracted tasks. See discussion *infra* Section IV.

28. Act 63 of 1948, Factories Act, 1948.

(h) provide for licensing, registration and inspection of factories.²⁹

Among the specific issues addressed by The Factories Act are cleanliness of the factory,³⁰ ventilation in the work space,³¹ overcrowding,³² availability of clean drinking water to the workers,³³ and specifications for clean, accessible toilet facilities.³⁴ Additionally, The Factories Act sets the maximum number of working hours at nine hours per day³⁵ and 48 hours per week,³⁶ which may be exceeded only with "the Chief Inspector's previous approval."³⁷ The Factories Act also "totally prohibits the employment of children below 14 years"³⁸ and states that women shall be employed only between 6 a.m. and 7 p.m.³⁹ Among the more progressive grants by The Factories Act to the workers are mandatory first aid facilities,⁴⁰ provision of canteens in factories employing 250 or more workers,⁴¹ and creches in factories employing 30 or more women.⁴²

Revising The Factories Act by addressing several issues, such as minimum wage schedules for different industrial job categories and overtime compensation, The Minimum Wages Act of 1948,⁴³ and its subsequent revisions in 1950,⁴⁴ 1953,⁴⁵ and 1963,⁴⁶ provides detailed guidelines for minimum wage rates for workers in every industry in India,⁴⁷ as well as a means for discovering for violations of the minimum wage

29. *Id.* § 1.

30. *Id.* § 11.

31. *Id.* § 13.

32. *Id.* § 16.

33. *Id.* § 18.

34. Act 63 of 1948, Factories Act, 1948, § 19.

35. *Id.* § 54.

36. *Id.* § 51.

37. *Id.* § 54.

38. *Id.* § 71.

39. *Id.* § 58.

40. Act 63 of 1948, Factories Act, 1948, § 45.

41. *Id.* § 46.

42. *Id.* § 48. A "crèche" is defined by the Factories Act as "a suitable room or rooms for [workers'] children who are under the age of 6 years." *Id.*

43. Act 11 of 1948, Minimum Wages Act, 1948.

44. Minimum Wages (Central) Rules, 1950.

45. Minimum Wages (Tamil Nadu) Rules, 1953.

46. Minimum Wages (Undisbursed) Amounts (Tamil Nadu) Rules, 1963.

47. See Minimum Wages Act, 1948, § 3.

laws.⁴⁸ The Minimum Wages Act, in addition to creating a Central Advisory Board to administer the law,⁴⁹ assigns specific penalties for certain offenses, including monetary fines and imprisonment.⁵⁰

Another legislative act that is intended to protect workers is the Industrial Disputes Act, 1947,⁵¹ whose goal is "to provide machinery for a just and equitable settlement of industrial disputes by negotiation and conciliation and thereby achieve industrial peace and economic justice."⁵² One of the Act's specific aims was "to provide job security to workers in industrial establishments."⁵³ The Industrial Disputes Act defines "industry" for the purpose of its application⁵⁴ and administers specific guidelines for lock-outs,⁵⁵ strikes,⁵⁶ and sets requirements for compensation to workers who have been "retrenched."⁵⁷ Additionally, the Act sets penalties for illegal strikes and lock-outs⁵⁸ and provides for boards of conciliation,⁵⁹ courts of enquiry,⁶⁰ and Industrial Tribunals⁶¹ to review and resolve all

48. *See id.* § 19.

49. *See id.* § 8.

50. *See id.* § 22.

51. Act 14 of 1947, Industrial Disputes Act, 1947.

52. *Id.* § 1.

53. *Id.* § 1.

54. *Id.* § 2(j). Defines "industry" as "any business, trade, undertaking, manufacture or calling of employees and includes any calling service, employment, handicraft, or industrial occupation or avocation of workmen." *Id.*

55. *Id.* § 2(l). Defines "lock-outs" as the "temporary closing of a place of employment, or the suspension of work, or the refusal by an employer to continue to employ any number of persons employed by him." *Id.*

56. *Id.* § 2(q). Defines "strikes" as the "cessation of work by employees of an industry acting in combination, or a concerted refusal to work or accept employment with a common understanding among the employees." *Id.*

57. Act 14 of 1947, Industrial Disputes Act, 1947, § 2(00). Defines "retrenchment" as the "termination of the service of a workman by the employer for any reason whatsoever, otherwise than as punishment inflicted by way of disciplinary action (i.e. termination of service as a punishment in a disciplinary is not retrenchment)." *Id.*

58. *Id.* § 26.

59. *Id.* § 5. This section empowers "the appropriate government to constitute boards of conciliation to promote settlement of industrial disputes. The board shall consist of one chairman and 2 or 4 members. The chairman shall be an independent person and the members shall be appointed in equal numbers to represent the parties in dispute (employer and employees)." *Id.*

60. *Id.* § 6. This section empowers "the appropriate government to constitute a court of enquiry, when occasion arises for that, for enquiring into any matter connected with, or relevant to an industrial dispute. The court may consist of one independent person or such more persons as the appropriate government may

industrial labor disputes.

Finally, the Maternity Benefit Act of 1961⁶² addresses the role of women in the industrial sector, establishing a benefit of pregnant workers' average daily wages during their absence six weeks before and six weeks after giving birth or miscarrying,⁶³ and protects them from dismissal during their maternity period.⁶⁴ Additionally, the Act provides a medical stipend from her employer if that employer has not otherwise provided for her medical care.⁶⁵ After returning to the job, the worker is permitted two daily breaks to nurse her child until that child reaches 15 months.⁶⁶

B. Obstacles to Enforcement: The Harsh Realities of India's Labor Conditions.

The breadth of these legislative acts suggests that India is a nation where the rights of industrial workers are closely guarded by the government. However, the reality of Indian labor conditions reveals something quite different. In 1997, a survey ordered by the Indian Supreme Court of child labor throughout the country was completed and documented the existence of nearly "150,000 wage-earning child laborers."⁶⁷ An non-governmental organization ("NGO") survey conducted in 1997 reported that as many as "111 million children (almost one in every three) [were] involved in some form of child labor that accounts for 20% of India's Gross National Product."⁶⁸

thinks [sic] fit . . . The court will enquire into the matters referred to it and ordinarily submit its report within 6 months. The report shall be in writing and signed by all the members. Its report is recommendatory in nature. It has no power to pass any award. It cannot enquire into any matter which is not referred to it." *Id.*

61. *Id.* § 7(a). This section empowers "the appropriate government to constitute one or more Industrial Tribunals for the adjudication of industrial disputes relating to any matter specified in the second schedule, or the third schedule, or to perform such other functions as may be assigned to them under the Act . . . An Industrial Tribunal . . . is only an ad-hoc body, i.e. it is constituted only for a particular case and is not a permanent tribunal."

62. Act 53 of 1961, The Maternity Benefit Act, 1961.

63. *See id.* § 4.

64. *See id.* § 4.

65. *See id.* § 26.

66. *Id.* § 6.

67. India Country Report, *supra* note 12.

68. Child Labor and Education in India, at <http://eric.tcs.tulane.edu/~afeinst/labor.html> (last visited Nov. 15, 1999). The difference in numbers reported by this

Labor policy analysts working in India estimate that there are currently about 70,000 child laborers in the garment industry alone.⁶⁹ The ILO estimates that there are approximately 44 million child laborers in India.⁷⁰ A confederation of unions in 124 countries has reported that "there were an estimated 55 million child workers in India despite legislation to outlaw the practice."⁷¹ Between the enactment of the Bonded Labor (Regulation and Abolition) Act in 1979 and March 31, 1993, 251,424 bonded workers were released from their obligations, with some states claiming that in excess of 25,000 such laborers currently remain in bond.⁷² In total, the United States Department of State estimates that over 90 percent of the Indian workforce, for various reasons, are not subject to the highly progressive Indian labor laws typified by The Factories Act, 1948,⁷³ leaving the fate of the vast majority of Indian workers in the hands of non-governmental entities.⁷⁴

Several systemic obstacles arise when addressing the problems of child and bonded labor (as well as recurring violations of Indian labor condition laws) through domestic Indian legislation and enforcement thereof. For example, "the continuing prevalence of [Indian child labor] may be attributed to social acceptance of the practice and to the failure of state and federal governments to make primary school compulsory."⁷⁵ The fact that Indian "[p]rimary school education is not compulsory, free, and universal"⁷⁶ leaves children vulnerable as those

survey and the one noted above at note 67 is attributable to the inclusion of child agricultural laborers, who account for 86% of the total number reported and are omitted from the India Country Report as agricultural workers are the most difficult to maintain accurate records of. *Id.* See India Country Report, *supra* note 12.

69. Josephine Bow, *Asia's Fertile Fields (Labor Conditions in the Garment Industry)*, WOMEN'S WEAR DAILY, May 1, 1996, at 8.

70. India Country Report, *supra* note 12.

71. Clare Nullis, *Labor Boycott to Target Products Made By Children*, CHICAGO SUN-TIMES, June 15, 1994, at 41.

72. India Country Report, *supra* note 12.

73. *Id.*

74. A stark example of the inapplicability of sweeping Indian legislative acts in this sphere is offered by the 1986 Child Labour Act, which was "designed to target children in hazardous industries" and is "so narrowly focused that it excludes more children than it includes. Fully 92 percent of all working children in India are not covered by the Act." See Tackling Abuses: Indian Government Action on Child Labour, MNC Masala, Corporate Watch Features, at <http://mnc-masala.corpwatch.html> (last visited Mar. 21, 2000).

75. India Country Report, *supra* note 12.

76. *Id.*

"sent from their homes to work because their parents cannot afford to feed them, or in order to pay off a debt incurred by a parent or relative, have little choice in the matter."⁷⁷ In 1997, MNC Masala⁷⁸ noted that "[t]he problem of educational deprivation in India is critical."⁷⁹ It is almost certain that India has entered the 21st century with nearly half its population (and more than 60 percent of its women) illiterate.⁸⁰ In 1995, an estimated 78 million primary school age children in India (between six and 11 years) were not in school.⁸¹ There is currently no general law governing compulsory education in India and in the one state (Tamil Nadu) that has passed such a law, it has yet to be implemented.⁸² Additionally, parents who may wish to seek out an education for their children may be discouraged by the widespread employment of sub-standard educators in India.⁸³ But generally, this concern seems to be overshadowed by that of income poverty. According to a press report in June, 1998, "parents in Orissa allegedly are selling their children to contractors for \$20 to \$38."⁸⁴ Government officials claim that nothing can be done in such cases as the children are going "with their parents' consent."⁸⁵ In short, one significant failing of the system is society's acceptance of child labor.⁸⁶ India's acceptance drives the market's demand for child labor as "employers prefer child labour because it is

77. *Id.*

78. MNC Masala is a non-governmental organization that studies the effects of globalization on India's economy and workforce. The group issues reports of its findings and advocates specific measures to combat the negative impact of globalization. See MNC Masala, Corporate Watch, at <http://www.igc.apc.org/trac/feature/india/index.html> (last visited June 1, 2000).

79. Persistent Deprivation, MNC Masala, Corporate Watch Features, at <http://mncmasala.corpwatch.html> (last visited Mar. 21, 2000).

80. *Id.* Accurate statistics regarding illiteracy in India on January 1, 2001 have not yet been compiled.

81. *Id.*

82. *Id.*

83. MNC Masala reported that in 1997, 4 out of every 5 primary school teachers in India have failed a Standard 5 Test, and 2 out of every 3 primary school teachers in India could not give a correct title to a paragraph. See Human Index, MNC Masala, Corporate Watch Features, at <http://www.igc.apc.org/trac/feature/india/stats/human1.html> (last visited Mar. 21, 2000).

84. India Country Report, *supra* note 12. Orissa is a coastal state in India that borders on the Bay of Bengal and includes the port cities of Bhitarkanika and Puri.

85. *Id.*

86. See *id.*

cheaper than adult labour and because children, unlike adults, cannot question the treatment meted out to them."⁸⁷ Additionally, "[e]vidence indicates that the child's wage . . . is a third to a half that of adults for the same output, with the child working for as many, if not more, hours than the adults."⁸⁸

Exceptionally lax enforcement methods pose another significant impediment to preventing the spread of sweatshop operations.⁸⁹ It is conceded that "[a]lthough occupational safety and health measures vary widely, in general, neither state nor central Government resources for inspection and enforcement of standards are adequate."⁹⁰ According to an employee at the Punjab Labour Department, "[w]e have very good labour laws but the implementation is lacking because of a lack of political will at state level."⁹¹ An officer for an NGO operating in Punjab noted that "[t]here is very little faith left in the Labour Department among the workers."⁹² Perhaps most significantly, an officer at the Indian Human Rights Commission stated that "[w]e should promote the involvement of sincere and dependable NGO groups because where there are government inspectors there is corruption."⁹³ In the absence of consistent government monitoring of garment factories for compliance with Indian law, factory owners and managers are effectively left with the power to further cut their production and labor costs by ignoring legal requirements such as minimum wages, overtime compensation and creches.⁹⁴

III. GLOBAL APPROACHES

In the face of individual states' failure to effectively address the issue of oppressive factory working conditions, the international community has responded with global regimes aimed at stamping out the elements of sweatshop operations.⁹⁵ These efforts, however, have met with no more suc-

87. Tackling Abuses, *supra* note 74.

88. *Id.*

89. See India Country Report, *supra* note 12.

90. *Id.* See also note 14.

91. Tackling Abuses, *supra* note 74.

92. *Id.*

93. *Id.*

94. See India Country Report, *supra* note 12.

95. See SAARI, *supra* note 17, at 154.

cess than the aforementioned Indian domestic measures.⁹⁶ First, it is necessary to identify the relevant efforts of the international community to address the sweatshop issue. Second, it is pertinent to examine the factors that have caused these efforts to fail. Finally, the note will discuss how individual corporate monitoring programs have successfully addressed the problems of sweatshop operations using the case specific approach.

To address the specific issue of child labor, the United Nations Convention on the Rights of the Child⁹⁷ "explicitly recognized the right of the child to be protected from economic exploitation"⁹⁸ in Article 32 of the Convention.⁹⁹ Such exploitation included "work that interferes with a child's education [and work that is] harmful to a child's health or physical, mental, spiritual, moral, or social development."¹⁰⁰ Similarly, the ILO has promoted the creation of "international labor standards" deliberating over "those standards which will become international labor Conventions or Recommendations."¹⁰¹ The ILO created a framework that permits member nations to file complaints against other member nations alleging non-compliance with the ILO's labor standards and allows the ILO's governing body to review them.¹⁰² The ILO claims that its standard-setting function draws its effectiveness "from the constant search for consensus between public authorities and the principal interested parties, namely employers and workers."¹⁰³

The ILO ultimately encounters the same problem of national sovereignty that the United Nations faces in attempting to enforce its decisions and standards, even on member nations.¹⁰⁴ Article 2(7) of the United Nations Charter specifical-

96. See discussion *infra* Part II.B.

97. GA Res. 44/25, November 20, 1989, entered into force September 2, 1990.

98. SAARI, *supra* note 17, at 154.

99. GA Res. 44/25, *supra* note 97, art. 32.

100. SAARI, *supra* note 17, at 154.

101. International Labour Organization: International Labour Standards and Human Rights, at <http://www.ilo.org/public/english/50normes/standard.htm> (last visited Feb. 6, 1998).

102. See *id.*

103. *Id.*

104. See UNITED NATIONS CHARTER, art. 2, para. 7. For the purpose of this Note, national sovereignty, as a factor preventing U.N. members from enforcing resolutions concerning labor condition standards, is characterized by the language of Article 2(7), which reads:

ly states that matters "within the domestic jurisdiction of any state" do not fall within the United Nations' enforcement jurisdiction.¹⁰⁵ A nation's regulation of its industrial labor force and garment factories clearly falls within the boundaries of domestic regulation. Although the United Nations, through several conventions and declarations has gradually moved towards a qualified view of national sovereignty,¹⁰⁶ these actions specifically addressed issues such as "the rights of women, children, refugees, migrant workers, stateless persons, minorities, prohibition of torture, racial or religious discrimination, right to development and peace, etc."¹⁰⁷ As a result, the international community seems reluctant to undermine national sovereignty in addressing the sweatshop issue. Although there appears to be a move towards humanitarian interventionism, as evidenced by NATO's operations in Kosovo in 1999, Article 2(7) still governs international conduct regarding human rights and sovereignty.¹⁰⁸

Another problem that plagues the ILO is what Henry Kissinger referred to as an "appallingly selective concern in the applications of the ILO's basic conventions on freedom of association and forced labor,"¹⁰⁹ which Mr. Kissinger argues "strengthens the proposition that these human rights are . . . subject to different interpretations for states with different political systems."¹¹⁰ Combined with the fact that not all

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Id.

105. *Id.*

106. The United Nations' protracted handling of South Africa's policy of Apartheid is perhaps the most striking example of the international community's slow progress towards embracing proactive measures in response to traditionally domestic issues. For an effective analysis of this process, see Louis Sohn, *Interpreting The Law*, in UNITED NATIONS LEGAL ORDER 169, 211 (Oscar Schachter & Christopher Joyner, eds., 1995).

107. Abdulrahim P. Vijapur, *No Distant Millennium: The UN Human Rights Instruments and the Problem of Domestic Jurisdiction*, 35 INDIAN J. INT'L L. 51, 57 (1995).

108. See UNITED NATIONS CHARTER, *supra* note 104, at art. 2(7).

109. Walter Galenson, U.N. Studies: The International Labor Organization: Mirroring the U.N.'s Problems, 7.

110. *Id.*

member states ratify each treaty, this selectivity in addressing these violations is particularly troubling in that failure to ratify does not insulate a nation from complaints filed by other states regarding freedom of association.¹¹¹ India has not ratified ILO conventions created in 1937, 1957, and 1973 regarding forced labor and minimum age standards for industry.¹¹² However, another ILO member state could, under the framework created for addressing member states' non-compliance with ILO standards, bring an action against India for violating the terms of one of these conventions. Consequently, the absence of universally accepted standards as manifested in a series of universally ratified conventions, and in tandem with a universally enforced standard, renders the enforceability of global labor standards aspirational at best. The addition of asserted sovereignty into this equation makes a given nation's cooperation vital and renders the independence of the system null and void. To effectively address the sweatshop issue, the industry players have to take the initiative, as they are the ones providing the incentive for the lowest possible costs of production and thus, creating the conditions for sweatshops to thrive.¹¹³

IV. THE MARKET-BASED SOLUTION

The aforementioned failures of domestic and international legal measures to effectively police illegal sweatshops has largely left the issue in the hands of the corporations whose licensing agreements fuel the system.¹¹⁴ "Today the emerging issue is how do you hold private companies accountable for the treatment of their workers at a time when government control is ebbing all over the world."¹¹⁵ The impetus for self-policing by designers and retailers has primarily to do with preserving

111. See *id.*

112. See International Standards Department, ILO/Geneva, at <http://www.ilo.org/public/english/50normes/standard/htm> (last visited Feb. 6, 1998).

113. See Andrew Ross, *Introduction to NO SWEAT: FASHION, FREE TRADE, AND THE RIGHTS OF GARMENT WORKERS* 25 (1997).

114. See *id.* at 23.

115. Thomas L. Friedman, *The New Human Rights*, N.Y. TIMES, July 30, 1999, at 19.

their self-image in an industry driven by image.¹¹⁶ One commentator said:

Media interest has been kindled by the spectacle of blue-chip names in retail and design being embarrassed by revelations about the exploited labor behind their labels. In the wake of the publicity scandals, some companies have been pressured to implement codes of conduct and to consider facilitating independent monitoring of labor conditions in their contractors' plants.¹¹⁷

The United States is currently the world's largest importer of garments, importing them from over 150 different countries, many of which are considered "underdeveloped."¹¹⁸ Many garments are manufactured through licensing agreements with major American retailers and designers and are produced in factories throughout the developing world.¹¹⁹ In recent years, the media and workers' rights advocates have held these licensors publicly responsible for the adverse working conditions that have been discovered in many of the factories where their garments are made. The failure of local authorities in the manufacturers' nation to police factory conditions through enforcement of local and national laws has left the American corporations vulnerable to charges of complicity in the perpetuation of these conditions.¹²⁰ In response to this, some garment companies have adopted corporate codes of conduct and instituted independent monitoring programs to supervise the conduct of their suppliers' factories. Codes of conduct are formal policies which purport to shape corporate conduct in certain ways.¹²¹ Most corporate codes of conduct address the classic sweatshop issues, such as child and involuntary labor, discrimination, coercion and harassment, health and safety, and compensation.¹²² The code, once prepared, is translated

116. See Blackwell, *supra* note 3, at 102.

117. Ross, *supra* note 113, at 31.

118. Emmelhainz & Adams, *supra* note 21.

119. See *id.*

120. See Alan Rolnick, *The Saipan Saga: Why It Could Have Far-Reaching Impact*, BOBBIN, June 1, 1999, at 65.

121. See Jill Murray, *Corporate Codes of Conduct and Labour Standards*, International Labor Organization: Bureau For Workers Activities, at <http://www.ilo.org/public/english/230actra/publ/codes.htm> (last visited Feb. 6, 1998).

122. See Alan Rolnick, *Muzzling the Offshore Watchdogs*, BOBBIN, Feb. 1, 1997, at 72.

into the languages¹²³ spoken in the offshore contractor's factory and posted where all of the workers can view it.¹²⁴ The code of conduct serves to clearly state the licensor's conditions for doing business with that specific licensee and promotes the licensee's compliance through incessant threat to terminate the licensing agreement, often stated in the code or in ancillary contracts which formalize the licensing relationship.¹²⁵

To ensure that licensees are complying with these codes, licensors often use independent supplier monitoring programs, in which factory condition auditors are sent to specific factories by the licensor to report on its present conditions, ensuring that the licensee is complying with the licensor's code of conduct and all applicable local laws.¹²⁶ As the western firms may be held accountable for any abuses occurring in their suppliers' factories (by informed consumers through the potential loss of sales due to the negative publicity caused by disclosures of these abuses), knowledge of these abuses gives the licensors the choice of taking immediate and definitive corrective action, such as terminating the suppliers' contracts.¹²⁷ One such program, the "Global Sourcing and Operating Guidelines" program,¹²⁸ implemented in 1992 by Levi Strauss & Company was examined as a model supplier monitoring program by an International Forum on labor conditions in garment industry factories held in Belgium in 1998.¹²⁹

The Forum used the Levi Strauss program as a model specifically because it was one of the earliest programs of its kind.¹³⁰ Although criticizing Levi Strauss' deference to local minimum wage laws, rather than insisting on a "living

123. Many factories in relatively prosperous nations such as Taiwan and Hong Kong (with smaller number of native industrial-level workers) use recruiting agencies to hire workers from other, poorer nations. As a result, many of these factories employ significant numbers of workers, speaking numerous languages, who may not comprehend code of conduct posters in only the native language of the factory's location.

124. See Rolnick, *supra* note 122, at 72.

125. See *id.*

126. See *id.*

127. See Body of Knowledge, PR Central, Levi's Responsible Sourcing Guidelines, at <http://www.prcentral.com/c95levi.htm> (last visited Feb. 23, 2000).

128. International Forum, *supra* note 23.

129. See *id.*

130. See *id.*

wage,”¹³¹ the Forum generally praised Levi Strauss for its effort to “establish norms of behavior for multinationals which seek to follow ethical standards, legal requirements, environmental requirements, employment standards and certain levels of community involvement.”¹³² However, the most important finding of the Forum in examining the Levi Strauss program was the intrinsic value of an independent monitoring program, in contrast to a company-administered one. In spite of the contention of Levi’s executives, who thought that Levi Strauss personnel were best suited to inspect suppliers’ factories, the Forum concluded, based upon information gathered in Levi Strauss’ Asian supplier factories, that workers in those factories naturally associate Levi’s representatives with their own bosses, “whom they fear.”¹³³ The inherent trust they would give independent monitoring teams would result in more accurate audits of the factory conditions and would allow Levi Strauss to take any action necessary upon an accurate accounting of those conditions.¹³⁴ Based upon a precise accounting, the company is able to communicate its requirements for change to the factory to pressure the factory into compliance with local law.¹³⁵ Other companies, such as The Gap, have been lauded for their use of independent monitoring programs rather than relying on company-employed auditors.¹³⁶

The success of independent monitoring programs in garnering positive media attention¹³⁷ such as that employed by The Gap has prompted garment industry companies to join forces to promote a uniform, industry-wide code of conduct and principles of monitoring.¹³⁸ Perhaps the clearest evidence of the industry’s trust in codes of conduct and factory monitoring programs is the central role they played in the recent settlement of the class action suit stemming from allegations of corporate complicity in alleged labor abuses in the Northern

131. *Id.*

132. *Id.*

133. *Id.*

134. See International Forum, *supra* note 23.

135. See *id.*

136. See Blackwell, *supra* note 3, at 101.

137. See *id.*

138. See Preliminary Agreement Charter Document Fair Labor Association, Prepared by Apparel Industry Partnership, at <http://www.lchr.org/sweatshop/aipfull.htm> (last visited Sep. 18, 1999).

Marianas.¹³⁹ The suit, which alleged that the defendant firms had participated in a “racketeering conspiracy,”¹⁴⁰ uncovered extensive violations of labor law in the factories and workers’ quarters.¹⁴¹ These findings were widely reported by the media¹⁴² and the resulting negative publicity convinced the defendants to settle rather than defend themselves in prolonged litigation.¹⁴³ In the settlement, an independent factory auditing firm was designated to make unannounced visits to observe factories in their ordinary operations in the Northern Marianas.¹⁴⁴ This suit raised the issue of factory conditions in a setting where local law does little to mitigate sweatshop working conditions¹⁴⁵ and resolved in a settlement to institute a privately administered, independent monitoring program.¹⁴⁶ Although the suit may have heightened legislative awareness of the sweatshop issue in the United States,¹⁴⁷ the significant fact is that the industry regulated itself in the absence of any truly effective legal framework. The success of internal corporate regulation is important when predicting the success of private factory monitoring in a country such as India, where laws have consistently failed to correct sweatshop factory conditions.¹⁴⁸ Furthermore, the faith that NGOs have placed in independent monitoring programs outside the garment industry provides an important insight to the value of such programs in India.¹⁴⁹

139. See Robert Collier, *Apparel Firms Settle Suit on Sweatshops: A First Step To Correct Labor Abuse On Saipan*, SAN FRANCISCO CHRONICLE, Aug. 10, 1999.

140. *U.S. Firms Face ‘Racketeering’ Charges*, BBC News - BBC Online Network, at http://news.bbc.co.uk/1/hi/english/world/americas/newsid_254000/254854.stm (last visited May 26, 2000).

141. See *Beneath the American Flag: Labor and Human Rights Abuses in the CNMI*, at <http://www.house.gov/resources/105cong/democrat/cnmifin.html> (last visited May 26, 2000).

142. See *Is This The USA? Behind the Trusted ‘Made in the USA’ Label* - ABCNews.com OnAir, Transcript, at http://www.mach3www.com/trs13/public_html/2020.html (last visited Sep. 18, 1999).

143. See Collier, *supra* note 139.

144. *Doe I et al. v. The Gap, Inc. et al.*, C.D. Cal. No. CV-99-00329-CAS (AJWx) (1999).

145. See *Beneath the American Flag*, *supra* note 141.

146. See *Doe I et al. v. The Gap, Inc. et al.*, C.D. Cal. No. CV-99-00329-CAS (AJWx) (1999).

147. See California’s Bill to Stop Sweatshops, *supra* note 6.

148. See *Almost Everything You Always Wanted To Know About Independent Monitoring*, Clean Clothes Campaign, at <http://www.cleanclothes.org/codes/monitoring-long.htm> (last visited Mar. 21, 2000).

149. See THE ENRON CORPORATION: CORPORATE COMPLICITY IN HUMAN RIGHTS

Private measures taken by the western licensors are not subject to the issues of societal acceptance of sweatshop conditions,¹⁵⁰ nor to the failure of legal enforcement instruments to carry out meaningful enforcement of Indian labor law.¹⁵¹ Factory licensees in India are given a set of conditions with which they must comply to enjoy the benefits of a licensing agreement with a well-known western corporation.¹⁵² Furthermore, these conditions are prominently posted in the factory so that workers are aware of their rights.¹⁵³ The workers are also aware that the licensor has made the factory owners' observance of the workers' rights a condition of pursuing business under the license, so that interviews by factory auditors with workers may elicit pointed responses identifying abuses that have been hidden by the factory's management.¹⁵⁴ Therefore, the on-going threat of unannounced visits by monitoring teams provides the motivation for the factory owners to ensure that the code of conduct is being followed, simply as a price of doing a lucrative business with the licensor. These pressures work independently of the legal system, so that the weaknesses in the legal structures which address labor issues (such as corrupt inspectors or insufficient funds to carry out effective state-ordered factory inspections)¹⁵⁵ will not be reflected in the attitude of factory managers towards working conditions and the necessary correction will take place.

VIOLATIONS 5 (Human Rights Watch, 1999). In response to large-scale demonstrations over the business practices of a major Western energy company in the Indian state of Maharashtra, local police carried out mass arrests and beatings of the organizers and protestors. The corporation's role in co-opting the local authorities to suppress dissent against the company's operations led Human Rights Watch, a prominent NGO, to issue a list of recommended courses of action to the Indian government as well as to Enron. Among the recommendations to Enron was the request to "[a]llow independent verification, by national and/or international NGO's, of compliance by the company with international, national, and state-level human rights and environmental standards. *Id.*

150. See India Country Report, *supra* note 12.

151. See discussion *infra* Part II.B.

152. See Emmelhainz & Adams, *supra* note 21.

153. See Corporate Codes of Conduct and Labour Standards - International Labour Organization Bureau for Workers' Activities, at <http://www.ilo.org/public/english/dialogue/actrav/publ/codes.htm> (last visited June 1, 2000).

154. See *id.*

155. See discussion *infra* Part II.B

The real and perceived independence of the monitoring systems themselves will ultimately decide if lasting change can be achieved, or if these programs will simply evolve into a means of controlling negative publicity for western licensors without producing any significant improvement. Many of the programs currently in use are administered directly by the licensors or their legal representatives¹⁵⁶ and may lend themselves to charges of superficiality by critics.¹⁵⁷ The significant result of the Saipan litigation¹⁵⁸ is the enforcement of a monitoring program that is completely independent of the licensors or the factory owners involved in the suit.¹⁵⁹ The program will include "unannounced factory visits and investigation of complaints by workers"¹⁶⁰ and will be administered by a non-profit monitoring firm rather than quality assurance divisions of the licensors.¹⁶¹ This move towards monitoring programs that are not answerable to licensors or factory owners has been described as "a good faith effort to further [licensors'] commitment to using vendors who comply with the law."¹⁶² However, to ensure that the potentially suspect agenda of the licensors is not simply replaced by the specific agenda of a single monitoring firm,¹⁶³ competition within the monitoring field may be necessary to preserve objectivity.

156. See Almost Everything, *supra* note 148.

157. See *What's Fair about the Fair Labor Association?*, Global Economy, at <http://www.globalexchange.org/economy/corporations/sweatshops/fla.html> (last visited Mar. 21, 2000).

158. See *Doe I et al. v. The Gap, Inc. et al.*, C.D. Cal. No. CV-99-00329-CAS (A.J.W.x) (1999).

159. See Steven Greenhouse, *supra* note 10.

160. *Id.*

161. See *id.*

162. *Id.*

163. In an editorial in her firm's magazine intended to define independent monitoring, Verité's founder, Heather White, focused exclusively on monitoring programs in China. In the article, she makes sweeping claims such as "China poses the biggest monitoring challenges," and "[m]anaging monitoring programs in China using the Verité model of worker interviews is complex because the government is opposed to human rights work conducted within its borders." See Heather White, *Defining Independent Monitoring*, MONITOR, Winter 1999, Issue 2, at 3. White's focus on political matters rather than specific factory labor conditions in China indicates a basic philosophical stance that may lead to efforts to change national labor laws rather than assisting the companies who contract with her firm in enforcing them.

The firm chosen by the litigants to audit factories in Saipan, although respected by the garment industry,¹⁶⁴ exists largely without competition other than the quality assurance departments of industry licensees. This situation may lend itself to the imposition of that firm's personal philosophy of labor policy on the daily concerns of the management of these factories, rather than its reliance on the wisdom of the national legislatures and labor agencies (and their inherent consideration of social issues particular to their regions) in formulating labor policies that are compatible with the people who are subject to them. Ultimately, the continued success of independent monitoring may depend upon the creation of competing firms that, through competition, can push each other towards objective resolutions of sweatshop conditions rather than pressuring licensors and licensee factories into specific philosophical policy decisions.¹⁶⁵ This is not to say that licensor responses to violations need always be deferential to the host state's labor laws. One of the remarkable attributes of independent monitoring programs is how they provoke change in a state's laws, the enforcement thereof, and the general attitude of a state's government towards the perception of their actions (or inaction) with regards to human rights held by the consuming public.¹⁶⁶

In response to the heightened attention paid to substandard factory conditions within its borders and in the global market, the Indian government has taken steps towards improving its record on labor abuses.¹⁶⁷ In 1998, the Indian government renewed its agreement with the ILO's International Programme on the Elimination of Child Labour and has acted to aggressively remove children from the the workforce.¹⁶⁸ Additionally, the number of NGO's working in India to solve the child labor problem has risen from seven in 1990 to over 700 in 1999.¹⁶⁹ To alleviate the economic hardship families endure when a child is removed from his or her job, the Indian government is now obliged to pay a significant subsidy to such

164. See Collier, *supra* note 139.

165. See *supra* text accompanying note 163.

166. See *All About Independent Monitoring*, Clean Clothes, at <http://www.cleanclothes.org/1/monitor1.html> (last visited Sep. 16, 2000).

167. See *Tackling Abuses*, *supra* note 74.

168. See *id.*

169. *Id.*

families if alternative employment cannot be found for an adult in that child's family.¹⁷⁰ The law imposes significant fines against employers who violate the 1986 Child Labour (Prohibition and Regulation) Act and uses the money to finance that child's education.¹⁷¹ This is a small, but identifiable step towards universal primary education, which "helps keep children out of the workforce."¹⁷²

V. CONCLUSION

F.A. Hayek wrote that the "fundamental principle that in the ordering of our affairs we should make as much use as possible of the spontaneous forces of society, and resort as little as possible to coercion, is capable of an infinite variety of applications."¹⁷³ The treatment of sweatshops in the global marketplace bears this out. What began in response to "a public relations nightmare"¹⁷⁴ has turned into an effective solution for an issue that legal systems, both national and international, have failed to confront definitively. The market, having created the problem, can eradicate sweatshops by rendering this practice unprofitable. The western clothing retailers and designers who have sought out the cost-saving benefits of producing their goods in the developing world have the power to withhold their business from scofflaw factory operators. In response to the market's reaction to this issue, governments and international regimes are now improving their enforcement mechanisms to provide relief for workers laboring under sweatshop conditions, lest these governments be perceived as unresponsive. Perhaps in cooperation with these national and local governments, corporations can effect systemic change that will improve factory conditions generally by raising the overall factory condition standards and the expectations of their colleagues and competitors. Additionally, the efforts by garment manufacturers to unify their enforcement/monitoring programs marks a departure from the belief that private industries should take their behavioral cues from the legal system and

170. *See id.*

171. *See id.*

172. *Id.*

173. F.A. HAYEK, *THE ROAD TO SERFDOM* 21 (1994).

174. Shawn Meadows, *Will Saipan Legal Battle Stretch the Limits of Liability?*, BOBBIN, May 1, 1999, at 16.

points towards a self-governing system where market forces speak sufficiently loud to bring about much-needed change in the lives of garment factory workers.