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THE SELF-REGULATING CORPORATION: HOW CORPORATE CODES CAN SAVE OUR CHILDREN

*Natasha Rossell Jaffe**

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INTRODUCTION

The explosive growth and concomitant deregulation of the global economy has produced a myriad of social issues not sufficiently accounted for by state domestic laws or international legal systems. Among the more abhorrent social problems created and proliferated by the existence of a global economy lacking global regulation is the insidious practice of exploiting child labor. Built on the shoulders of the technology boom and expansion of the multinational corporation (“MNC”), the global village operates without a sheriff. In this village, where a premium is placed upon the ethic of profit maximization, where an endless cycle of hosts offer up their young behind closed doors and beyond the reach of those who care, children are being put to work.

The purpose of this note is to both draw attention to the negative interplay between the proliferation of the MNC and the abusive employment of child labor, and to advocate a practical solution to the problem. Part I of this note provides a brief history of the practice of child labor, highlighting the shift in the social utility that once accompanied the practice. Part II maps out the emergence of the MNC. Here, the focus is on the modern incarnation of the MNC and on exploring the sociopolitical factors that preclude effective legal control. Part III examines the more significant mechanisms historically used to

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combat problems such as the work of international and non-governmental organizations (“NGOs”), as well as the recent use of consumers as a tool of corporate change. As this note reveals, few of these methods have been, or have any hope of being independently effective. Part IV introduces the concept of self-regulation through corporate codes. It examines the strengths and weaknesses of this form of corporate control and analyzes how it may likely succeed in areas where global law enforcement has failed. Lastly, Part V sets forth the argument that corporate codes, while flawed, are the only practical solution to the problem of child labor, and concludes with suggestions for ensuring their effectiveness.

I. THE PROBLEM OF CHILD LABOR

Child labor has been utilized throughout history.¹ With its benign roots in agrarian society, the practice of employing child labor became increasingly noxious with the onslaught of the industrial revolution. The British were the first to take notice of this trend, and by the early 19th century enacted their first child labor laws.² At the same time in the

1. There is no internationally endorsed definition of child labor or universally prescribed methodology for collecting data on child labor. Therefore, this note will utilize the definition of child labor delineated in the United Nations Convention on the Right of the Child. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR Annex, U.N. Doc. A/44/736 (Nov. 20, 1989), *reprinted in* 28 INTERNATIONAL LEGAL MATERIALS 1456 (1990). Under the convention, a child is defined presumptively as a person under the age of 18. It deplores child labor where it is “detrimental” to the child’s health, development, and education. Susan L. Pollet, *Outside Counsel: The Continued Exploitation of Child Labor at Home and Abroad*, N.Y. L.J. Apr. 15, 2004, at 4. However, this note was written with an appreciation that, [n]ot all work performed by children is detrimental or exploitative. Child labor does not usually refer to “light work,” after school work, or legitimate apprenticeship opportunities for young people. Nor does it refer to young people helping out in the family business or on the family farm. Rather, the “child labor” of concern is generally employment that prevents effective school attendance, and which is often performed under conditions hazardous to the physical and mental health of the child. Robert B. Reich, Secretary of Labor, U.S. Dept. of Labor, *The Apparel Industry and Codes of Conduct: A Solution to the International Child Labor Problem?* at 9 (1996), <http://www.dol.gov/ILAB/media/reports/iclp/apparel/apparel.pdf>.

2. The first law that was effective, the Factory Act of 1833, forbade the employment of children under the age of 9. It also limited the number of hours older children could work: between ages 9 and 13 the limit was nine hours per day; between ages 13 and 18 the limit was twelve hours. The law also provided for state

United States, the use of child labor had become prevalent, and by the 20th century, more than two million children in the U.S. had been put to work.³ With the beginning of the Industrial Revolution, children were forced to tend to the ever-growing number of machines that lined the then “modern” factory floors. These children worked for long hours with poor pay, and under extremely dangerous conditions.⁴

The problem of child labor has always been a divisive issue. Chicago School economist Gary Becker, for example, argued that “[p]utting children to work should be construed as a rational household decision given the available alternatives and should therefore be excluded from the realm of normative or ethical judgments.”⁵ This point, while overstated, does reveal an important social utility derived from the work of child laborers.

Many families rely on the income produced by their children and to that extent, when fair salaries are paid and the work conditions are reasonable, child labor can be, and often is, beyond ethical discussion. Today, however, in part as a result of the growth of MNCs, it is estimated that there are 246 million child laborers.⁶ Seventy-five percent of them perform hazardous jobs such as mining or working with chemicals, pesticides or dangerous machinery.⁷ According to the International Labour Office (“ILO”),⁸

inspections. However, the Factory Act applied only to the textile industry and exempted many other industries, such as shipbuilding and the mining of iron and coal.

Encyclopedia Britannica, Child Labour, available at <http://www.britannica.com/ebi/article-234147>.

3. *Id.*

4. *Id.*

5. Robert Crawford, *Soccer Balls Made for Children by Children? Child Labor in Pakistan*, INSEAD 5, available at http://www.hec.unil.ch/ocadot/CASES/soccer_case.doc (citing GARY BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (Univ. of Chicago Press 1976)). Moreover, there has been some criticism highlighting the ethnocentric quality of imposing child labor standards on a global community which lacks the requisite moral consensus; Karen Vossler Champion, *Who Pays for Free Trade? The Dilemma of Free Trade and International Labor Standards*, 22 N.C.J. INT’L L. & COM. REG. 181, 214-15 (Fall 1996).

6. *World Briefing United Nations: Millions of Children in Dangerous Jobs*, N.Y. TIMES, May 7, 2002, at 14.

7. Todd Pugatch, *Historical Development of the Sweatshop* (Apr. 30, 1998), <http://www.unc.edu/~andrewsr/ints092/sweat.html>.

8. The ILO will be discussed in greater detail later in this note. For a brief history

[i]t is estimated that there were some 211 million children ages 5 to 14 at work in economic activity in the world in 2000. This accounts for a little less than one-fifth of all children in this age group. About 73 million working children are less than 10 years old. The total economically active child population 5-17 years old is estimated at 352 million children.⁹

The Asia-Pacific region has the “largest number of child workers in the 5-14 [year old] age category at 127.3 million.” Sub-Saharan Africa has 48 million, while Latin America and the Caribbean come in third with 17.4 million.¹⁰

While the use of this labor seemingly occurs in the most desolate of places, its source can be traced to industrialized nations and even to our own shores.¹¹ Monsanto, for example, the second largest seed company in the world, is a U.S.-based MNC. In India alone, Monsanto employs 15,300 child laborers in its cottonseed production.¹² Nike Inc., the American based apparel company and “the world’s largest global marketer of athletic footwear . . . and equipment, . . . out-sources 97% of its footwear products to factories in four countries: China, Indonesia, Thailand and Vietnam. Those countries are all characterized by highly repressive and corrupt governmental regimes that provide little if any enforcement of their own labor laws.”¹³

In the last few years, the issue of child labor has once again moved to the forefront of the national consciousness.¹⁴ While the aforementioned figures indicate that the problem is far from solved,

see *infra* notes 66-68 and accompanying text; Pollet, *supra* note 1.

9. ILO, *Every Child Counts: New Global Estimates on Child Labour* (Apr. 2002), <http://www.ilo.org/public/english/standards/ipecc/simpoc/others/globalest.pdf>. This piece is an excellent source for information and statistics on child labor. We suggest that anyone who is interested in this subject visit this web site.

10. ILO, *Facts on IPEC's Strategy to Eliminate Child Labor*, http://www.ilo.org/public/english/standards/ipecc/publ/download/factsheets/fs_ipeccstrategy_0303.pdf (last visited Jan. 22, 2006).

11. *Id.*

12. India Committee of the Netherlands, *Child Labour and Trans-National Seed Companies in Hybrid Cotton Seed Production in Andhra Pradesh* (Apr. 24, 2003), <http://www.indianet.nl/cotssec2.html>.

13. Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 337, 399 (2005).

14. Amy Brecount White, *Putting an End to Sweatshops; Individual Consumers Really Can Make a Difference*, WASH. POST, Sept. 30, 1997, at E05.

recent legal and social developments hold promise for a brighter future.

II. THE DEVELOPMENT OF THE MNC AND THE LEGAL PARADIGM WHICH FAILS TO CONTROL IT

The use of child labor is a historically common practice made treacherous by the mechanization of production that accompanied the Industrial Revolution.¹⁵ Over the last fifty years, the employers of child labor have grown and spread beyond their humble beginnings; where once they brought local children to local factories, they now exist in far, foreign places, in all corners of the world, and, largely as a result of globalization, these corporations have slowly evolved into MNCs.¹⁶

A. The Multinational Corporation

The modern MNC is based on the Dutch and British East India Companies of the 17th century.¹⁷ While it is difficult to pinpoint the exact moment the MNC appeared, most economists and business historians place its emergence in the second half of the 19th century.¹⁸ As Professor Muchlinski explains,¹⁹ the history of the MNC can be neatly divided into three periods.²⁰ The first period, which began with

15. See *supra* notes 1-4 and accompanying text.

16. Joseph J. Savitsky & Shahid Javed Burki, *Globalization and the Multinational Corporation*, in THE JAPAN PROGRAM'S WORKING PAPER SERIES ON GLOBALIZATION, available at http://www.iadb.org/int/jpn/English/support_files/GLB%203%20Glob.and%20Multinational%20Corporation.pdf.

17. *Id.* at 5.

18. PETER T. MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 20 (Blackwell 1995).

19. Professor Muchlinski is a Professor of Law and International Business at the University of Kent, Kent Law School. He is the Principal Adviser to the United Nations Conference on Trade and Development (UNCTAD) on their major issues papers series concerning international investment agreements, and he has written many scholarly articles on the development of the MNC. University of Kent, Kent Law School, Professor Peter Muchlinski, http://www.kent.ac.uk/law/people/left_dept/muchlinski.htm (last visited Feb. 9, 2006).

20. Muchlinsky, *supra* note 18, at 20. Also, it should be noted that while Professor Muchlinski refers to the subject of his study as multinational enterprises because he wishes to avoid the strictures that the term multinational corporations implies, we use the term multinational corporations in a loose and non-restrictive way so that the

the creation of the “internationally integrated, privately owned manufacturing firm[,]”²¹ ended with the outbreak of World War I.²² The second period lasted until the start of World War II,²³ and the final, or third period, began in 1945 and continues through today.²⁴

The first period was dominated by the British.²⁵ However, because their major assets were located and managed overseas with no British-based assets or operations, the British companies of that period would not be considered MNCs today.²⁶ The second period saw the continued development of the MNC.²⁷ The growth of the MNC, however, was significantly hindered by the economic instability caused by World War I.²⁸ The third period is categorized by the “unprecedented importance of the multinational corporation in international production.”²⁹

The modern MNC is defined as a corporation or enterprise that manages production facilities in at least two countries.³⁰ There are three types of MNC.³¹ First, horizontally integrated multinational corporations manage production facilities that are located in different countries but produce the same or similar products.³² Second, vertically integrated multinational corporations manage production facilities in one or several countries in order to produce products that serve as input to its production facilities in another country or countries.³³ Lastly, diversified multinational corporations manage production facilities located in different countries that are neither horizontally nor vertically

difference between our use of the term in this work and that of Professor Muchlinski’s is only cosmetic.

21. *Id.*

22. *Id.*

23. *Id.* at 22.

24. *Id.* at 25.

25. *Id.* at 20.

26. *Id.* (although legitimate MNCs did exist in this period, many of them based in Germany).

27. *Id.* at 22-23.

28. *Id.* at 23.

29. *Id.* at 25. For a more detailed history of the MNC see *id.* at 20.

30. Wikipedia, *Multinational Corporation*, <http://en.wikipedia.org/wiki/MNC> (last visited Mar. 3, 2006).

31. *Id.*

32. *Id.*

33. *Id.*

integrated.³⁴

Today, the MNC is a dominant force in the global economy, and while it is certainly capable of great good, it has been shown that the opposite may also be true. As early as 1816, Thomas Jefferson warned against the proliferation of the corporation: “I hope we shall take warning from the example and crush in it’s [sic] birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws [of] our country.”³⁵ In hindsight, Jefferson’s concerns seem prophetic.

As of 2003, more than 65,000 multinational corporations were doing business and controlling assets in more than one country [Multinational corporations] increased their number of exports from 25 percent in the 1980s to one-third in the 1990s. [Multinational corporations] participate in over 60 percent of world trade, playing a significant role in production, distribution, and sale of products from developing and developed countries alike. Sales of the largest 100 multinational corporations increased from \$3.2 trillion in 1990 to nearly \$4.8 trillion in 2000. Furthermore, of the world’s 15 largest budgets, six are governmental and nine are corporate; each of the top 15 [multinational corporations] has a budget greater than the GDPs of at least 120 countries³⁶

The size of these MNCs greatly hampers the abilities of governments to control them.³⁷ Additionally, there are two factors, the combined effects of which make the proliferation of the MNC a problem in the realm of child labor. First, as noted above, the industrial countries which most MNCs call “home,” early on legislated against the practice of employing such labor³⁸ — forcing the MNCs to find fertile ground in

34. *Id.*

35. Wikipedia, Talk:Thomas Jefferson, at http://en.wikiquote.org/wiki/Talk:Thomas_Jefferson (citing Thomas Jefferson, *Letter to Logan* (1816), in THOMAS JEFFERSON ON DEMOCRACY 138 (1953)).

36. Shauna J. Sadowski, *Bringing Multinational Corporations into the Environmental Treaty-Making Process Through the UN Global Compact 1* (2005), available at http://www.pon.org/downloads/ien14_2sadowski.pdf (last visited Mar. 3, 2006).

37. See *infra* notes 54-63 and accompanying text.

38. See, e.g., Encyclopedia Britannica, *supra* note 2. For example, in the United States in 1916, Congress passed the Keating-Owens Child Labor Act, which banned the sale of goods made by children under a specified age threshold. *Id.* Though this act

foreign countries where child labor laws are not as restrictive. Second, the countries in which this fertile ground existed did not have the complex economies necessary to support their own corporations, thus these countries remained underdeveloped and susceptible to the temptations offered by foreign investment.³⁹ As a result, corporations that wish to utilize child labor often simply base themselves in an industrialized country, and either establish a subsidiary in the Third World, or outsource their production needs to smaller companies already there.⁴⁰ Such a practice is attractive to an international player because it provides cheap labor and the competitive edge that is increasingly necessary in today's global economy.⁴¹ This intense competition results in a need for cheaper production in order for profit margins to rise and final products to be made at an increasingly low cost.⁴²

In order to meet the competitive demand, companies employ young children in underdeveloped countries, paying them substantially less than the law would allow in an industrialized nation.⁴³ Even worse, the

was ultimately struck down by the Supreme Court, it marked the beginning of a movement that has continued to the present day. *Id.* At the same time, the National Child Labor Committee, an organization dedicated to the eradication of child labor, was created and later helped pass The Fair Labor Standards Act of 1938 ("FLSA"). *Id.* The main objective of this congressional act was to "eliminate labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency, and well-being of workers. The [FLSA] also prohibited child labor in all industries engaged in producing goods in inter-state commerce." *Id.*

39. *Id.*

40. *Id.*

41. Globalization forces companies, which would otherwise operate in discrete and unrelated markets, to compete directly with one another. Crawford, *supra* note 5, at 11.

42. *But see* Owen E. Herrstadt, *Voluntary Corporate Codes of Conduct: What's Missing?*, 16 THE LABOR LAW 349, 349 (Winter/Spring 2001) (arguing that in the information age, this fierce competition is in fact helping to create and spread new attention to human rights issues based on the calculation that consumers are watching and care).

43. "In China, workers at Wellco Factory making shoes for Nike are paid 16 cents/hour . . . 11-12 hour shifts, 7 days a week, 77-84 hours per week; workers are fined if they refuse overtime, and they are not paid an extra rate for overtime hours." Radley Balko, *Labor: Sweatshops and Globalization*, available at <http://www.aworldconnected.org/article.php/525.html> (last visited Mar. 15, 2006). Alternatively, the current Federal minimum wage in the United States is \$5.15 an hour. *See* U.S. Dept. of Labor web site, <http://www.dol.gov/esa/whd/> (last visited Mar. 15, 2006). A study commissioned by the India Committee of the Netherlands, the International Labor Rights Fund of the USA and Eine Welt Netz NRW of Germany

company internalizes the economic benefits; thus, when the goods are imported back into the U.S. market, consumers never see the savings.⁴⁴

For the corporation producing or manufacturing goods, this economic magic trick is simple. A company need only find a country with a high rate of poverty, a low level of education, and lenient or unenforced child labor laws.⁴⁵ Underdeveloped countries benefit greatly from the presence of MNCs, and the incentives are skewed against regulating them.⁴⁶ They create wealth in the states where they operate by providing jobs, producing goods and services, introducing technologies, and developing markets.⁴⁷

As a result, a common trend emerges. Countries that wish to reap the benefits from the presence of MNCs will often competitively seek them out. In doing so, these developing countries continuously relax their employment laws so that subcontractors in these countries can offer the MNCs the cheapest cost of production. "The cost of labor in underdeveloped economies is often kept artificially low by repressive, anti-labor legislation and governmental action."⁴⁸ This trend is sometimes referred to as a "race to the bottom."⁴⁹

The presence of foreign investment in these developing countries also serves as a platform for the creation of their own export economies,⁵⁰ as well as a myriad of other economic benefits that increase the incentive to allow the use of child labor.⁵¹

found that the use of child laborers in cotton seed production creates savings for the company of up to 12 percent. Coordination Gegen BAYER-Gefahren (Coalition against Bayer-Dangers), *Low Cottonseed Procurement Price Spawns Child Labour*, available at <http://www.cbgnetwork.org/1221.html> (last visited Mar. 3, 2006).

44. Champion, *supra* note 5, at 184.

45. *Id.*

46. *Id.* at 185.

47. Murphy, *supra* note 13, at 397.

48. Champion, *supra* note 5, at 185.

49. Crawford, *supra* note 5, at 11. The race to the bottom is facilitated by three factors applicable to many, if not most production schemes. First, the products must be homogeneous and, in that, the major determining factor in a comparison is price. Second, legal regulations must form an important component of the cost structure. Third, MNCs must not incur a substantial transaction cost when moving plants. Klaus E. Meyer, *Perspectives on Multinational Enterprises in Emerging Economies: Perspective*, 35 J. INT'L BUS. STUD. 259 (July 1, 2004).

50. Murphy, *supra* note 13, at 397.

51. The increasing power of the [multinational corporation] is also represented

In fact, in 2001, 28% of foreign direct investment (“FDI”) flowed to developing countries.⁵² In that same year, the ten biggest developing country recipients of FDI accounted for 75% of total flows to that sector.⁵³ Considering the enormous benefits reaped by the underdeveloped countries that allow the MNC to operate with impunity, it is foolish to leave the responsibility of regulating MNC behavior in the hands of these countries. Unfortunately, no legal system exists which enables the willing nations to take on the task.

B. A Failed Legal System

The problem of child labor was decidedly simpler when national corporations were employing children from their “home country.”⁵⁴ The proliferation of the MNC complicated the issue exponentially, and domestic laws as well as international legal policies of both then and now have been ill-equipped to handle the problem.⁵⁵

In accordance with the principles of national sovereignty, neither the United States, nor any other nation can simply apply its domestic laws to the wholly domestic corporations of a foreign country.⁵⁶

through foreign direct investment (“FDI”). Cross-border mergers and acquisitions, in which a foreign corporation acquires more than 10 percent control of a domestic enterprise, increased from \$94 million to \$866 billion between 1996 and 2000. This has a particularly profound effect on developing countries in which foreign direct investment (FDI) constitutes a country’s largest source of external finance. In developing countries, cross-border mergers and acquisitions increased by 50 percent from 1995 to 1999.

Sadowski, *supra* note 36, at 2.

52. Paul Redmond, *Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance*, 37 INT’L LAW 69, 77 (Spring 2003). Foreign direct investment (“FDI”) is the movement of capital across national borders in a way that permits the investor control over the acquired asset. FDI has grown in importance in today’s global economy, with FDI stocks now constituting over 20% of global GDP. Wikipedia, *Foreign Direct Investment*, <http://en.wikipedia.org/wiki/FDI> (last visited Mar. 15, 2006).

53. Redmond, *supra* note 52, at 77.

54. The use of the term “home country” here is intended to mean the country where the corporation is headquartered. PHILLIP I. BLUMBERG, *THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY* 169 (Oxford Univ. Press 1993).

55. *Id.* at 171-72.

56. See *id.* at 172; See also Wikipedia, *Sovereignty*, http://en.wikipedia.org/wiki/Sovereignty#Sovereignty_in_international_law (last visited Jan. 24, 2006).

Similarly, established international policy prevents a country from applying its laws to the actions of a foreign subsidiary of a domestic corporation. In other words, the existing international policies prevent the application of “home country extraterritoriality.”⁵⁷ Unfortunately, the international norms which should operate as an effective method of regulating MNC behavior were established in a time “when corporations typically confined their operations to a single country,” and therefore do not adequately address the problems posed by globalization.⁵⁸ These laws prevent willing governments from prohibiting their domestic companies from employing child labor abroad. Of these norms, the greatest effect can be attributed to the nationality principle⁵⁹ and the territorial principle as well as its corollary, the effects doctrine.⁶⁰

The effects doctrine, arguably the most promising of the three for allowing home country extraterritoriality, allows for the extension of territorial jurisdiction when the acts occurring outside of the nation affect, in a “discrete, foreseeable, and substantial” way, the nation wishing to apply its legal regime.⁶¹ Unfortunately, an application of this principle to child labor law would be strained and commentators doubt

57. BLUMBERG, *supra* note 54, at 169. (“Home country extraterritoriality” uses enterprise principles in “executing a nation’s political or legal policies with respect to the domestic parent corporation of a multinational group, [which in turn] means extraterritorial application of the national program to the foreign components of the group.”).

58. *Id.*

59. The nationality principle states that a business entity’s nationality is determined by the state in which it is incorporated, and that a subsidiary does not take on the nationality of its parent. *Id.* The result of this doctrine is that a foreign subsidiary of an American MNC is not considered an American corporation and is, therefore, not subject to the laws applicable to American corporations. However, the American modification of the nationality principle substantially modifies the traditional rule to allow for the exercise of jurisdiction over foreign subsidiaries where doing so advances particularly important regulatory programs in the home country. At the time this note was written, the authors were unaware of any application of this doctrine to the area of child labor. *Id.*

60. *Id.* Because the effects doctrine expands the potential power of the territorial principle to reach legal abuses such as the employment of child labor, this note will limit the discussion to the effects doctrine, its interpretation and its requirements.

61. This language was adopted from the American Law Institute, in its Restatement (Third) of the Foreign Relations Law of the United States. *See id.* at 172.

that it could be applied to economic objectives.⁶² Therefore, countries that have taken a formal stance against child labor within their own borders are left with little recourse to address the problem outside of them.⁶³

III. EXTRA-LEGAL METHODS FOR DEALING WITH CHILD LABOR

The inability of the legal system to address the issue of child labor has created a need for extra-legal remedies, remedies that are not constrained by the principles of international law. The most notable extra-legal remedy is the work of international organizations, non-governmental agencies, and conscientious consumers.

A. International Organizations

The work done on behalf of child laborers by international organizations cannot be discounted. The most notable organization is the International Labor Organization ("ILO"),⁶⁴ and its specialized program, the International Programme on the Elimination of Child Labour ("IPEC").⁶⁵

Since its inception in 1919, the ILO has enacted 185 conventions aimed at establishing a uniform labor standard.⁶⁶ These standards, if

62. Blumberg, *supra* note 54, at 176.

63. *Id.* For a more thorough discussion on these international principles and their effect on the ability of a nation to apply its domestic laws outside its borders, see BLUMBERG, *supra* note 54.

64. The ILO's "primary role is to promote the global community's acceptance of international labor standards through the adoption of conventions, guidelines, and recommendations after consultation with governments, labor unions, and employers." *Developments in the Law — Legal Tools for Altering Labor Conditions Abroad*, 118 HARV. L. REV. 2202, 2205 (2005) [hereinafter *Harvard Developments in the Law*]. The ILO, "created by the treaty of Versailles in 1919, and adopted by the United Nations immediately following World War II, has been at the forefront of the movement." *Id.* at 2206.

65. This is by no means an exhaustive list. Absent from it, among many other noteworthy organizations, are the United Nations International Children's Emergency Fund ("UNICEF") and the Organization for Economic Co-operation and Development ("OECD"). These organizations, as well as many others, continue to make strides of varying impact in the area of child labor, but will not receive mention in this note which is primarily concerned with the corporation's impact on the issue of child labor.

66. *Harvard Developments in the Law, supra* note 64, at 2205. Convention C138,

globally adopted, could reasonably fill the vacuum left by the legal system's inability to address this type of transnational problem. Unfortunately, the ILO "lacks real enforcement powers and relies primarily on 'moral persuasion, publicity, shame, diplomacy, dialogue, and technical assistance' to urge compliance with its conventions."⁶⁷ To date, less than 60% of ILO member countries have ratified all of the ILO core labor conventions, amongst which is the effective abolition of child labor.⁶⁸

IPEC is a younger organization. Created in 1992, it has advanced the progressive goal of eliminating child labor.⁶⁹ IPEC works to achieve

Minimum Age Convention, adopted in 1973, states that "[t]he minimum age specified in pursuance of paragraph 1 of this Article shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years." Paragraph 1 establishes that the purpose of the convention is to define a minimum age for employment. See ILO, *Convention Concerning Minimum Age for Admission to Employment* (June 26, 1973), <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138>. Another key convention is C182, *Worst Forms of Child Labour Convention*, adopted in 1999. This convention calls for members to take immediate action against the worst forms of child labor and defines the worst forms of child labor as:

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

ILO, *Convention Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labour*, 38 I.L.M. 1207 (June 17, 1999), available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182>.

67. See Harvard Developments in the Law, *supra* note 64, at 2207 (quoting Daniel S. Ehrenberg, *From Intention to Action: An ILO-GATT/WTO Enforcement Regime for International Labor Rights*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 163, 164 (Lance A. Compa and Stephen F. Diamond eds., Univ. of Pennsylvania Press 1996)).

68. Amongst which is the effective abolition of child labor. *Id.* at 2206.

69. See *id.* at 2206. "While the goal of IPEC remains the prevention and elimination of all forms of child labour, the priority target groups for IPEC's action are the worst forms of child labour . . ." For a full definition of the worst forms of child labour as defined in Convention No. 182, see *supra* note 66. See International Labour Organization, *IPEC Action Against Child Labour: Highlights 2004*, (October 2004),

this by employing several methods: through country-based programs which promote policy reform, build institutional capacity and put in place concrete measures to end child labor; through raising awareness; and through mobilization aimed at changing social attitudes and promoting the ratification and effective implementation of ILO child labor conventions.⁷⁰ As results of these efforts, hundreds of thousands of children have been either withdrawn from work and rehabilitated or have been prevented from entering the workforce altogether.⁷¹ Non-governmental organizations have had similar, though varying success by employing different means than their politically connected counterparts.⁷²

B. Non-Governmental Organizations⁷³

NGOs work on standardizing codes, raising public awareness, creating solidarity with claimants, conducting research, gathering evidence, and advocating with governments and companies.⁷⁴

Additionally, “NGOs have progressively entered areas traditionally reserved for governments, [including workers rights] . . . becoming community organizers with greater expertise than the inter-governmental organizations mandated in the same issue areas.”⁷⁵ As an example, Sudhaar, a Pakistani NGO that draws its funding from the ILO, began to set up educational facilities for children working in leather tanneries. The program was so successful that foreign NGOs and inter-governmental agencies encouraged Sudhaar to expand its work into

available at http://www.ilo.org/public/english/standards/ipecc/publ/download/implementation_2004_en.pdf.

70. See IPEC Action Against Child Labour, *supra* note 69, at 15.

71. *Id.* at 34.

72. *Id.* at 49.

73. A non-governmental organization or NGO is an organization that is not part of a government and was not established by states. The term is typically restricted to social, cultural, legal, and environmental groups having goals that are primarily noncommercial. Wikipedia, *Non-governmental Organization*, <http://en.wikipedia.org/wiki/NGO>.

74. I.R.E.N.E., *Controlling Corporate Wrongs: Liability of Multinational Corporations — Legal Possibilities, Initiatives and Strategies for Civil Society* 8 (Mar. 20-21, 2000), <http://www.mvo-platform.nl/mvotekst/irene%20controlling%20corporate%20wrongs.pdf>.

75. Crawford, *supra* note 5, at 12.

other areas as an instrument of change.⁷⁶

NGOs have also worked with governments around the world to bring legal pressures against MNCs employing child labor. In Britain, for example, Oxfam and the World Development Movement (“WDM”) have been pressing the British government to change the law in favor of making it easier to sue corporations for failing to comply with labor standards.⁷⁷ However, despite the efforts of the NGOs and international organizations, it is estimated that there are still 246 million child laborers around the world.⁷⁸

C. Consumerism as a Force of Social Change

MNCs are concerned primarily with the bottom line.⁷⁹ This focus on profit maximization, when combined with the power possessed by an informed consumer, produces an interesting synergetic result that has the possibility to inspire enormous change in the area of child labor.

A predicate, however, to consumer power is consumer knowledge. The onslaught of the information age has brought change to many areas of corporate life. One of the infinite impacts of the information age is that corporations are finding it more difficult to keep the activities of their subsidiaries out of the public view.⁸⁰ When consumers are made aware of wrongful corporate activities, they may react as consumers, possibly boycotting the MNC’s product, thereby injuring the bottom line.⁸¹ A 1995 survey reveals just how serious consumers are about labor issues.⁸² According to the survey, “78 percent of respondents said that they would prefer to shop at retail stores that had committed

76. *Id.*

77. I.R.E.N.E., *supra* note 74, at 9.

78. *World Briefing United Nations: Millions of Children in Dangerous Jobs*, *supra* note 6.

79. *See supra* notes 30-42 and accompanying text.

80. Debora L. Spar, *Creating Corporate Social Responsibility*, BLUEPRINT MAG., June 2001, available at http://www.ppionline.org/ppi_ci.cfm?knlgAreaID=115&subsecID=900026&contentID=964.

81. *Id.* For example, in Europe, consumers have boycotted Asian carpets made using child labor. UNICEF, Children’s Rights, the Progress of Nations, *Children Pay High Price for Cheap Labour*, <http://www.unicef.org/pon95/chil0016.html>. *See also* White, *supra* note 14.

82. Spar, *supra* note 80.

themselves to ending garment-worker abuse; 84 percent said they would pay \$1 extra on a \$20 item to ensure that the garment had been made in a worker friendly environment.”⁸³ Surveys like this lead some to conclude that consumer human rights preferences are not incompatible with MNCs’ profit orientation.⁸⁴ These commentators, like us, see consumer power as a formidable instrument of change.⁸⁵

There is no better example of the consumer’s enormous power than the Kathie Lee Gifford incident. In 1996, Ms. Gifford was thrust into the epicenter of the child labor issue. After lending her name to a discount line of women’s clothing, it was discovered that the clothes were the product of Central American child labor.⁸⁶ The discovery prompted a severe and uniform outcry from consumers.⁸⁷ Whether as a result of this public outrage or her own conscience, Ms. Gifford is now one of the most outspoken personalities on the issue of child labor.⁸⁸ Additionally, at a time when few politicians were focusing on the issue, scores of activists and media personalities suddenly surrounded the issue of child labor, bringing to it an attention that it had long ago lost.⁸⁹

This example is illustrative of consumer power, a power which some have already attempted to harness. During the first term of the Clinton administration, Labor Secretary Robert B. Reich launched the

83. *Id.* A similar survey conducted one year later produced the same results. Vivian Marino, *Sweatshops Becoming A Retail Issue; Stores Find Themselves Being Held Accountable For Human-Rights Abuses*, SUN-SENTINEL, June 23, 1996, at 1. It should be noted that these surveys may overstate the reality of the consumer sentiment. The two surveys were taken in the mid 90s when the economy was in an upswing, and we cannot know how people would respond in a sluggish or recessive economy. Additionally, as a general matter, one cannot discount the possibility that the people taking the survey were lying. No one wants to sound cheap when talking about child labor.

84. Redmond, *supra* note 52, at 73.

85. See White, *supra* note 14.

86. Spar, *supra* note 80.

87. William Anderson, *Kathie Lee’s Children*, THE FREE MARKET Vol. 14 Num. 9 (Sept. 1996), available at http://www.mises.org/freemarket_detail.asp?control=45&sortorder=articledate (the lobbyists for the National Labor Committee Union Lobbyists, a labor union, demanded that the government halt any imports from Ms. Grifford’s Honduras factory).

88. *Id.*; see also Beth J. Harpaz, *As Sweatshop Abuses Unfold, Retailers Take Heat On Celebrity Labels*, CHI. TRIB., June 10, 1996, at 2.

89. *Id.*; Harpaz, *supra* note 88.

“No Sweat” campaign.⁹⁰ This endeavor attempted to steer MNCs in the garment industry into compliance with labor laws by exposing the retailers who were using overseas child labor.⁹¹ The Labor Department also published the Labor Department Trendsetter list.⁹² The list highlighted the MNCs that “demonstrated a commitment to U.S. labor laws, and to monitoring overseas production.”⁹³ In effect, the “No Sweat” campaign utilized the duality of consumer power by punishing malfasant corporations with negative publicity and rewarding those corporations that refuse to employ child labor with positive publicity. It is in this milieu that MNCs are becoming profoundly aware of consumer power, and they have begun to respond, primarily by instituting corporate codes.⁹⁴

IV. CORPORATE CODES AND THE SELF-REGULATION OF THE MNC

MNCs themselves have begun to recognize the divergence between their actions and social expectations.⁹⁵ Consequently, and considering the possible negative economic impact of not changing their behavior, many MNCs have “embraced the movement toward voluntary codes of conduct. [These codes] . . . inculcate key norms in the field of labor, human rights, consumer protection, anticorruption, and the environment.”⁹⁶

Corporate codes, as the term is used in this note, can be described in the following manner: (1) they are voluntary in nature, (2) typically consisting of a series of principles, (3) standards or guidelines, which are

90. Anderson, *supra* note 87.

91. *Id.*

92. Frank Swoboda, *Anti-Sweatshop Program Tailored for the Times*, WASH. POST, May 30, 1996, at A29.

93. *Id.* (This made use of what is known as the “spotlight phenomenon.”)

94. Herrnstadt, *supra* note 42.

95. The American Law Institute’s *Principles of Corporate Governance* illustrates the public’s expectations. It qualifies the “corporation’s economic objective of profit and shareholder wealth maximization by recognizing the corporation’s character as a social institution as well.” Under this model, a corporation cannot simply act as a profit engine, but must also take into account the social externalities that attend its activities. See Redmond, *supra* note 52, at 73-74.

96. Murphy, *supra* note 13, at 400.

broad and aspirational or detailed, and (4) operational in nature.⁹⁷ The codes often refer to accepted international norms,⁹⁸ many times emphasizing an adherence to domestic regulations.⁹⁹ Sometimes the codes are created on an *ad hoc* basis to apply to a specific corporate entity, while at other times the code is formulated for an entire industry.¹⁰⁰ For example, the Apparel Industry Partnership (“AIP”), a partnership of labor, industry and consumer representatives, established a workplace code of conduct regarding apparel and footwear industries that U.S. manufacturers are currently being asked to adopt.

A. A History of Corporate Codes

Corporate codes made their first significant appearance in the late 1980s.¹⁰¹ Perhaps one of the best known of the earlier corporate codes was what is known as the “Sullivan Principles.”¹⁰² Created in 1977 by Reverend Leon H. Sullivan, these codes were first adopted in the 1980s.¹⁰³ The Sullivan Principles, which consisted of six principles, were developed to help guide corporations dealing in South Africa during apartheid.¹⁰⁴ Among the principles was a ban on segregated eating, and a similar ban on segregated work facilities.¹⁰⁵ There was also a commitment to placing non-whites in management positions.¹⁰⁶ One hundred and fifty MNCs made the pledge to these principals.¹⁰⁷

Another early and influential system of corporate codes was the “MacBride Principles.”¹⁰⁸ These too were promulgated in the 1980s.¹⁰⁹

97. *Id.*

98. Such as the ILO core labor principles.

99. Murphy, *supra* note 13, at 400.

100. *Id.* Among other key labor issues, the code contains provisions regarding child labor. Robert J. Liubicic, *Corporate Code of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives*, 30 LAW & POL’Y INT’L BUS. 111 (Fall 1998).

101. Redmond, *supra* note 52, at 87.

102. Murphy, *supra* note 13, at 394.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. Liubicic, *supra* note 100, at 124.

109. *Id.*

They were established to reduce discrimination against Catholic workers in U.S. MNCs operating in Northern Ireland.¹¹⁰ These codes promoted hiring, training, and advancement on a non-sectarian basis.¹¹¹ As of 1995, 40% of U.S. MNCs operating in Northern Ireland had subscribed to the MacBride Principles.¹¹² The MacBride principles serve as an excellent example of how corporate codes can be used to address the unique situation of a particular MNC.

U.S.-based clothing manufacturers and retailers were the first to utilize codes.¹¹³ Many of these codes were adopted as a form of insulation — an attempt by corporations to protect themselves from the labor practices of their foreign subsidiaries.¹¹⁴ Others were created as a response to specific incidences which created negative publicity.¹¹⁵ The first corporate codes were individualized.¹¹⁶ These codes were voluntary and based on an OECD inventory of modern corporate codes. These remain the most prevalent.¹¹⁷ The next most common type of code is the “industry wide” code.¹¹⁸ This form of code is adopted by an industry or trade association after the members of that industry or association are given the opportunity to reach a consensus regarding its content.¹¹⁹ The remaining percentage is divided between those codes created by international organizations and those created by multistakeholders.¹²⁰

110. *Id.*

111. *Id.*

112. *Id.*

113. Redmond, *supra* note 52, at 87.

114. *Id.* at 88.

115. *Id.* at n.55.

116. *Id.* at 88.

117. OECD, Working Party of the Trade Committee, *Codes of Conduct — An Expanded Review of Their Contents*, TD/TC/WP(99)56/Final Fig. 1, available at [http://appli1.oecd.org/olis/1999doc.nsf/c16431e1b3f24c0ac12569fa005d1d99/c12568d1006e01b9c12568f70035dd97/\\$FILE/00078855.DOC](http://appli1.oecd.org/olis/1999doc.nsf/c16431e1b3f24c0ac12569fa005d1d99/c12568d1006e01b9c12568f70035dd97/$FILE/00078855.DOC) (last visited Apr. 17, 2006). According to the OECD inventory, 48% of corporate codes are voluntary and individual. *Id.* Many of these individual codes contained either “guidelines for the conduct of suppliers and business partners, a statement of the company’s commitment to the public, . . . [or] guidelines for the company’s employees.” Redmond, *supra* note 52, at 88.

118. OECD, *supra* note 117. According to the OECD inventory, these types of codes represent 37 percent of modern corporate codes. *Id.*

119. Redmond, *supra* note 52, at 88.

120. *Id.* The committee appointed by the U.N. Economic and Social Council

As of yet, there is no uniform method of reporting codes.¹²¹ Therefore, there is no precise information regarding their content.¹²² The OECD inventory, however, indicates a high level of consistency in particular sectors¹²³ and a similarly high level of consistency with regard to content.¹²⁴ Of the codes inventoried, 60% referred to labor standards.¹²⁵ Of these codes, 25% make mention of “human rights,”¹²⁶ while 43% mention child labor.¹²⁷ “Numerous codes also specify what is to be done if a child is found to be in the employ of a sub-contractor (e.g. the child is to be taken care of until some alternative is found — return to family, re-entry into school, etc.). Other codes do not specify whether any special obligation to the child exists.”¹²⁸

B. The Strengths of Corporate Codes

As discussed above, MNCs operate almost entirely outside of the control of the existing domestic and international legal systems.¹²⁹ Currently, only the consumer, with his/her ability to undermine the fundamental purpose of corporate action — a power that is not constrained by boundaries or international legal principles — can challenge and change MNC behavior.¹³⁰ It is, however, within the corporate prerogative to decide the most appropriate way to conform to consumer expectations. This solution is found in corporate codes.

While the individual and voluntary nature of corporate codes is a

(“ECOSOC”) to study the impact of MNCs has attempted to create a code of conduct for transnational corporations. The process has taken fifteen years, with the latest draft submitted in 1990. The draft was never adopted by the U.N. General Assembly, mainly because of the insurmountable resistance from developing states to what some have referred to as “economic neo-colonization.” Murphy, *supra* note 13, at 403-04.

121. Redmond, *supra* note 52, at 89.

122. *Id.*

123. OECD, *supra* note 117, at table 2. More than half of the corporations with individual codes were involved in trade. The next most numerous sectors were textiles and chemicals and extractive industries. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. Redmond, *supra* note 52, at 89.

128. OECD, *supra* note 117, at 14. “Also, to not employ child [labor] is the most frequently mentioned commitment (36 out of 37 codes).” *Id.*

129. See *supra* notes 43-51 and accompanying text.

130. See *supra* notes 65-80 and accompanying text.

weakness in that violations of the code do not result in what could be called “traditional” legal sanctions, it is also one of their greatest strengths.¹³¹ Individual and voluntary codes need not be precise.¹³² Where uniform legal strictures tend to ignore unique corporate circumstances, each MNC or industry can draft the codes to meet their idiosyncratic needs, thus eliminating the barrier of achieving a consensus among the many relevant groups.¹³³ Additionally, though corporate codes are not empowered with the force and effect of law, they are entwined with the corporation’s public image.¹³⁴ Violation of the codes to which corporations have pledged themselves is a violation of the public trust.¹³⁵ Though there may be no legal recourse, the consumer may employ his “demand side” power by refusing to purchase goods or services from that company.

Moreover, where an industrialized country cannot apply its child labor laws to a wholly-owned foreign subsidiary of a domestic corporation, the social norms of that nation should find their way into the corporate codes of MNCs based in those countries.¹³⁶ The following hypothetical exemplifies how this could work. An MNC is incorporated and headquartered in the United States. The U.S. government has been unsuccessful in using the legal system to prevent this MNC from employing child labor in the production of its wallets. The wallets are made in Asia. The MNC sells most of its product in the U.S. and European markets.¹³⁷ The MNC’s stock is traded on the NASDAQ. When the story breaks that the MNC has been employing child labor, the effect will be most noticeably felt in the markets of industrialized countries. In these markets, there exists an established aversion to the

131. Redmond, *supra* note 52, at 90.

132. *Id.*

133. *Id.* This note has already detailed one instance where the legal system’s requirement of uniformity combined with the conflicting interests of global players has resulted in the failure of effective MNC regulation. *See, e.g., supra* note 109.

134. Redmond, *supra* note 52, at 90.

135. *Id.*

136. *Id.*

137. This is an assumption of this particular model. While the assumption would not be necessarily true of all corporate situations, it is important for the point being made here that the majority of the consumers of the MNC’s products live in a society which does not support the use of child labor, and without judgments we choose these markets.

use of child labor.¹³⁸ It is also in these markets where the shareholders as well as the consumers exist. Therefore, when the MNC seeks to rehabilitate itself (or preempt the situation altogether) through the adoption of corporate codes, it will establish codes that respond to the sensibilities of its consumer base.

Lastly, the use of corporate codes may prove to be the most effective tool in combating the use of child labor because the codes are more feasible than alternative strategies such as prescriptive international instruments.¹³⁹ They offer the opportunity to effect practical change at the operating level and work quickly.¹⁴⁰ In this way, they are at the very least logistically more preferable than legal strictures.¹⁴¹

Corporate codes, therefore, could potentially allow for the effective regulation of many aspects of MNC behavior. Unfortunately, corporate codes have yet to prove themselves worthy of such adulation. Existing corporate codes suffer from several impairments.

C. Weaknesses of the Modern Corporate Code

One of the most acute problems with reliance on corporate codes is that such reliance is only warranted where the corporation is susceptible to consumer pressure.¹⁴² The more exposed an MNC is to publicity, the greater the incentive to respond to social pressures by adopting corporate codes.¹⁴³ As a corollary, the more visible MNCs that adopt these codes are also prone to publicize their doing so.¹⁴⁴ Accordingly, firms that do not supply public markets directly will have less of an incentive to conform to social expectations.¹⁴⁵ This results in a "halo effect" for similar MNCs who have not actually adopted such codes.¹⁴⁶

Another problem with viewing corporate codes as a solution to all corporate malfeasance, although not a problem for the child labor issue,

138. See *supra* notes 2-4 and accompanying text.

139. Redmond, *supra* note 52, at 90.

140. *Id.* at 91.

141. *Id.*

142. Liubicic, *supra* note 100, at 116.

143. Redmond, *supra* note 52, at 90.

144. *Id.*

145. Liubicic, *supra* note 100, at 116.

146. Redmond, *supra* note 52, at 90.

is that because MNCs adopt these codes to pacify consumer demands, they tend to be narrowly tailored to “hot button” issues, ignoring those activities which get less media attention.¹⁴⁷ As a nation, we appear to be rather selective when it comes to those labor issues that really concern us.¹⁴⁸ As such, an MNC like Levi-Strauss can maintain an image of corporate benevolence because its code of conduct prohibits the use of child labor, forced labor, and discrimination, even though its subcontractors crush employees’ attempts to unionize.¹⁴⁹

Another significant problem with current corporate codes is that many of them are written vaguely or worded in permissive language.¹⁵⁰ This undercuts any sense of obligation to fulfill the requirements under the code, or alternately, requires so little of the MNC that fulfilling the requirements accomplishes nothing.¹⁵¹

For example, the Shell Group, a global group of energy and petrochemical companies, defines their social responsibility as follows: “[t]o conduct business as responsible corporate members of society, to comply with applicable laws and regulations, to support fundamental human rights in line with the legitimate role of business, and to give proper regard to health, safety, security and the environment.”¹⁵² This statement is vague. It only commits the company to not violating the law, but by using the term “applicable” they may, for example, employ child labor, where doing so is legal.¹⁵³

The Monsanto code of business conduct, on the other hand, creates affirmative obligations with penalties for violations, but is so vague and incomplete that it affords the global community no protection.¹⁵⁴

147. *Id.*

148. Liubicic, *supra* note 100, at 142.

149. *Id.* at 128-29.

150. Penelope Simons, *Corporate Voluntarism and Human Rights: The Adequacy and Effectiveness of Voluntary Self-Regulation Regimes*, in DEPARTMENT DES RELATIONS INDUSTRIELLES INDUSTRIAL RELATIONS (Canada) No. 1, Vol. 59, 101 (Jan. 1, 2004).

151. *Id.*

152. Shell International Limited, *General Business Principles*, http://www.shell.com/static/royal-en/downloads/sgbp/sgbp_300805.pdf (2005).

153. It should be noted that Shell’s General Business Principles do not make specific reference to the employment of child labor. *Id.*

154. Monsanto, *Code of Business Conduct*, http://www.monsanto.com/monsanto/layout/our_pledge/corp_gov/code.asp.

Monsanto's code fails to mention child labor altogether and also pledges itself only to "comply with applicable laws and regulations." In the section of their code entitled "Our Commitment to Working Within our Communities," the code only states that:

[They] understand the impact [they] have on the communities in which [they] do business, and . . . want to make positive contributions for the betterment of those communities. [That they] understand that it is a privilege to be allowed to do business within our communities, and . . . will do [their] best to be worthy of the privilege granted [them] every day.¹⁵⁵

This section of the code creates no affirmative obligations. One would be hard pressed to find Monsanto in violation of this section, and so the MNC is able to tout the code's existence and reap the public relations benefits without hampering its activities in any meaningful way.

Additionally, even when an MNC's corporate code specifically prohibits a practice such as employing child labor, new methods of global production can work to undermine the commitment. For example, in the context of international production and distribution, many MNCs whose corporate codes receive the most publicity do not manufacture the products they sell.¹⁵⁶ Under the current structure of many corporate codes, an MNC, if so inclined, can reap the public relations benefits of establishing Orwellian codes but can also reap the financial benefits of the employment of child labor by dealing with subcontractors who have not made similar pledges.¹⁵⁷

The lack of uniformity among the codes allows MNCs to funnel their unpopular practices through less visible subsidiaries.¹⁵⁸ In this way, the individual nature of corporate codes, which above was heralded as a strength, acts as a serious and sometimes debilitating weakness.¹⁵⁹

Finally, and perhaps most importantly, the current system lacks a credible process to oversee compliance with the codes.¹⁶⁰ A system for

155. *Id.*

156. Murphy, *supra* note 13, at 401.

157. *Id.* at 401-02.

158. *Id.*

159. This weakness, however, will be addressed in the following part of this note.

160. Simons, *supra* note 150. While recent times have seen an increase in focus on monitoring, compared to the need the efforts have not been sufficient.

ensuring compliance with the codes would be crucial to the effectiveness of voluntary self-regulation.¹⁶¹ Without a trustworthy system of verifying compliance, the totality of the consumer's power cannot be brought to bear upon the MNCs. On the one hand, where consumers are only aware that a corporate code is in place but cannot be sure the MNC is in compliance with that code, the MNC is able to receive the public relations benefit of having the code, but incurs no obligation to abide by it.¹⁶² On the other hand, where corporations know that there is no such verification system in place, the cost benefit analysis, as it pertains to abiding by the codes, is slanted against doing so.

V. BEEFING UP CORPORATE CODES

Consumer influence is both the force that propels MNCs to adopt corporate codes as well as the source behind their power.¹⁶³ Effectively harnessing the consumer's influence over MNC behavior and properly rewarding "meaningful compliance" with self imposed obligations require a regulatory scheme that preserves a minimum threshold of corporate responsibility and is both transparent to the consumer and unambiguous in its requirements.¹⁶⁴

While uniformity is an essential component of effective self-regulation,¹⁶⁵ it may also be the death knell to any regulation.¹⁶⁶ Whereas the individual nature of corporate codes allows us to circumvent the need for an impossible consensus among MNCs and nations with conflicting social and economic interests, a total lack of even a base level consensus results in an ineffectual system under which MNCs are able to feign corporate responsibility. If corporate codes are to solve the most fundamental human rights violations, of which the employment of child labor is one, these codes — all codes — must

161. Redmond, *supra* note 52, at 92; *see also* Liubicic, *supra* note 100, at 144-50.

162. Liubicic, *supra* note 100, at 114.

163. *See supra* notes 79-94 and accompanying text.

164. As used here, the term "meaningful compliance" refers to that behavior which is in accordance with the MNC's corporate code and fulfills a substantive obligation beyond the code.

165. *See supra* notes 158-59 and accompanying text.

166. *See supra* notes 119, 130-33 and accompanying text.

achieve uniformity to the extent necessary to reach a minimum threshold of corporate responsibility.

Accomplishing uniformity first requires that we create a single, visible, possibly quasi-governmental organization.¹⁶⁷ The organization will have several charges but no legal authority. Among the most important of its functions will be the establishment of a rating system. Each increment on the rating scale should correspond to a set of definitive and concrete obligations, to which MNCs with that rating have committed themselves. Base level uniformity is achieved through the lowest rating. If an MNC wishes to reap the public relations benefits that corporate codes and socially responsible behavior can generate, they will be forced to abide, at the very least, to this minimum threshold or receive no rating.

This approach is not entirely new. A similar method has been adopted by the Social Accountability 8000 ("SA8000").¹⁶⁸ SA8000 is a certification program that was created by the Council on Economic Priorities Accreditation Association in 1997.¹⁶⁹ The program provides standards for measuring MNC performance in the areas of: "child labor, forced labor, occupational health and safety, freedom of association, discrimination, disciplinary practices, working hours, compensation, and management."¹⁷⁰ Currently, SA8000 certifies 170 facilities

167. A functional system would require a single, highly visible entity to establish behavioral norms and verify compliance with MNCs' corporate codes, lest more harm be done than good. If the system allowed for more than one agency to set standards, and allowed an agency other than that one to certify compliance, the system would be promoting "verification shopping." An MNC would be able to shop for a verification agency, or even create an internal verification division, that either falsifies compliance unscrupulously, or has such lax standards that the MNCs' behavior qualified as compliant. The consumer then, we believe, loses his power to a bureaucracy of mirrors. The corporation gains a degree of separation from compliance, and before the consumer can evaluate the MNC's actions, it must first evaluate the MNCs evaluator. A system unified around one agency solves these problems; more so, if that agency is linked to governmental power. The U.N. would be an excellent organization to administer the functions that will follow.

168. Liubicic, *supra* note 100, at 126.

169. *Id.*

170. *Id.* SA8000 takes the following position on child labor: "no workers under the age of 15; minimum lowered to 14 for countries operating under the ILO Convention 138 developing-country exception; remediation of any child found to be working." Social Accountability International, *Promoting the Human Rights of Workers Around the World* 4 (Nov. 11, 2005), available at <http://www.sa-intl.org/index.cfm?>

worldwide.¹⁷¹ Certification of signatories and monitoring of compliance “is carried out by CEPAA-accredited certification firms.”¹⁷² The program, however, differs in many important respects from that which is advocated here. SA8000, for example, does not require the inclusion of a company’s subsidiaries in the certification process.¹⁷³ Additionally, SA8000 does not cover all sectors of production, and therefore cannot provide the necessary level of standardization.¹⁷⁴

Alternatively, the organization advocated for here will be charged with standardizing the language in corporate codes and in doing so will promote meaningful commitments.¹⁷⁵ After meeting with a cross section of relevant parties, organizations, governments and MNCs, the agency will adopt its own model language.¹⁷⁶ If an MNC wishes to ignore the language suggestions published by the agency, it may do so. However, this subjects the MNC to the risk that its chosen language will correspond to an undesirable rating.

This single organization model would have its largest impact in addressing the weaknesses of current verification processes. Currently, verification exists, if at all, in three forms: internal monitoring;¹⁷⁷

fuseaction=document.showDocumentByID&nodeID=1&DocumentID=165.

171. *Id.* at 2.

172. *Id.* As will be discussed later in this note, the multiplicity of actors that the SA8000 relies on is a significant weakness which will be accounted for by our proposal. See *infra* text accompanying notes 177-79.

173. Teresa Fabian, *Social Accountability 8000 (SA8000) — the first auditable, global standard for ethical sourcing driven by CEPAA 3* (Jan. 1998), http://www.woek.de/pdf/glob_coc_social_accountability_8000.pdf.

174. *Id.*

175. The SA8000’s certification firms are briefed by local unions and human rights organizations. *Id.* at 2. Similarly, the proposed agency would meet with international organizations, hear suggestions from government representatives and local unions, and incorporate these suggestions into the guidelines on which they base their rating system. The agency’s language would be drafted with the deficiencies of prior codes in mind. The language would be precise, coherent and exacting. It would set forth verifiable substantive requirements which, if accomplished, would result in improved human rights conditions.

176. The agency would adopt model language suited to each level of its rating system. An MNC that adopts this language, and is certified for having met its obligations, would guarantee itself the corresponding rating.

177. Internal monitoring seems to be the most prevalent method used by U.S. MNCs to verify compliance with corporate codes. Liubicic, *supra* note 100, at 134.

foundation monitoring,¹⁷⁸ and independent monitoring.¹⁷⁹ Of the three, independent monitoring allows for the most transparency and for honest reporting.¹⁸⁰ Honesty and credibility are the keys to promoting the adoption of corporate codes. It is only if the consumer is confident in the verification process that the full force and effect of their power can be felt.¹⁸¹ To this end, government involvement is preferable, if not essential. If the agency charged with the task of promulgating the rating system and language models were associated, or run by, a reputable international governmental agency such as the United Nations, the consumer could be confident in its reporting. This way, consumers would be free to act on their preferences, promoting not only basic compliance from the MNCs, but maybe also a “race to the top” as these highly competitive MNCs vie for consumer affection.

Currently, corporate codes are adopted mainly by highly visible MNCs — those susceptible to consumer pressures.¹⁸² This has implications for two groups of corporations: those foreign based subcontractors that are hidden from public view and therefore unaffected by consumer power, and those companies or industries that operate in a theater that is removed from the public light, such as manufacturers of intermediate consumer goods.¹⁸³ Our proposed organization would have the ability to influence, albeit indirectly, the behavior of these hidden subcontractors. As part of the rating system introduced above, the agency would include a mechanism for reporting on the behavior of

178. This is where a MNC or group of MNCs, in conjunction with human rights organizations, establishes a non-profit foundation to monitor and verify compliance. *Id.* at 135. The members of the boards of these foundations are selected from within the MNCs and from the groups that joined to create it. *Id.*

179. *See id.* at 135-36.

180. A major issue with internal monitoring is the massive conflict of interest problem it creates. *Id.* at 136. Even if we assume that all reporting is conducted honestly, the mere appearance of impropriety deprives the codes of the credibility that is essential for the harnessing of consumer power. *Id.*

181. We argue that, so long as consumers remain unconfident that MNCs are complying with their self-imposed obligations, they will give only watered down effect to their preferences (i.e., that no child labor be used in the production and manufacturing of a good), thereby diminishing the incentives for corporations to adopt codes at all.

182. *See supra* notes 131-33 and accompanying text.

183. Intermediate goods are the “raw materials and components that are purchased by other corporations to make end-use goods.” Liubicic, *supra* 100, at 141.

every subcontractor used by a rated MNC. This could take the form of a secondary rating, such as a plus or minus add-on, or it could be included, like class participation, in determining the overall grade, thus creating an incentive for MNCs to exert their influence over those with whom they subcontract.¹⁸⁴

By creating this additional consideration, one which would be reflected in an MNC's rating, we are able to ameliorate the overall problem posed by subcontractors.¹⁸⁵ By tying the actions of these subcontractors to the public image of the MNCs who use them, we create a conduit through which consumer pressure can reach these faceless entities.

Lastly, we believe that by adopting our single organization theory we will ultimately be able to solve the "hot button issue" problem.¹⁸⁶ Currently, only those issues that receive media and consumer attention make their way into the corporate conscience.¹⁸⁷ This is not likely to change soon, nor is it likely that consumers will change to become less selective with their concerns. The only hope then for those issues now neglected by our limited concern is for the issues that currently occupy our conscience to be solved. Solving the current hot button issues will create a vacuum that conscious consumers will seek to fill. It is only logical that once these second-order concerns are pushed to the forefront, they too will be adopted by the consumer.

VI. CONCLUSION

Corporate codes, if optimally utilized, can make a tremendous difference in the area of child labor. These codes may also be used to address many other human rights and environmental issues.¹⁸⁸ They

184. Some MNCs, such as Wal-Mart, have already taken the initiative and incorporated provisions regarding their vendor partners and their subcontractors into their codes. *Id.* at 129.

185. See *supra* notes 157-58 and accompanying text.

186. See *supra* notes 147-49 and accompanying text.

187. See *supra* notes 147-49 and accompanying text.

188. In fact, it is important that the rating system used to address child labor issues accompany a rating for environmental issues. Failing to do so may result in underdeveloped nations, which once relaxed labor laws in order to attract MNCs, relaxing their environmental laws to do the same. Liubicic, *supra* note 100, at n.131.

derive their power from the consumer and are, therefore, not limited by the strictures of international legal polices. They are self imposed, essentially fueled by the same competitive spirit which until now has acted as a destructive force in many of these arenas.¹⁸⁹ Where once corporations fought, to the detriment of their workforce, for cheaper sources of production, they may now battle for the publicity that attends socially conscious behavior.

The key to maximizing the power of corporate codes is to effectively address and harness the source of their power. Clarity, singularity, and credibility are the three most important requirements of recording and reporting MNC behavior. By creating a trustworthy mechanism to keep the consumer informed, we increase the chance that consumers will act on their preferences. Credibility may be achieved through governmental association, clarity through a simple and well publicized message, and singularity by the promotion of one agency supported by all others.¹⁹⁰

The goal is to change the corporate cost-benefit analysis when it comes to the issue of child labor. The stronger the force produced by consumers (i.e., a refusal to purchase goods made by child labor), the greater the cost associated with the practice. We hope here to finally tilt the scales and end this insidious practice once and for all.

189. See *supra* notes 41-44 and accompanying text.

190. Publicity is a necessary predicate to the effective functioning of this plan. In order to harness consumer power, the consumer must know where to look to find this information, how to read the information and the basis for the ratings. In the beginning, the agency, as well as committed human rights organizations, will bear most of the costs associated with information gathering, compilation, logistics, dissemination and publicity. Ultimately, the cost of publicity will shift, at least in part, onto those MNCs with the highest ratings. These MNCs will have an incentive to promote the agency and its ratings so that they may reap the most possible benefits.