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 discusna5o (n)-5 m (S-e)-4.2 (8(.)]TJ 0 0w *Responsibility*, G

LOBAL 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].

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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

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,

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

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.

be interpreted so as to accomplish "tangible results" for the people affected by business practices and to promote sustainable development.[96] The United

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

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.

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, 2007 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 p*roposition 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 p*roposition 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 p*roposition 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].

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,

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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 notitione 0 Tc 0 Tw 6.96 -0 0 6.96 403.08 681.2 640

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 Act[175] 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/hrg.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 dom

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 be5.3 (p es8 (nc)0.8n34.1(i)5.2 (n4 (eckHxud2 (e)0.8 (i)16.7 83.4 (ound l)5.3 94.227

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