

**RUTGERS LAW RECORD***The Internet Journal of Rutgers School of Law | Newark*www.lawrecord.com**NEW GOVERNANCE AND THE ROLE OF PUBLIC AND PRIVATE MONITORING OF LABOR CONDITIONS: SWEATSHOPS AND CHINA SOCIAL COMPLIANCE FOR TEXTILE AND APPAREL INDUSTRY/CSC9000T**

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I. Introduction

Effective regulation has three essential components. First, the law must develop standards; second, there must be sufficient monitoring of compliance to detect non-compliance; and third, there must be some form of motivation to avoid non-compliance.¹ The growth in international trade has created significant challenges for all three of these stages.² This paper will focus upon the monitoring stage and analyze emerging regulatory vehicles used to detect non-compliance. The traditional regulatory model involves a law, state inspectors and legal sanctions for non-compliance.³ One of the largest challenges for the state is how to adequately monitor compliance. Countries like the United States and China have literally tens of millions of workplaces. It is impossible for the state to monitor the activities in every workplace without the support of non-state actors.

New governance scholars have observed the limitations with the reliance upon the regulatory state and have proposed transforming government into a series of public and private

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¹ STEPHEN BREYER, REGULATION AND ITS REFORM 5 (1982).

² The challenges created by trade can be evinced by the problems created when Western nations attempted to have social clauses inserted into WTO trade agreements to make the increased trade dependent on improved labor conditions: Elisa Alben, *GATT and the Fair Wage: a Historical Perspective on the Labor-Trade Link* 101 COLUM. L. REV. 6, 1410-1477 (2001); Adelle Blackett, *Whither Social Cl? Human Rights, Trade Theory and Treaty Interpretation* 31 COLUM. HUM. RTS. L. REV. 1, 72 (1999); Kevin Kolben, *Note from the Field: Trade, Monitoring, and the ILO: Working to Improve Conditions in Cambodia's Garment Factories*, 7 YALE HUM. RTS. & DEV. L. J. 80 (2004).

³ For a discussion of how this traditional model can be improved by responsive regulation see IAN AYRES AND JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1995).

networked relations.⁴ New governance models include non-state stakeholders in a participatory and collaborative process to develop more effective regulatory responses.⁵ Accordingly the focus of new governance regulation is not state control, but expanding the regulatory pie to improved regulatory responses.⁶ New governance interventions still retain the threat of punishment. Rather than focusing upon large state interventions, new governance focuses upon decentred regulation and regulatory nodes.⁷ This form of regulation has been proposed and adopted in a range of areas including labor laws,⁸ environmental laws⁹ and school reforms.¹⁰

One of the benefits of private regulations is that they can encourage the state to develop enforceable public regulations.¹¹ The creation of these public regulations can have a positive or negative result. If the public vehicle increases monitoring and enforcement, clearly this is positive. There is, however, a risk that the state intervention prevents the private regulatory model from operating without replacing it with an effective public regulation. The act of turning private institutions and practices into state sanctioned institutions and practices may alter the nature of the private vehicles. Some private enforcement vehicles are effective precisely because they are not state controlled. To maximize the potential from both public and private enforcement the integrative linkage model has been developed.¹²

Integrative linkage focuses on maximizing the regulatory outcome and tailors the combination of public and private institutions and practices in each case.¹³ Arguably integrative linkage can assist countries with poor labor rights records, where there is public and private resistance to change, to better develop public regulatory models. Kolben observes that the

⁴ Daniel J. Fiorino, *Rethinking Environmental Regulation: Perspectives on Law and Governance*, 23 HARV. ENVTL. L. REV. 441 (1999); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004); Bradley C. Karkkainen, Reply, "New Governance" in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471 (2004); Orly Lobel, Surreply, *Setting the Agenda for New Governance Research*, 89 MINN. L. REV. 498 (2004); Richard Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437 (2003); Louise G. Trubek, *Public Interest Lawyers and New Governance: Advocating for Healthcare*, 2002 WIS. L. REV. 575 (2002) [hereinafter Trubek, *Public Interest Lawyers*]; Louise G. Trubek, *New Governance and Soft Law in Health Care Reform*, 3 IND. HEALTH L. REV. 139 (2006) [hereinafter Trubek, *New Governance*]; Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, 28 FORDHAM URB. L.J. 1611 (2001); Joanne Scott & David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 EUR. L.J. 1 (2002).

⁵ Amy J. Cohen, Negotiation, *Meet New Governance: Interests, Skills, and Selves*, 33 LAW & SOC. INQUIRY 503, 522-27 (2008).

⁶ Cristie L. Ford, *New Governance, Compliance, and Principles-based Securities Regulation*, 45 AM. BUS. L.J. 1, 28 (2008) (Ford conceptualizes a New Governance framework for securities regulation. She explains how new governance alters the relationship between regulators and industry - a relationship not defined by inflexible regulators mandating rules that are often incompatible with fast-paced business environments, but a relationship defined by a shared responsibility and a pragmatic responsiveness to "complex real-life social systems").

⁷ Scott Burris, Michael Kempa and Clifford Shearing, *Changes in Governance: A Cross-Disciplinary Review of Current Scholarship*, 41 AKRON L. REV. 1 (2008).

⁸ Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434 (2007).

⁹ Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 6-7 (1997); Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1231-32 (1995).

¹⁰ James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 229-31, 271 (2003).

¹¹ See MICHAEL J. TREBILCOCK & JAMES J. KIRTON, INTRODUCTION: HARD CHOICES AND SOFT LAW IN SUSTAINABLE GLOBAL GOVERNANCE, IN *HARD CHOICES, SOFT LAW VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE* 12 (John J. Kirton & Michael J. Trebilcock eds., 2004).

¹² Kevin Kolben, *Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes*, 48 HARV. INT'L L.J. 233, 234 (2007).

¹³ *Id.*

“interplay of private regulatory regimes and regulatory capacity in developing states” has not been tested sufficiently in the literature to date and that the assumption surrounding the connection between integrative linkage and improved regulation is conjectural.¹⁴ This paper will build upon Kolben’s research and analyze how the operation of private regulations in China have encouraged the state to develop a public regulation that largely copies and replaces existing private regulatory regimes. While the creation of this model may have long term positive effects, this paper will highlight how the use of integrative linkages in these particular cases has created serious concerns surrounding the independence, quality of auditors and potential for capacity building.

Part I of this paper will analyze the monitoring problems associated with Chinese occupational safety and health (OSH) laws. In an environment with low monitoring and enforcement it is especially critical that any integrative linkages do not reduce the effectiveness of private monitoring vehicles. Part II of this paper will explore how international concern over sweatshops has developed and part III will analyze what private monitoring vehicles have developed to fill the regulatory gap caused by the failure of China to effectively enforce labor laws. These private monitoring vehicles are largely external to China and are beyond state control. China has regarded non-Chinese based regulation as potential threats to national sovereignty and prosperity. In response, China has introduced an integrative linkage model which will be analyzed in part III. This integrative linkage model modifies the operation of the existing private monitoring vehicles. The structure of this integrative linkage model has the potential to weaken the effectiveness of the private monitoring vehicles and reduce the level of monitoring. This paper argues that integrative linkages could substantially improve regulatory outcomes, but the state and commentators need to ensure that the inclusion of private institutions and practices into such models does not reduce the effectiveness of the private vehicles.

I. The Regulatory Gap: State Monitoring and Enforcement in China

This section will analyze the cultural and regulatory problems China has encountered in monitoring and enforcing labor laws. Rather than attempting to investigate all labor rights, this paper will use the situation of OSH in Chinese textile and apparel factories as a case study. This analysis will show why the private institutions and practices discussed in part II have emerged and why the integrative model introduced in part III runs the risk of reducing the effectiveness of existing private models.

After 21 years of drafting, China introduced its first specialized workplace safety law in the *Law of the People's Republic of China on Work Safety* 2002 (PRC).¹⁵ This law commenced on November 1, 2002 and binds all people engaged in production and operations within China.¹⁶ The law makes exclusive reference to safety at work, with no reference to health. China has subsequently introduced specialized occupational safety laws for the production of dangerous chemicals,¹⁷ coal mines,¹⁸

¹⁴ *Id.*; See *infra* text accompanying note 199.

¹⁵ Art. 97 prescribed the commencement date. For general discussion of the introduction of this law see: Liu Chaojie and Fu Gui, *A Review of Occupational Health and Safety Legislation in China* 57 LABOR L. J. 4, 238 (2006).

¹⁶ Law of the People's Republic of China on Work Safety 2002 (PRC) Art 2.

¹⁷ Implementing Measures of the Production Safety Permit System for Dangerous Chemicals Manufacturing Enterprises 2004 (China State Administration of Work Safety and the State Administration for Coal Mine Safety Supervision); Notice on Issuing Guidelines on Safety Evaluation of Manufacturing Enterprises of Dangerous Chemicals (Trial Implementation) 2004 (China State Administration of Work Safety).

construction,¹⁹ offshore petroleum operations²⁰ and fireworks and firecrackers for private use.²¹ As no specialized OSH laws have been promulgated for textile and apparel manufacturing, enterprises in these industries are regulated by the general provisions of the *Law of the People's Republic of China on Work Safety 2002* (PRC).

The largest concern with Chinese OSH laws is not the positing of legal duties, but the control and enforcement of those laws. While local governments are charged with enforcing OSH laws, the number of inspectors to enforce labor laws is inadequate to accomplish the task. There are only about 3,000 inspectorates, which employ about 45,000 inspectors, charged with inspecting over 3,000,000 enterprises.²² Cooney observes that the “[t]he quantity of labor inspectors may well be inadequate to implement the law systematically across the country.”²³ Zhong-bin and Qin-yun have also argued that China lacks a comprehensive plan to enforce labor laws, and that the fragmented and disorganized approach of the inspectorates results in extremely poor enforcement of labor laws.²⁴

I argue that one of the main reasons Chinese OSH laws are poorly enforced is due to the economic focus of these OSH laws. Labor laws in China were not primarily introduced with the intent to protect Chinese workers. Instead, these laws were essentially implemented to satisfy European and American governments’ demands for formal OSH statutes. PRC has followed a trend in China of regarding workers’ OSH as important, inter alia, to enhance economic development:

This Law is hereby enacted in order to strengthen supervision over work safety, to prevent and reduce work safety accidents, to guarantee people's life and property safety, and to hasten the economic development.²⁵

The blending of safety and economic considerations has reportedly resulted in confusion over whether economic interests or safety concerns take priority. Chinese culture places a high priority on life,²⁶ but also gives priority to community harmony and benefits over individual

¹⁸ Art. 1 of the Implementation of Economic Penalties relating to Illegal Behaviors against Work Safety 2003 (China State Administration of Work Safety and the State Administration of Coal Mine Safety) limits this regulation to coal mines.

¹⁹ Interim Provisions on Administration of Use of Personal Labor Protection Articles for Construction Workers 2007 (China Ministry of Construction); Several Opinions on Accelerating Development and Reform of Construction Industry 2005 (China Ministry of Construction; National Development and Reform Commission; Ministry of Finance; Ministry of Labor and Social Security; Ministry of Commerce; State-owned Assets Supervision and Administration Commission of the State Council).

²⁰ Provisions on Offshore Petroleum Work Safety 2006 (State Administration of Work Safety).

²¹ Art. 2 of the Regulations on Work Safety License 2004 (China State Council) expands the licensing system to enterprises engaged in mining, construction and production of dangerous chemicals, fireworks and firecrackers for personal use.

²² Zhongguo Falu Nianjian [*Law Yearbook of China*] 45 (2003); Toshiki Kanamori and Zhijun Zhao, Asian Dev. Bank Inst., Private Sector Development in the People's Republic of China (2004).

²³ Sean Cooney, *Making Chinese Labor Law Work: the Prospects for Regulatory Innovation in the People's Republic of China*, 30 *FORDHAM INT'L L.J.* 1050, 1066 (2007).

²⁴ Zhang Zhong-bin and Sun Qin-yun, *Analysis of Laws, Regulations and Standards in Area of Occupational Health*, 3 *CHINA ACAD. OF SAFETY SCI. AND TECH.* 4, 55.

²⁵ Law of the People's Republic of China on Work Safety 2002 (PRC) Art 1.

²⁶ Russell Kirkland, *Enhancing Life? Perspectives from Traditional Chinese Value-Systems*, 36 *J.L. MED. & ETHICS* 26 (2008).

interests.²⁷ This economic focus of Chinese OSH laws has been identified as a substantial barrier to the enforcement of Chinese labor laws.²⁸ There is a significant debate in China over whether workers' rights to OSH should be conceived as an individual right or as something that increases overall productivity.²⁹ Similarly debated is whether national economic interests or individual health and safety should take priority.³⁰

The idea that safe workplaces will enable enterprises to increase their profitability is a dangerous presumption to put in statute.³¹ Some regional councils have interpreted the legislation's overall purpose to be a maximization of profits and have accordingly focused on economic growth rather than safety. In a highly competitive environment, every enterprise is pressured to keep its production costs low and each regional council is pressured to attract manufacturing contracts. A situation where there are virtually no pressures to uphold workplace rights, coupled with a pressure to keep labor costs low, is likely to result in a race to the lowest enforcement of labor conditions.³² Under these circumstances, it is not surprising that regional councils are biased in favor of production and operation units³³ and do not rigorously enforce labor laws.³⁴

Research demonstrates Chinese regional councils substantially fail to enforce labor laws.³⁵ The National Labor Committee has concluded:

On paper the laws are there, but ... they mean nothing, as every law is blatantly violated. ... Clearly these workers are seen as a cheap commodity, expendable, and not worth investing in.³⁶

²⁷ Perry Keller (ed), *Chinese Law and Legal Theory*, ch 6, 14 (2000); ANDREW NATHAN, HUMAN RIGHTS IN CONTEMPORARY CHINA 125-64 (Randle Edwards, Louis Henkin & Andrew J. Nathan eds., 1986); Randall P. Peerenboom, *What's Wrong with Chinese Rights?: Toward a Theory of Rights with Chinese Characteristics*, 6 HARV. HUM. RTS. J. 29 (1993).

²⁸ Leong Liew, *What Is To Be Done? WTO, Globalisation and State-Labor Relations in China*, 47 AUSTL. J. POL. & HIST. 1, 39 (2001); Eng Chen, *Between the State and the Labor: the Conflict of Chinese Trade Unions Double Identity in Market Reform*, 176 THE CHINA QUARTERLY 1006 (2003); Niklas Egels-Zande, *Suppliers' Compliance with MMNC's Code of Conduct: Behind the scenes of Chinese Toy Suppliers*, 75 J. BUS. ETHICS 45 (2007).

²⁹ Sun Bing-Xin, *Value Perspective on the Rights of Occupational Safety*, 21 CHINA CONTEMP. L. REV. 51, 125 (2007).

³⁰ In other areas, individual rights have been substantially suppressed to ensure national economic goals. For a discussion see Martha M. Hopkins, *Olympic Ideal Demolished: How Forced Evictions in China Related to the 2008 Olympic Games Are Violating International Law*, 26 HOUS. J. OF INT'L L. 155 (2006).

³¹ Liu Chaojie and Fu Gui, *A Review of Occupational Health and Safety Legislation in China*, 57 LABOR L. J. 4, 238 (2006).

³² The race to the bottom theory contends, where two jurisdictions trade, the jurisdiction with higher labor conditions will be forced to lower them to compete. See for discussion of this theory: Anita Chan, *A "Race to the Bottom": Globalisation and China's Labor Standards*, 46 CHINA PERSPECTIVES 41 (2003); Marina Thorborg, *Chinese Workers and Labor Conditions from State Industry to Globalized Factories: How to Stop the Race to the Bottom*, 1076 ANNALS OF THE NEW YORK ACAD. OF SCI. 1, 893 (2006); Joseph E. Stiglitz, *Conference: The Ninth Annual Grotius Lecture Series: 2007 Grotius Lecture: Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights With Responsibilities*, 23 AM. U. INT'L L. REV. 451, 490 (2008); Patrick Macklem, *Labor Law Beyond Borders*, 5 J. INT'L ECON. L. 605 (2002).

³³ Aaron Halegua, *Getting Paid: Processing the Labor Disputes of China's Migrant Workers*, 26 BERKELEY J. INT'L L. 254, 266 (2008).

³⁴ John Balzano, *Criminal Liability for Labor Safety Violations in the People's Republic of China*, 3 WASH. U. GLOBAL STUD. L. REV. 503, 510 (2004); Joseph A. Petrick and Foster C. Rinefort, *The Challenge of Managing China's Workplace Health and Safety*, 109 BUS. & SOC'Y REV. 171 (2004).

³⁵ PLAYFAIR 2008 CAMPAIGN, NO MEDAL FOR THE OLYMPICS ON LABOR RIGHTS 10 (2007).

³⁶ CHARLES KERNAGHAN, ET. AL., NAT'L LABOR COMMITTEE (USA), OLYMPIC SWEATSHOP: SPEEDO PRODUCTION IN CHINA 26 (2007).

If workers attempt to protest against labor violations to regional councils, they are reportedly either ignored, receive unjust decisions or punished.³⁷ *Students and Scholars against Corporate Misbehavior* provides an account of what happens when workers attempt to collectively raise concerns about their labor conditions.³⁸ After workers raised concerns about the egregious labor conditions, factory management punished the workers.³⁹ The local police detained some workers without charge and the regional council ignored workers' concerns and supported management's position.⁴⁰ This research uniformly demonstrates that the regional council focused on upholding managerial prerogative rather than enforcing labor laws.

As OSH laws are not enforced in factories, factory management adopts practices that substantially endanger workers' safety and health rights. Noise, dust, and fumes are serious concerns in factories.⁴¹ Mattel reports that one of its suppliers did not provide workers with noise protection in an extremely noisy factory which resulted in hearing loss.⁴² *Students and Scholars against Corporate Misbehavior* report that ventilation in inspected factories is ineffectual, and that heat and fumes in most departments are dangerously high.⁴³

China Labour Watch reported that despite toxic fumes, workers were not provided safety masks or equipment unless Western factory inspectors were present.⁴⁴ Playfair reported similar findings to China Labour Watch.⁴⁵ Playfair interviewed many workers and reported numerous violations, including failure to provide safety masks or ventilation in high dust work area or safety gloves when working with dyeing agents.⁴⁶ Some of the dyeing agents that workers handled without gloves caused workers to suffer intense pain and to develop sores on their hands. Playfair was able to visibly inspect workers' open sores. The National Labour Committee reported even more alarming OSH practices. The National Labour Committee reported that workers were forced to work with highly corrosive toxic chemicals with no masks, gloves or other safety protections.⁴⁷ Exposure to such chemicals causes workers to have breathing difficulties and if "a drop of these chemicals touches their skin, the skin immediately begins to burn and fester".⁴⁸

³⁷ Mary Gallagher, 'Use the Law as Your Weapon!: The Rule of Law and Labor Conflict in the PRC' in Neil Diamant, Stanley Lubman and Kevin O'Brien (eds), *ENGAGING THE LAW IN CHINA: STATE, SOCIETY, AND POSSIBILITIES* (2005); Isabelle Thireau and Hua Linshan, 'One Law, Two Interpretations: Mobilizing the Labor Law in Arbitration Committees and in Letters and Visitors' Bureaus' in Neil Diamant, Stanley Lubman and Kevin O'Brien (eds), *Engaging the Law in China: State, Society, and Possibilities* (2005).

³⁸ STUDENTS AND SCHOLARS AGAINST CORPORATE MISBEHAVIOR, *WAL-MART'S SWEATSHOP MONITORING FAILS TO CATCH VIOLATIONS: THE STORY OF TOYS MADE IN CHINA FOR WAL-MART* 25 (2007).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ CHINA LABOR WATCH, *INVESTIGATIONS ON TOY SUPPLIERS IN CHINA; WORKERS ARE STILL SUFFERING* 3 (2007).

⁴² CHARLES KERNAGHAN, JONATHAN GIAMMARCO, BARBARA BRIGGS, ALEXANDRA HALLOCK AND TOMAS DONOSO, *MAKING BARBIE, THOMAS & FRIENDS, AND OTHER TOYS FOR WAL-MART: THE XIN YI FACTORY IN CHINA* 36 (National Labor Committee, 2007).

⁴³ STUDENTS AND SCHOLARS AGAINST CORPORATE MISBEHAVIOR, *LOOKING FOR MICKEY MOUSE'S CONSCIENCE: A SURVEY OF THE WORKING CONDITIONS OF DISNEY FACTORIES IN CHINA* 29 (2005).

⁴⁴ CHINA LABOR WATCH, *INVESTIGATIONS ON TOY SUPPLIERS IN CHINA; WORKERS ARE STILL SUFFERING* 3 (2007).

⁴⁵ PLAYFAIR 2008 CAMPAIGN, *NO MEDAL FOR THE OLYMPICS ON LABOUR RIGHTS* 19, 20 (2007).

⁴⁶ *Id.*

⁴⁷ CHARLES KERNAGHAN, JONATHAN GIAMMARCO, BARBARA BRIGGS, ALEXANDRA HALLOCK AND TOMAS DONOSO, *NATIONAL LABOR COMMITTEE, OLYMPIC SWEATSHOP: SPEEDO PRODUCTION IN CHINA* 26 (2007).

⁴⁸ *Id.*

The failure to provide safety equipment also causes less dramatic injuries. The Playfair Alliance has reported that workers are forced to work for 13 hours per day sitting on a hard wooden stool performing repetitive actions.⁴⁹ The poor ergonomics has resulted in skeletal and muscular injuries.⁵⁰

The critical problems with OSH in Chinese are aggravated by the fact most workers are working under extreme fatigue. Chinese law prescribes a 44 hour week.⁵¹ However, a survey conducted by the Guangdong Province Department of Labour and Social Security found approximately 26 million internal migrant workers work between 10 and 14 hours per day and about half of these workers did not have a day off per week.⁵² Mattel reports that one of the factories which supplied them products for over seven years had workers working seven days per week, up to 80 hours per week and some daily shifts up to 17 hours.⁵³ The Playfair Alliance reports workers work up to 13 hours per day, seven days per week (not including rest breaks, if any) and work between 300 hours and 356 hours per month, depending on the factory.⁵⁴ China Labour Watch reports workers work between 10 and 14 hours per day, seven days per week in the busy season.⁵⁵ The National Labour Committee reported workers regularly work 15½ hour days, seven days per week.⁵⁶ On some occasions, workers are forced to work 24 hour shifts and face fines if they refuse to work because they are exhausted.⁵⁷ Chan claims that in extreme cases, workers can be forced to work a total of 48 hours straight and up to 120 hours per week.⁵⁸ Students and Scholars against Corporate Misbehavior claim some factories work their workers over 80 hours per week.⁵⁹ In one report, the National Labour Committee reports workers are forced to work between 12 and 16 hours per day, seven days per week and can work months without receiving permission to take a day's rest.⁶⁰

There has been substantial research indicating that labor conditions in many Chinese factories are extremely poor. This has become relevant for Western states as Western countries and corporations have traded in sweated products. China has consistently been the world's largest

⁴⁹ PLAYFAIR 2008 CAMPAIGN, NO MEDAL FOR THE OLYMPICS ON LABOUR RIGHTS 20 (2007).

⁵⁰ *Id.*

⁵¹ Article 36 of the Labour Law of the People's Republic of China 1994 (PRC).

⁵² Marina Thorborg, *Chinese Workers and Labor Conditions from State Industry to Globalized Factories: How to Stop the Race to the Bottom*, 1076 ANNALS OF THE NEW YORK ACADEMY OF SCIENCES 1, 893 (2006).

⁵³ CHARLES KERNAGHAN, JONATHAN GIAMMARCO, BARBARA BRIGGS, ALEXANDRA HALLOCK AND TOMAS DONOSO, NATIONAL LABOR COMMITTEE, MAKING BARBIE, THOMAS & FRIENDS, AND OTHER TOYS FOR WAL-MART: THE XIN YI FACTORY IN CHINA 36 (2007).

⁵⁴ PLAYFAIR 2008 CAMPAIGN, NO MEDAL FOR THE OLYMPICS ON LABOUR RIGHTS 22-24 (2007); *see also* PLAY FAIR ALLIANCE, PLAY FAIR THE OLYMPICS (2004) (where employees are reported to work up to 18 hours per day in some factories, 7 days per week).

⁵⁵ CHINA LABOR WATCH, INVESTIGATIONS ON TOY SUPPLIERS IN CHINA; WORKERS ARE STILL SUFFERING 3 (2007).

⁵⁶ CHARLES KERNAGHAN, JONATHAN GIAMMARCO, BARBARA BRIGGS, ALEXANDRA HALLOCK AND TOMAS DONOSO, OLYMPIC SWEATSHOP: SPEEDO PRODUCTION IN CHINA 19 (2007).

⁵⁷ *Id.*

⁵⁸ Jenny Wai-ling Chan, *Gender and Global Labor Organizing: Migrant Women Workers of Garment Industry in South China*, Paper presented at the Sweatshop Watch and Marianas Fund of the Tides Foundation Conference, Colorado, presenting research gathered with the Chinese Working Women Network (May 2005).

⁵⁹ Students and Scholars Against Corporate Misbehavior, Wal-Mart's Sweatshop Monitoring Fails to Catch Violations: the Story of Toys Made in China for Wal-Mart 12 (2007).

⁶⁰ CHARLES KERNAGHAN ET AL, THOMAS & FRIENDS GOES TO CHINA STUMBLES AND IS RECALLED 2-3 (2007).

manufacturing exporter.⁶¹ For example, in 2005 Chinese trade in manufactured goods dominated 24 percent of the world market.⁶² It is estimated that China will increase its exports of knitted apparel products by 41 percent between 2001 and 2010 and its general manufacturing exports to the USA by 55 percent over that same period.⁶³

II. Pressure upon China to improve Enforcement of Labour Standards

The egregious breaches of labor conditions in Chinese factories resulted in such factories being labeled sweatshops.⁶⁴ Western states and corporations became especially concerned with the labor conditions in overseas factories where sweated products were being exported to Western markets. These concerns developed to a combination of human rights and economic concerns. In response to these concerns a range of public and private regulatory models have been developed.

Recently in the United States, state governments have become involved in the Sweat Free Procurement Movement.⁶⁵ This movement was started by the state of Maine, and requires all corporations which supply products to the public bodies associated with Maine, not to have acquired those products from domestic or international sweatshops.⁶⁶ Similar laws have now been introduced in other states, including California,⁶⁷ Pennsylvania,⁶⁸ Portland,⁶⁹ New Jersey⁷⁰ and San Francisco.⁷¹ In response to market pressures, individual corporate groups introduced schemes to demonstrate their commitment not to trade in sweated products.

Some corporate groups have adopted codes of practice that they have audited by internal or external audits. Internal auditors generally have unlimited access to workshops and do not create any risks in relation to intellectual property or trade secret threats.⁷² Many auditors performed their audits simultaneously with product control audits.⁷³ While this is logistically economical, this practice has created suspicion that audits are not reliable due to the inherent conflict between corporations retaining suppliers and increasing profits.⁷⁴ External accounting firms have been

⁶¹ CHINA TEXTILE AND APPAREL INDUSTRY, ANNUAL REPORT ON SOCIAL RESPONSIBILITY OF CHINA TEXTILE AND APPAREL INDUSTRY 2006 11 (2007).

⁶² *Id.*

⁶³ NINA ASCOLY & INEKE ZELDENRUST, CHALLENGES IN CHINA: EXPERIENCES FROM TWO CCC PILOT PROJECTS ON MONITORING AND VERIFICATION OF CODE COMPLIANCE (2003).

⁶⁴ Santoro observes some supply models focus upon exploitation while others focus upon developing a positive image in the region. Whether the supply chain will involve sweatshops will depend upon, inter alia, the corporate objective. MICHAEL A. SANTORO, PROFITS AND PRINCIPLES, GLOBAL CAPITALISM AND HUMAN RIGHTS IN CHINA 16-32 (2000).

⁶⁵ For a discussion of various regulatory vehicles proposed and implemented in the United States see: Mark B. Baker, *Promises and Platitudes: Toward a New 21st Century Paradigm for Corporate Codes of Conduct?*, 23 CONN. J. INT'L L. 123, 150-162 (2007).

⁶⁶ *Administrative Procedures and Services Regulation* (City of Maine), Part 4, Subchapter I-B, State Purchasing Code of Conduct for Suppliers.

⁶⁷ An Act to amend S 6108 of the Public Contract Code, Relating to Public Contracts 2003 (California, SB 578).

⁶⁸ Executive Order for Sweat-free Apparel Procurement 2004 (Pennsylvania).

⁶⁹ Sweat-free Procurement Ordinance for the City of Portland.

⁷⁰ Sweat-free Procurement Rules 2006 (New Jersey).

⁷¹ The Sweatfree Contracting Ordinance of the City and County of San Francisco, 2005.

⁷² HU XIAOYONG, THE JAPAN INSTITUTE FOR LABOUR POLICY AND TRAINING CORPORATE CODES OF CONDUCT AND LABOUR-RELATED CORPORATE SOCIAL RESPONSIBILITY: ANALYZING THE SELF-REGULATORY MECHANISMS OF MULTINATIONAL ENTERPRISES AND THEIR IMPACTS TO DEVELOPING COUNTRIES 33-35 (2006).

⁷³ *Id.*

⁷⁴ *Id.* at 34.

retained to audit codes.⁷⁵ Also, specialist corporate social responsibility auditors have grown in popularity.⁷⁶ Perhaps the most popular corporate social responsibility schemes are the not-for-profit, industry-controlled, third-party-accredited auditors.

The not-for-profit, industry-controlled auditors are funded generally by corporations, and are intended to operate independently from the corporations that established them. These entities first emerged in 1996 and 1997 when two associations emerged.⁷⁷ The first association was developed by the Apparel Industry Partnership which established the Fair Labour Association and the second association was the Council on Economic Priorities Accreditation Agency, which subsequently changed its name to Social Accountability International.⁷⁸ These industry-controlled certification associations were established directly in response to the lack of accountability and appearance of validity of the existing auditing procedures.⁷⁹ The Fair Labour Association and SA8000 are both schemes which posit standards and certify third party certification bodies to actually perform the audits. The Fair Labour Association and Social Accountability International do not actually perform audits themselves. The SA8000 scheme, for example, contains extremely detailed standards on labor conditions including safety protection and guards, OSH training, hygiene and other OSH factors.⁸⁰ Factories are audited by qualified certification bodies.⁸¹ Auditing firms become certified under SA8000 by applying to Social Accountability Accreditation Services for accreditation.⁸² Social Accountability Accreditation Services assesses the expertise of the auditing firm through an impartial assessment procedure, and periodically reviews the accuracy of the certification body's auditing by performing their own audits. This means that a certification body which performs confounded audits may have their certification revoked.

Factories which have SA8000 accreditation are published online, which enables corporations which are concerned with ethical trading to easily identify factories which are accredited as respecting human rights. Social Accountability International is developing the Business Development Database of SA8000-compliant factories.⁸³ This database will provide details of the certified factories' capacity, current production runs, nature of work, costs and geographic location. This will substantially increase the ability of purchasers to identify SA8000-compliant factories. Once SA8000 improves their register of certified factories, this will greatly increase the potential for small and medium-sized corporate purchasers to source their products ethically. Currently, small and medium-sized corporations often lack financial resources to engage fully in the corporate social

⁷⁵ DARA O'ROURKE, TRANSNATIONAL RESOURCE AND ACTION CENTRE, SMOKE FROM A HIRED GUN: A CRITIQUE OF NIKE'S LABOR AND ENVIRONMENTAL AUDITING IN VIETNAM AS PERFORMED BY ERNST & YOUNG 11 (1997).

⁷⁶ CLEAN CLOTHES CAMPAIGN, LOOKING FOR A QUICK FIX - HOW WEAK AUDITING IS KEEPING WORKERS IN SWEATSHOPS 55-57 (2005).

⁷⁷ *Id.*

⁷⁸ For a discussion of the standards, see Deborah Leipziger, *SA8000; the Definitive Guide to the New Social Standard*, FINANCIAL TIMES, May 2001.

⁷⁹ Charles Curry-Smithson, *The Fair Labor Association: a Case Study of Emerging Intersectional Collaboration as a Strategy for Ensuring Global Labor and Human Rights* 38-41 (PhD Thesis, Fielding Graduate Institute, 2002).

⁸⁰ Neil Kearney, *Corporate Codes of Conduct: the Privatised Application of Labour Standards*, in REGULATING INTERNATIONAL BUSINESS: BEYOND LIBERALISATION 218-19 (Sol Picciotto and Ruth Mayne eds., 1999).

⁸¹ Social Accountability International, Accreditation, <http://www.saintl.org/index.cfm?fuseaction=page.viewPage&PageID=511> (last visited Dec. 21, 2008).

⁸² *Id.*

⁸³ Social Accountability International, SA8000 Harvard Study, <http://www.saintl.org/index.cfm?fuseaction=page.viewPage&PageID=810> (last visited Dec. 23, 2008).

responsibility movement.⁸⁴ If a register of certified factories is available at the click of a button, then the cost of maintaining an ethical supply chain is negligible.

One of the major criticisms of not-for-profit, industry-controlled, third-party accreditation auditing is that associations are controlled by their members and their members are the corporations which are accused of breaching human rights. Regardless of the actual validity of the audits, the perception of bias can exist if these associations permit high degrees of corporate control over the auditing process. The Fair Labor Association, for example, was criticized as it certified auditing firms but then allowed individual corporations to select who would perform the audit and what factories would be audited. The perceived lack of independence of auditors attracted criticism and resulted in amendments, so now the Fair Labor Association selects the auditors, pays the auditors and selects which factories the auditors will visit.⁸⁵

If corporations' supply chains are certified by associations such as SA8000 or the Fair Labor Association then it is submitted that there is a comparatively high probability that labor abuses will be identified by the audits when compared to partial or internal audits. The SA8000 auditing process is highly regarded. Lyn claims "SA8000...is the most viable and comprehensive international workplace management system available in the world."⁸⁶ Gilbert and Andreas Rasche have contended that SA8000 is "theoretically well-founded and able to overcome some of the current deficits of the certification initiative."⁸⁷ While the certification process may provide valid results, Gobbels and Jonker have questioned if SA8000 provides sufficient support to deal with labor issues at an organizational level.⁸⁸ There is, however, research which has demonstrated SA8000 has had a positive impact upon improving labor conditions in some certified factories.⁸⁹

While the improvement of labor conditions in Chinese factories can be regarded as a positive aspect of Western public and private regulation, the issue for China is that they have virtually no control over the setting of standards, the monitoring of factories or the punishment of those factories. In essence China has its sovereignty diminished by the operation of Western-based regulations. Arguably China may have its competitive advantage, gained through cheap labor,⁹⁰ diminished.⁹¹ It is therefore not surprising that some Chinese authors claim that the dominant reason Western states are concerned with labor conditions in China is not so much based on

⁸⁴ Natalie Odd, *The Global Reporting Initiative (GRI): To What extent Do the GRI Corporate Sustainability Guidelines Enable Business to Move towards Sustainability? What Are the Organizational-level Challenges to Implementation of the GRI for Different Sizes and Types of Companies?* (2003) (MA Thesis, Royal Roads University, Canada).

⁸⁵ Xiaomin Yu, *Putting Corporate Codes of Conduct Regarding Labor Standards in a Global-National-Local Context: a Case study of Reebok's Athletic Footwear Supplier Factory 100-101* (2006) (Ph.D. Thesis, Hong Kong University of Science and Technology).

⁸⁶ I-Ling Lin, *Profit Through goodwill: Corporate Social Responsibility in China and Taiwan* 49 (2006) (M.A. Thesis, University of Southern California).

⁸⁷ Dirk Gilbert and Andreas Rasche, *Discourse Ethics and Social Accountability: the Ethics of SA 8000*, 17 BUSINESS ETHICS QUARTERLY 2, 187 (2007).

⁸⁸ Math Gobbels and Jan Jonker, *AA1000 and SA8000 Compared: a Systematic Comparison of Contemporary Accountability Standards*, 18 MANAGERIAL AUDITING JOURNAL 1, 54 (2003).

⁸⁹ Kaewta Rohitratana, *SA 8000: A Tool to Improve Quality of Life*, 17 MANAGERIAL AUDITING JOURNAL 2, 60 (2002).

⁹⁰ TED C. FISHMAN, *CHINA, INC.: HOW THE RISE OF THE NEXT SUPERPOWER CHALLENGES AMERICA AND THE WORLD* 53-76 (2005).

⁹¹ Huang He-tao, *"Converging" and "Linkage": International Labor Standards and International Trade*, CHINA'S LABOR RELATIONS INSTITUTE JOURNAL (2001).

genuine concern for the human rights of Chinese workers, but rather to protect the jobs of Western employees.⁹²

Chinese authors, in fact, claim that Western states adopt blue trade barriers to protect Western states' domestic workers' jobs.⁹³ The use of the word 'blue' in this term refers to the colloquial term for manufacturing workers: blue collar.

While groups in China are concerned with any scheme which can threaten their commercial interests, there is particular concern around SA8000. The growth and comprehensive nature of the SA8000 scheme caused this scheme to attract both public and private concern in China.⁹⁴ SA8000 has developed into one of the major certification schemes in the world. Lin explains that SA8000 "is the most viable and comprehensive international workplace management system available in the world."⁹⁵ The role of SA8000 in China is "hotly discussed" in China.⁹⁶ Some authors have claimed this accreditation system is effectively a blue trade barrier aimed at reducing the competitiveness of Chinese exports.⁹⁷ As the Western-driven corporate social responsibility movement has already resulted in some industries being forced to comply with Western-prescribed standards, some authors claim SA8000 is already sufficiently mandatory to constitute a blue trade barrier.⁹⁸ Other authors claim that SA8000 will only become a blue trade barrier if it changes from a voluntary scheme to a mandatory scheme.⁹⁹

The fear that SA8000 may become a mandatory scheme appears to be a major factor driving public policy in the Chinese textile industry. Xiaoyong explains:

SA8000 verification has a potential market sanction, so some Chinese companies and government agencies worried that the European and US governments were planning to limit Chinese imports that did not adopt these social and environmental standards. Such a measure would effectively force Chinese exporting manufacturers to adopt these social standards, which

⁹² Li Youzhi and Liu Hong, *Influence of Blue Barrier on China's Exports and Its Counter Measure*, 63 JOURNAL OF HUNAN INTERNATIONAL ECONOMICS UNIVERSITY 1 (2006).

⁹³ Li Wen-Chen, *Situation of International Labor Rights' Protection and Its Influence on Chinese Enterprises*, 4 *China Industrial Economy* (2005); Shi Jin, Study of Blue Trade Barrier Issues in International Trade 1-5 (LLM Thesis, Harbin Engineering University, China, 2006).

⁹⁴ Dankanglin, *SA8000 and the Realization of Laborers' Rights*, 1 CHONGQING INSTITUTE OF VOCATIONAL AND TECHNICAL JOURNAL (2005); Pun Ngai, *Globalized Factory Regimes and "Re-organized Moralism": Transnational Corporate Codes of Conduct and Labor Politics in China* (Working Paper, Div of Social Science, Hong Kong University of Science and Technology, 2004); Li Ying, *SA8000, xin de maoyi bilei? (SA8000, a new trade barrier?)*, *Nanfang Dushi bao*, 20 November 2003, in Anita Chan, *Recent Trends in Chinese Labor Issues - Signs of Change* 57 CHINA PERSPECTIVES 23 (2005).

⁹⁵ I-Ling Lin, *Profit Through Goodwill: Corporate Social Responsibility in China and Taiwan* (MA Thesis, University of Southern California, 2006).

⁹⁶ Li-Wen Lin, *Corporate Social Accountability Standards in the Global Supply Chain: Resistance, Reconsideration, and Resolution in China*, 15 CARDOZO JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 321, 327 (2007).

⁹⁷ *Id.*

⁹⁸ Liu Xin and Zuo Zhi-ping, *Blue Trading System and Its Impact on Chinese Enterprises: Interpretation of the Blue Trade System as Well as Its Influences on China's Enterprises*, 4 JOURNAL OF HUNAN AGRICULTURAL UNIVERSITY (SOCIAL SCIENCES) (2005).

⁹⁹ Zhao Jianjie, Huang He-tao and Zhao Jian-jie, *SA8000 and Trade Unions to Safeguard Their Rights' Strategy*, JOURNAL OF THE CHINESE INSTITUTE OF LABOR RELATIONS (2005).

would involve various costs and thus limit China's competitiveness as a manufacturing and exporting economy.¹⁰⁰

Chinese public and private institutions are concerned that individual States, such as the United States and Japan, and regional blocks, such as the European Union, will popularize SA8000 through compulsion.¹⁰¹ Concerns in China that the U.S. may introduce mandatory labor conditions are well-founded. Dissatisfaction with the lack of compulsion in the voluntary corporate social responsibility movement and voluntary codes has, unsurprisingly, led to calls for supply chain regulation with “teeth”.¹⁰²

Kinley and Tadaki argue corporate codes of conduct will eventually solidify into either domestic or international hard law.¹⁰³ Advocates of mandatory codes have argued that enforceable legal sanctions are necessary to provide corporations unambiguous direction on how they should respond to human rights issues, backed by legal sanction.¹⁰⁴ McNerney has contended that “voluntary corporate social responsibility measures should supplement, not supplant, state regulation.”¹⁰⁵ Murphy claims that a “carrot and stick” approach (rather than a “carrot or stick”) is essential to motivate multi-nationals to respect human rights.¹⁰⁶ Many authors have argued that the imposition of human rights over corporations will only achieve substantial results if corporations’ duties are supported by legal sanctions.

Individual European states have been involved with developing SA8000 in China. European States and industry have developed the charter by European social partners in the footwear sector.¹⁰⁷ Under the terms of this charter, in 2003 the European Union funded Social Accountability International to conduct the European Footwear Supplier Training Program in China.¹⁰⁸ Social Accountability International then partnered with the European Confederation of the Footwear Industry and The European Trade Union Federation (Textiles, Clothing and Leather) to provide training and explore vehicles to “develop and implement a monitoring and verification system that

¹⁰⁰ HU XIAOYONG, *THE JAPAN INSTITUTE FOR LABOR POLICY AND TRAINING, CORPORATE CODES OF CONDUCT AND LABOR-RELATED CORPORATE SOCIAL RESPONSIBILITY: ANALYZING THE SELF-REGULATORY MECHANISMS OF MULTINATIONAL ENTERPRISES AND THEIR IMPACTS TO DEVELOPING COUNTRIES* (2006).

¹⁰¹ Meng Tian, *Sweatshop and Enterprise Social Responsibility*, 11 INNER MONGOLIA TVU STUDIES 46 (2006).

¹⁰² Mark B. Baker, *Tightening the Toothless Vise: Codes of Conduct and the American Multinational Enterprise*, 20 WIS. INT'L L. J. 89, 142 (2001); Lance Compa and Tashia Hinchliffe-Darricarrere, *Doing Business in China and Latin America: Developments in Comparative and International Labor Law: Enforcing International Labor Rights through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663, 687 (1995).

¹⁰³ David Kinley and Junko Tadaki, *From Talk to Walk: the Emergence of Human Rights Responsibilities for Corporations' International Law*, 44 VA. J. INT'L L. 931, 960 (2004).

¹⁰⁴ David Barnhizer, *Waking from Sustainability's "Impossible Dream": the Decision-making Realities of Business and Government*, 18 GEO. INT'L ENV'TL. L. REV. 595, 661 (2006); CHRISTIAN AID, *BEHIND THE MASK: THE REAL FACE OF CORPORATE SOCIAL RESPONSIBILITY* 3, 56 (2004); IAN SMILLIE, *PARTNERSHIP AFRICA CANADA, THE DIAMONDS AND HUMAN SECURITY PROJECT, MOTHERHOOD, APPLE PIE AND FALSE TEETH* (2003); MUTHUCUMARASWAMY SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 178 (2d ed. 2004).

¹⁰⁵ Thomas McNerney, *Putting Regulation before Responsibility: Towards Binding Norms of Corporate Social Responsibility*, 40 CORNELL INT'L L. J. 171, 173 (2006).

¹⁰⁶ Sean D. Murphy, *Essay in Honor of Oscar Schachter: Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389, 433 (2005).

¹⁰⁷ For discussion, see Andre Sobczak, *Codes of Conduct in Sub-contracting Networks: a Labor Law Perspective*, 44 JOURNAL OF BUSINESS ETHICS 225 (2003).

¹⁰⁸ SOCIAL ACCOUNTABILITY INTERNATIONAL, *10TH ANNIVERSARY REPORT* 73 (2007).

would be both credible and adapted to the size of companies in” China.¹⁰⁹ In effect, this program provided research on how the European Commission could base mandatory or voluntary standards over Chinese factories. On the basis that European states are funding research that provides models for imposing labor standards over China, it is reasonable for public and private institutions in China to be concerned that non-Chinese mandatory regulatory models may be adopted.

The encouragement of SA8000 does not only come from developed States. A Social Accountability International report discusses how India and Pakistan have worked with SA8000 and how these states can further integrate SA8000 standards into their domestic industries.¹¹⁰ Social Accountability International attended 26 meetings in Indian cities convened by the Textiles Committee of the Indian Ministry of Textiles to facilitate increased SA8000 certifications. The Pakistani Ministry of Commerce has launched a national program to increase the number of SA8000 certifications across the State. The Pakistan Adoption of Social Accountability (SA8000) Project intends to provide approximately 250 factories with financial support to become SA8000 certified, and administrative assistance in organizing such certifications. Both these States claim that increasing their involvement with SA8000 will increase their exports by gaining a national reputation of ethical production.¹¹¹

The fact that developing states are demonstrating support for the internationalization of labor standards increases the probability that some form of binding standards may be imposed internationally. For a significant period of time disagreement between northern and southern states has prevented the development of internationally binding labor regulations. One of the central problems with the introduction of social clauses in WTO agreements was the resistance from developing states.¹¹² If developing states demonstrate a lower level of resistance to linking labor conditions and trade, then the possibility of reaching a consensus to introduce such a scheme is increased. From a Chinese perspective, the increasing international acceptance of developing mandatory supply chain regulations represents a threat to China’s sovereignty and commercial interests.

III. China’s Introduction of an Integrative Linkage model: CSC9000T

This part will analyze China’s integrative linkage model for improving labor conditions in the textile and apparel system, specifically the development and the problems with ensuring that labor conditions are effectively monitored.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1 for India, 61 for Pakistan.

¹¹¹ *Id.*

¹¹² Authors claim that creating a link between international trade and labor conditions will increase the working conditions of workers in the developing states. See, e.g. Christian Barry and Sanjay G. Reddy, *Symposium: Global justice: Poverty, Human Rights, and Responsibilities: Panel 2: Global Justice and International Economic Arrangements: International Trade and Labor Standards: A Proposal for Linkage* 42 CORNELL INT’L L. J. 546, 547 (2006); Alisa Dicaprio, *Are Labor Provisions Protectionist?: Evidence from Nine Labor-augmented U.S. Trade Arrangements* 26 COMP. LAB. L. & POL’Y J. 1, 31 (2004). Other authors argue that creating a trade and labor link will only benefit Western employees and not provide increased protections for workers in developing States. See, e.g. Dexter Samida, *Protecting the Innocent or Protecting Special Interests? Child Labor, Globalization, and the WTO*, 33 DENV. J. INT’L L. & POL’Y 411, 433 (2005). Many developing States alleged that developed States were concerned with the international regulation of labor conditions in order to protect the jobs of employees in developed States. See Onno Kuik, *Fair Trade and Ethical Labeling in the Clothing, Textile, and Footwear Sector: the Case of Blue Jeans*, 11 ILSA J. INT’L & COMP. L. 619, 629 (2005); Kevin Kolben, *The New Politics of Linkage: India’s Opposition to the Workers’ Rights Clause*, 13 IND. J. GLOBAL LEGAL STUD. 225 (2006).

A. The Development of Integrative Linkage: CSC9000T

From the early 1990s to the beginning of the twenty-first century, Chinese factories in western supply chains with corporate codes and social audits were exposed to social and environmental accountability.¹¹³ Effectively, the pressure of civil society in western states motivated western corporations to force Chinese factories to adhere to western standards.¹¹⁴ Where historically Chinese corporations were encouraged to focus entirely upon profits, now Chinese laws and writings encourage Chinese corporations to focus upon their social responsibility.¹¹⁵

Following the growth of corporate social responsibility reporting in China, the Ministry of Labor, the Ministry of Commerce, and the Chinese Enterprise Confederation all created corporate social responsibility investigation committees to investigate the development of this movement in China.¹¹⁶ The Chinese government encouraged the debate of the Global Compact in China, with a major Global Compact summit being held in China in 2005. At this summit, the Chinese Vice Minister of Commerce, Yi Xiaozhun, and hundreds of Chinese business leaders and officials from the Employers and Trade Union Federations expressed their desire to improve the realization of corporate social responsibility in China.¹¹⁷

Since 2005, China has been introducing a certification and management system for the textile industry called “China Social Compliance for Textile and Apparel Industry”, (CSC9000T). The institution charged with implementing this system describes the CSC9000T model as:

An industry specific management system for social compliance for China’s textile and apparel sector, which is based upon the Chinese laws and regulations and relevant international conventions as well as in line with the Chinese characteristics.¹¹⁸

The development of CSC9000T by the China National Textile and Apparel Council and implementation by the Responsible Supply Chain Association has Chinese government support.¹¹⁹ A number of government officials expressed their support for CSC9000T at the Responsible Supply Chain Association’s second annual conference for CSC9000T in 2007.¹²⁰

¹¹³ Danqing Zhu and Kim Hua Tan, *Issues and Challenges of CSR Practices in Textile Industry: An Empirical Study in Suzhou, China*, 5 INTERNATIONAL JOURNAL OF MANAGEMENT AND ENTERPRISE DEVELOPMENT 6, 759-772 (2008).

¹¹⁴ Yu Xiaomin, *Labor Movement under Economic Globalization: Issues, Questions and Theories*, 3 SOCIOLOGICAL STUDIES 188 (2006).

¹¹⁵ Wen Bingzhou and Niu Zhenxi, *Social Responsibility and International Competitiveness of Modern Corporations*, 127 NORTHWESTERN INDUSTRIAL UNIVERSITY JOURNAL 12, 46 (2007).

¹¹⁶ CHINA TEXTILE AND APPAREL INDUSTRY, ANNUAL REPORT ON SOCIAL RESPONSIBILITY 2006 (2007).

¹¹⁷ OBSERVATOIRE SUR LA RESPONSABILITÉ SOCIÉTALES DE ENTERPRISES, CORPORATE SOCIAL RESPONSIBILITY EUROPE, CORPORATE SOCIAL RESPONSIBILITY IN CHINA 2 (2006).

¹¹⁸ Responsible Supply Chain Association, CSC9000TManagementSystem, <http://www.csc9000.org.cn/en/>

¹¹⁹ CHINA TEXTILE AND APPAREL INDUSTRY, ANNUAL REPORT ON SOCIAL RESPONSIBILITY 2006 5 (2007).

¹²⁰ See, e.g. Sun Ruizhe, Office for Promoting the Development of Social Responsibility, Paper presented at the 2007 Annual Conference on Corporate Social Responsibility for China Textile and Apparel Industry, the Great Hall of the People in Beijing: People Orientation, Social Responsibility, and Scientific Development (Dec. 17, 2007); Ou Xinqian, National Development and Reform Commission, Paper presented at the 2007 Annual Conference on Corporate Social Responsibility for China Textile and Apparel Industry, the Great Hall of the People in Beijing: Address (Dec. 17 2007); Du Yuzhou, China National Textile and Apparel Council, Paper presented the 2007 Annual Conference on Corporate

The Chinese government's *11th 5-year Plan (2006-2010)* supports the development of corporate social responsibility in China.¹²¹ The China Textile and Apparel Industry claims this plan "urges the textile industry to enhance international economic and technological cooperation, making full use of both domestic and international markets and available resources, in order to develop and strengthen social and environmental accountability systems, maintain a good order of market competition, and push the textile industry to realize all-around, coordinated and sustainable development..."¹²² The CSC9000T system has been developed to ensure improvements in both the perception of Chinese factories as sweatshops and improving labor conditions in Chinese factories.¹²³ To achieve these objectives, CSC9000T will develop into a mandatory industry management and certification system.

CSC9000T adopts standards from core ILO and UN standards on labor rights and human rights including OSH. The duties contained in CSC9000T do not replace existing Chinese laws but rather impose additional duties and vehicles for enforcement of OSH laws in China. Unlike China's labor and OSH laws the CSC9000T system is not supported by statute. The CSC9000T system more resembles an industry driven code of practice. Accordingly, the nature of the enforcement differs from a command and control system. Where labor and OSH laws are posited by the state and enforced by the state, CSC9000T is posited by industry and enforced by industry.

B. Inspecting and monitoring factories under CSC9000T

Are the CSC9000T auditors independent from the state, qualified and reliable? Where the auditing process achieves these standards, then international states, corporations and civil society are able to rely upon the reports.¹²⁴ In contrast, if the monitoring process is floored, then any reports flowing from this process are likely to be suspect and amount to nothing more than a public relations exercise. Whether or not CSC9000T succeeds is only one aspect to the problem. If CSC9000T is ineffective yet it continues to operate, then this scheme may be utilized by corporate groups that reluctantly participate in the corporate social responsibility movement to hide their breaches of labor rights.

It could be argued that many corporations do not have a history of acting ethically or a history of devoting substantial corporate resources to immoral causes. Corporations have benefited from slavery, colonialism and have a track record of maximizing profits at the expense of human rights.¹²⁵ The shareholder primacy theory of corporate law provides corporations are legal entities created to make profits for their shareholders.¹²⁶ Berle was one of the first authors to define the

Social Responsibility for China Textile and Apparel Industry, the Great Hall of the People in Beijing: Key Note Speech (Dec. 17, 2007).

¹²¹ The Chinese government's 11th 5-year Plan (2006-2010) (2006).

¹²² CHINA TEXTILE AND APPAREL INDUSTRY, ANNUAL REPORT ON SOCIAL RESPONSIBILITY 2006 5 (2007).

¹²³ Responsible Supply Chain Association, About CSC9000, <http://www.csc9000.org.cn/en/CSC9000T.asd> (last visited Dec. 30 2008).

¹²⁴ For a discussion of a ratcheting approach using the ILO's expertise, see Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753 (1994); Michael Dorf & Charles Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

¹²⁵ Ilias Bantekas, *Corporate Social Responsibility in International Law*, 22 B. U. INT'L. L. J. 309 (2004).

¹²⁶ Milton Friedman, *The Social Responsibility of Business Is to Increase Profits*, BEYOND INTEGRITY: A JUDEO-CHRISTIAN APPROACH TO BUSINESS ETHICS 241-245 (Scott B. Rae & Kenman L. Wong eds. 1996); Lisa M. Fairfax, *The Impact of Stakeholder Rhetoric on Corporate Norms*, 31 J. CORP. L., 675, 675-732 (2006).

shareholder primacy theory.¹²⁷ Berle explained that shareholders invest their property with a corporation with the specific purpose of making money.¹²⁸ Under this model, the corporation is similar to a trustee. The corporation must put the shareholders' property to the purpose for which it has been entrusted to the corporation, and for no other purpose.¹²⁹ Jones, Marshall, Mitchell and Ramsay observe that:

The "shareholder primacy" view of the corporation seems to have emerged from the idea that directors (and the professional managers who give effect to the corporate strategy) are essentially "agents" for the shareholders, and consequently are under a fundamental obligation to manage the company in the interests of the shareholders.¹³⁰

Pursuant to the profit maximization focus of some corporations, the accuracy or inaccuracy of CSC9000T audits are only relevant so far as they can impact upon the corporations' bottom line.

If CSC9000T is supported by the Chinese state and appears to provide reasonably reliable audits, then this would provide public relations cover for any private or public entity that traded with that factory. This public relations cover could be maintained even if there are suspicions of labor rights abuses. After all, if a Chinese government body has inspected and audited the factory then there are grounds for relying upon that report. This could encourage existing private regulations to be reduced as the operation of CSC9000T becomes more widespread. The problem with this approach is that CSC9000T audits may not be valid. This means there is a potential of replacing moderately effective private regulation with a potentially floored public regulatory model. Before relying upon CSC9000T reports, and moving away from private regulation, it is critical to first analyze the CSC9000T auditing process.

Where traditional Chinese labor laws required the state to inspect factories to detect non-compliance, CSC9000T relies upon factories themselves to work collaboratively with the system to identify breaches and remedy them. The focus is not upon punishing non-compliance but with factories utilizing external support to progress to full compliance.

To implement the CSC9000T system, an enterprise will need to pass through a number of stages. Broadly speaking, these stages consist of an initial evaluation stage, training in corporate social responsibility stage and a re-evaluation stage.¹³¹

Where enterprises lack sufficient expertise, they should use the Responsible Supply Chain Association's services or the professional services of training or consulting institutions. Finally, the enterprise should contact the Responsible Supply Chain Association to arrange a third party performance evaluation on the CSC9000T management system in order to have an independent assessment to identify problems, their root causes, and corrective action plans for continuous

¹²⁷ Adolf A. Berle, *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367 (1932).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ MEREDITH JONES, ET AL., CENTRE FOR CORPORATE LAW AND SECURITIES REGULATION, COMPANY DIRECTORS' VIEWS REGARDING STAKEHOLDERS 3 (2007).

¹³¹ Anonymous, *Stitch in Time*, CHINA DAILY, July 16, 2007, <http://www.csc9000.org.cn/cn/NewsDetail.asp?AID=13813>.

improvement.¹³² The requirement to have the factory audited represents a substantial increase in inspecting from the command and control model.

As discussed earlier in this paper, China's command and control OSH regime is underenforced and the number of inspectors is inadequate to inspect all workplaces. As CSC9000T requires factories to be audited this represents a positive move. This positive result is not assured, however. Requiring factories to have audits will only improve labor standards if those audits are valid. If the audits are rigorous and valid then the CSC9000T audit will provide useful data on conditions in audited factories. If, however, the audits are confounded, then those audit reports cannot be relied upon as an indicator of labor conditions in factories. Accordingly, any action taken on confounded audits is floored.

The process of auditing enterprises' CSC9000T compliance is performed by approved third party auditors.¹³³ The Responsible Supply Chain Association will provide an enterprise with a list of approved third party auditors and the enterprise contacts the auditor directly. The enterprise provides the auditor with the self-evaluation form and then the enterprise and auditor jointly arrange a time for a site inspection to occur.

CSC9000T auditors evaluate the enterprise's performance and provide a CSC9000T performance evaluation report. The CSC9000T performance evaluation report specifies where the enterprise fails to meet the CSC9000T standards and provides targets and an action plan to enable the enterprise to become compliant. According to their findings, the auditors will grade the enterprise upon the CSC9000T grading scale.¹³⁴ The China Textile and Apparel Industry adopted a gradation scale consisting of "urgent corrections", "improvements needed" and "continuously improvable." Urgent correction is the worst grade, demonstrating critical problems, while improvements needed means the factory has "minor concerns or deviations and no crucial problems" and continuously improvable means that there are no significant problems.¹³⁵ When the China Textile and Apparel Industry reported on the pilot industrial cluster audits, they provided substantial detail.¹³⁶ The quality of information provided on these enterprises was clear to understand and provided in a mix of quantified gradations and qualitative comments. In relation to the ten factories inspected, the China Textile and Apparel Industry candidly stated:

¹³² Responsible Supply Chain Association - CSC9000T Management System, <http://www.csc9000.org.cn/en/CSC9000T.asp?DID=232&DT=CSC9000T%20Management%20System&AID=1298>.

¹³³ *Id.*

¹³⁴ Marina Thorborg, *Chinese Workers and Labor Conditions from State Industry to Globalized Factories: How to Stop the Race to the Bottom*, in 1076 ANNALS OF THE NEW YORK ACADEMY OF SCIENCES 1, 893 (2006); On how corporations can be ethical, see SIMON ZADEK, CIVIL CORPORATION 151-155 (2007).

¹³⁵ CHINA TEXTILE AND APPAREL INDUSTRY, ANNUAL REPORT ON SOCIAL RESPONSIBILITY 2006 5 (2007).

¹³⁶ *Id.*; The first batch of 10 pilot industrial clusters are: Puyuan County, Tongxiang City, Zhejiang Province (China's famous town of sweater), Zhili County, Huzhou City, Zhejiang Province (China's famous town of children's wear), Haining City, Zhejiang Province (China's textile industrial cluster), Pinghu City, Zhejiang Province (China's famous city of exported garment), Shenhui County, Jin Jiang city, Fujian province (China's famous town of underwear), Shishi City, Fujian Province (China's famous city of casual wear), Jintan City, Jiangsu Province (China's famous city of exported garment), Humen City, Dongguan City, Guangdong Province (China's famous town of ladies' wear), Zhongshan City, Guangdong Province (China's textile industrial cluster) and Kaiping City, Guangdong Province (China's textile industrial cluster). Responsible Supply Chain Association, To Build a Responsible Supply Chain by Putting CSR Management into Practice, <http://www.csc9000.org.cn/en/report.asn>.

[E]nterprises showed a good performance and achievement in the areas of child labor, forced labor, discrimination, and harassment and abuse, particularly in the respect of child labor, where only one child labor was found in the whole initial assessment process. Critical deviations from the requirements or concerns, however, were found at most pilot enterprises in the areas of employment contract, working time, wages and welfare, and occupational health and safety, especially working time regarded the most critical issue, where they all failed to reach the legal requirements as prescribed in the Labor Law.¹³⁷

These audit reports appear to provide both positive and negative information. Simply providing some negative reports does not however indicate that the audits accurately reflect the situation on the ground. Are the third party auditors qualified, independent and focused upon improving labor rights? There has been no research or authorized reports which provides data to pass judgment either way.

It can be observed that third party auditors are unlikely to have a pro-worker focus. In China there are very few private institutions representing workers' interests. One of the main private institutions through which workers promote their rights is trade unions. China however continues to ban trade unions and the only legitimate trade union in China is the All-China Federation of Trade Unions.¹³⁸ While the All-China Federation of Trade Unions has been active in many cases,¹³⁹ workers have a right to freedom of association as a human right. While CSC9000T may not be able to promote an independent union, it is concerning that the scheme does not promote any avenues for worker voice. Arguably any integrative linkage regulatory model should seek to promote the existence of both public and private regulatory models to increase the overall level of monitoring and enforcement.

As mentioned earlier, Chinese public regulation has been negatively impacted by a dual focus upon improving economic growth and improving labor rights. As public regulators are heavily influenced by state and corporate interests, workers have suffered. It appears CSC9000T could also suffer from the problem of linking economic growth and labor rights. The CSC9000T website explained that the program is based, inter alia, around Chinese laws and regulations and Chinese particular situation. Chinese labor laws have traditionally had very weak levels of monitoring and enforcement. Indeed, the creation of special economic zones (SEZ) was created with the intention

¹³⁷ CHINA TEXTILE AND APPAREL INDUSTRY, ANNUAL REPORT ON SOCIAL RESPONSIBILITY 2006 31 (2007).

¹³⁸ [SEE CHINESE CHARACTERS IN ORIGINAL] [Trade Union Law (P.R.C.)], (adopted by the Nat'l People's Cosng., effective Apr. 3, 1992, amended by the Standing Comm. Nat'l People's Cong., Oct. 27, 2001), [SEE CHINESE CHARACTERS IN ORIGINAL] [COLLECTED LAWS (ECONOMIC & ADMINISTRATIVE LAW)] 1122 (1996), as amended Oct. 27, 2001, translated at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383823.htm, art 9. See Virginia E. Harper, *The 60th Anniversary of the PRC: A Retrospective on the Chinese Legal System: Article: From Contracts to Compliance? An Early Look at Implementation Under China's New Labor Legislation*, 23 Colum. J. Asian L. 35, 2009, at 59 and 60.

¹³⁹ For a discussion of the advocacy of the All-China Federation of Trade Unions, see Aaron Halegua, *Getting Paid: Processing the Labor Disputes of China's Migrant Workers*, BERKELEY J. INT'L L. 254, 258 (2008); Li-Wen Lin, *Corporate Social Responsibility in China: Window Dressing or Structural Change?*, 28 BERKELEY J. INT'L L. 64, 98 (2010); Yun Zhao, *Labor Law Developments in China: China's New Labor Dispute Resolution Law: A Catalyst for the Establishment of Harmonious Labor Relationship?*, 30 COMP. LAB. L. & POL'Y J. 409 (2009); Yin Lily Zheng, Note, *It's Not What is on Paper, But What Is in Practice: China's New Labor Contract Law and the Enforcement Problem*, 8 WASH. U. GLOBAL STUD. L. REV. 595 (2009).

of violating labor rights.¹⁴⁰ In China, SEZs were also introduced, inter alia, to improve the employment prospects of its under-utilized population.¹⁴¹ The literature shows that these twin goals of economic and employment growth were made possible by strategies which included a substantial lowering of working conditions and the respect for human rights at work.¹⁴² SEZ factory management reportedly recruited vulnerable workers from regional China and systematically abused these workers' labor rights.¹⁴³ The well recognized problems of the under-enforcement of Chinese labor laws¹⁴⁴ are magnified in SEZs where the relevant public authorities have reportedly taken little or no action to reduce the widespread abuse of workers' rights.¹⁴⁵ As a consequence, SEZs have developed into regions where workers' rights are under-protected and systematically abused,¹⁴⁶ and some authors have referred to factories in SEZs as sweatshops.¹⁴⁷

While SEZs have resulted in poor working conditions, they have largely achieved their objective of increasing investment in Chinese manufacturing.¹⁴⁸ The concern regarding CSC9000T is that there is no information to determine whether the introduction of these schemes are a genuine attempt to improve labor rights or whether there exists a public relations vehicle to reduce the threat from blue trade barriers?

The intention behind CSC9000T is confused by apparently incompatible purposes. On one hand CSC9000T purports not to be an independent monitoring agency, but a body to assist management to collaboratively improve labor conditions. CSC9000T expressly states it is a performance and management system and not a certification system:

¹⁴⁰ Denis G. Arnold & Laura P. Hartman, *Moral Imagination and the Future of Sweatshops*, 108 BUS. & SOC'Y REV. 4, 425 (2003); Weiping Wu, *Pioneering Economic Reform through Promoting Foreign Investment in China's Special Economic Zones* (1996) (Ph.D. Thesis, Rutgers University).

¹⁴¹ WEI GE, SPECIAL ECONOMIC ZONES AND THE ECONOMIC TRANSITION IN CHINA 11-44 (2000); Mauricio Jenkins, *Export Processing Zones in Developing Economies: Theoretical and Empirical Considerations* (2000) (Ph.D. Thesis, Brandeis University); Jianxin Huang, *Special Zoning Strategy in the People's Republic of China: State Capacity and Policy Implementation* (1998) (Ph.D. Thesis, University of Tennessee).

¹⁴² ROI ALBERT, EXPORT PROCESSING ZONES: SYMBOLS OF EXPLOITATION AND A DEVELOPMENT DEAD-END 8 (2003).

¹⁴³ DELIA DAVIN, THE IMPACT OF EXPORT- ORIENTED MANUFACTURING ON CHINESE WOMEN WORKERS, REPORT PREPARED FOR UNRISD PROJECT ON GLOBALIZATION, EXPORT-ORIENTED EMPLOYMENT FOR WOMEN AND SOCIAL POLICY (2001); Ching-Kwan Lee, *Production Policies and Labor Identities: Migrant Workers in South China*, in CHINA REVIEW 1995 384 (Lo Chin Kin ed., 1995).

¹⁴⁴ Liu Fang, *International Labor Standards and China's Related Legislation Comparative Study*, 34 SCIENCE AND TECHNOLOGY FOR DEVELOPMENT 67 (2007); Gu Xinxin, *On Improvement of China's Labor and Social Security Legal System*, 26 JOURNAL OF YANCHENG TEACHERS COLLEGE (HUMANITIES, SOCIAL SCIENCES) 6, 20 (2006).

¹⁴⁵ PLAYFAIR 2008 CAMPAIGN, NO MEDAL FOR THE OLYMPICS ON LABOR RIGHTS 10 (2007), http://www.playfair2008.org/docs/playfair_2008-report.pdf.

¹⁴⁶ Anita Chan, *Labor Standards and Human Rights: the Case of Chinese Workers under Market Socialism*, 20 HUM. RTS. Q. 886, 897 (1988); TAKAYOSHI KUSAGO ZAFIRIS, SOCIAL PROTECTION GROUP HUMAN DEVELOPMENT NETWORK, THE WORLD BANK, EXPORT PROCESSING ZONES: A REVIEW IN NEED OF UPDATE 1-16 (1998), <http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Labor-Market-DP/9802.pdf>.

¹⁴⁷ Maria Gillen, *The Apparel Industry Partnership's Free Labor Association: A Solution to the Overseas Sweatshop Problem or the Emperor's New Clothes?*, 32 N.Y.U. J. INT'L L. & POL. 1059, 1068 (2000); Yu Xiaomin, *Labor Movement under Economic Globalization: Issues, Questions and Theories*, 3 SOC. STUD. 188, (2006).

¹⁴⁸ Wei Ge, *Special Economic Zones and the Economic Transition in China* 109-140 (1999); JUNG-DONG PARK, THE SPECIAL ECONOMIC ZONES OF CHINA AND THEIR IMPACT ON ITS ECONOMIC DEVELOPMENT 165-178 (1997); Weiping Wu, *Pioneering Economic Reform through Promoting Foreign Investment in China's Special Economic Zones* (1996) (PhD Thesis, Rutgers University).

CSC9000T adopts the mode of “performance evaluation” to judge enterprises’ social responsibility performance, giving up the conventional way of accreditation. CSC9000T performance evaluation is to help enterprises to review their own social and environmental responsibility management system and to find out the gap between voluntary social responsibility actions and the requirements of CSC9000T ...¹⁴⁹

CSC9000T adopts the collaborative approach in order to increase enterprises’ willingness to disclose problems to the CSC9000T auditors, to enable the Responsible Supply Chain Association to work with enterprises to improve labor conditions.

Even though CSC9000T claims not to certify factories, this scheme provides domestic and international customers information on labor conditions in audited factories.¹⁵⁰

Non-compliant factories are named and shamed by the CSC9000T scheme. In order to enable purchasers to identify easily which factories are compliant, the China Textile and Apparel Industry will develop a business structure and public information platform. This database will include a product index on what products are manufactured at each factory, details on how the CSC9000T management system is being operated, copies of the CSC9000T evaluation reports from enterprises and associated correction plans, and its implementation.¹⁵¹ The existence of positive or negative reports will have a substantial commercial impact upon Chinese factories. According to the Responsible Supply Chain Association some Chinese factories are already benefiting from participating in the CSC9000T scheme. The Responsible Supply Chain provides the following example:

In March 2006, Gaiqi became one of the first pilot enterprises of CSC9000T, which draw extensive attention at home and abroad. A Canadian client read the report and then placed an order of more than one million US dollars with Gaiqi. In addition, Gaiqi was not required to go through the factory inspection procedure by the Canadian company.¹⁵²

Accordingly the CSC9000T reports provide a potentially rich source of knowledge of information for purchases and civil society.

The validity of the social auditing process largely hinges upon the effectiveness of the auditors, and potentially this is the point of greatest weakness in the CSC9000T system, as experience in other areas of third party auditing suggest. Will third party auditors focus upon the accuracy of reports or focus upon improving economic growth? This blend of economic and labor rights created problems for the enforcement of statute based labor laws in China. It is equally possible that third party auditors will focus more upon communal rights and promote economic growth. Without more public information on how auditors are approved and monitored it is difficult to commend the quality of the CSC9000T reports.

¹⁴⁹ Responsible Supply Chain Association, CSC9000T Management System, *supra* note 134.

¹⁵⁰ Responsible Supply Chain Association, What benefits the RSCA can bring to buyers and brands?, [http://www.csc9000.org.cn/en/CSC9000T.asp?DID=232&DT=CSC9000T Management System&AID=12982](http://www.csc9000.org.cn/en/CSC9000T.asp?DID=232&DT=CSC9000T%20Management%20System&AID=12982).

¹⁵¹ CHINA TEXTILE AND APPAREL INDUSTRY, ANNUAL REPORT ON SOCIAL RESPONSIBILITY 2006 38 (2007), http://info.worldbank.org/etools/antic/docs/Resources/InitiativeType/AntiCorruption%20Declarations/China_Declaration.pdf.

¹⁵² Responsible Supply Chain Association, Popularizing the Achievements in Promoting the Development of Social Responsibility in Chinese Textile Enterprises, <http://www.csc9000.org.cn/en/NewsDetail.asp?AID=17638>.

CSC9000T also suffers from the limitation of not publishing standards on how third party auditors should perform their audits. As a consequence third party auditors could adopt good or bad practices. As third party auditors who adopt less intrusive and auditing practices that enable factories to avoid labor rights abuses are likely to be attractive to factories, this will likely place downward pressure upon the quality of audits as third party auditors attempt to attract clients.

The nature of dubious auditing practices can be gleaned from existing private regulation. Many corporations adopt ethical trade practices which involve third party audits of factories. The factors which confound these audits point to the possible barriers CSC9000T audits might confront. Auditors often provide factories with notice prior to inspection, which is preferred by management as it enables management to structure work flows around audits. War on Want reports many audits provide factories 20 days warning prior to inspecting the factory and its records.¹⁵³ I suggest that warning factories prior to visits can have disastrous effects upon the internal validity of the audit. There is a lot at stake in audits - if a factory receives a negative report, it can lose contracts or be required to spend money improving labor conditions,¹⁵⁴ could also cost management their jobs. If auditors give notice of audits, the factory operator can clean the factory, ensure fire exits are not blocked and modify work processes.¹⁵⁵ This distorts the auditing data as this does not represent how workers are actually working under normal circumstances. When Chinese factories are notified of an audit, management are reported to have committed fraud, threatened workers and engaged in other unethical acts to distort the auditing result.¹⁵⁶ To increase the validity of results, audits need to occur randomly and provide factories minimal notice prior to performing the inspection.¹⁵⁷

There are many reported instances of Chinese factory management engaging in extreme acts to ensure social audit results are confounded. Egels-Zande's meta-study of primary research found that seventy-seven per cent of factories engaged in unethical acts to distort the auditing results.¹⁵⁸ In particular, seventy-seven per cent of factories ordered workers to lie to the social auditors. Thirty-three per cent provided workers with financial benefits for lying and punished workers who failed to deceive the social auditors sufficiently. Forty-four per cent of factories ordered workers who were under the lawful age to stay home on the days of factory audits and fourteen per cent of factories fraudulently generated employment contracts prior to audits. Kernaghan, Giammarco, Briggs, Hallock and Donoso,¹⁵⁹ *Labor Behind The Label*,¹⁶⁰ the Playfair Alliance,¹⁶¹ Ascoly and

¹⁵³ WAR ON WANT, FIGHTING GLOBAL POVERTY: FASHION VICTIMS: THE TRUE COST OF CHEAP CLOTHES, PRIMARK AT ASDA AND TESCO 13 (2005).

¹⁵⁴ ANNUAL REPORT ON SOCIAL RESPONSIBILITY, *supra* note 61, at 20; *see* KERNAGHAN ET AL., *supra* note 42, at 37.

¹⁵⁵ S. Frenkel and D. Scott, *Compliance, Collaboration, and Codes of Labor Practice: the Adidas Connection*, 45 CALIFORNIA MANAGEMENT REVIEW 1, 29 (2002); Mike Healy and Jennifer Iles, *The Establishment and Enforcement of Codes*, 39 J. BUS. ETHICS 112, 117-24 (2002).

¹⁵⁶ Diana Winstanley, Joanna Clark and Helena Leeson, *Approaches to Child Labor in the Supply Chain*, 11 BUSINESS ETHICS: A EUROPEAN REVIEW 3, 210 (2002).

¹⁵⁷ MAY WONG AND STEPHEN FROST, ASIA MONITOR RESOURCE CENTER, MONITORING MATTEL: CODES OF CONDUCT, WORKERS AND TOYS IN SOUTHERN CHINA 23 (2002), http://www.woek-web.de/web/cms/upload/pdf/aktion_fair_spielt/publikation/wong_frost_2000_monitoring_mattel.pdf.

¹⁵⁸ Niklas Egels-Zande, *Suppliers Compliance with MMNC's Code of Conduct: Behind the Scenes of Chinese Toy Suppliers*, 75 J. BUS. ETHICS 45, (2007).

¹⁵⁹ *See* KERNAGHAN ET AL., *supra* note 42, at 11; KERNAGHAN, *supra* note 36, at 19; *see also* REPORTS OF THE NATIONAL LABOR COMMITTEE, THE NATIONAL LABOR COMMITTEE, ANOTHER WAL-MART BARGAIN: MADE IN CHINA (2007).

¹⁶⁰ LABOR BEHIND THE LABEL, LET'S CLEAN UP FASHION: THE STATE OF PAY BEHIND THE UK HIGH STREET 6 (2006); LABOR BEHIND THE LABEL, UPDATE: LET'S CLEAN UP FASHION: THE STATE OF PAY BEHIND THE UK HIGH STREET 6 (2007).

Zeldenrust,¹⁶² Students and Scholars Against Corporate Misbehaviour¹⁶³ and Wai-ling Chan¹⁶⁴ found factories required workers to sign two sets of timesheets. One set of time sheets accurately recorded the workers' egregious overtime hours of 10 to 13 hour days, 7 days a week, and the other set of timesheets recorded hours of work which complied with Chinese laws and relevant corporate codes.¹⁶⁵ Workers are coached on how to lie to corporate auditors. This process enables the Chinese factories to "appease the gullible ... corporate auditors so that the corporate monitoring scam can proceed."¹⁶⁶

China's integrative linkage model in CSC9000T has the potential of improving labor rights in China. The collaborative nature of this model reflects Chinese culture and may create change. The beneficial impact of these reforms will only be realized however if the scheme ensures adequate monitoring. The notion of education and support for the majority of factories and punishing only the few companies that fail to uphold standards is a well established model. It is submitted that effective enforcement does not always equate to a model which only punishes non-compliance. Regulators have recognized that responding to every breach of labor laws with punishment can create a culture of hostility which causes employers to attempt to avoid detection rather than discharge their duties.¹⁶⁷ Incentives alone, however, cannot ensure respect for labor laws. Gunningham has observed that even with incentive-based regulatory models, "some form of persuasion by coercion by means of law remains a necessary condition."¹⁶⁸

Ayres and Braithwaite have combined both incentives and punishments in their widely supported regulatory enforcement pyramid model.¹⁶⁹ The regulatory enforcement pyramid model provides incentives for parties who attempt to comply with their duties and punishment for those who intentionally or willfully negligently fail to discharge their duties.¹⁷⁰ The pyramid presumes the majority of people will be at the bottom of the pyramid, voluntarily complying with their duties. In the middle of the pyramid are supportive schemes to assist people to comply with their duties. At the top of the pyramid are legal sanctions for the small number of people who fail to discharge their legal duties satisfactorily.¹⁷¹ The enforcement pyramid represents an understanding that regulators should determine how effective parties are regulating themselves prior to escalating interventions to impose legal sanctions.¹⁷²

¹⁶¹ PLAY FAIR 2008 CAMPAIGN, NO MEDAL FOR THE OLYMPICS ON LABOR RIGHTS 25-29 (2007).

¹⁶² NINA ASCOLY AND INEKE ZELDENRUST, CLEAN CLOTHES CAMPAIGN, CHALLENGES IN CHINA: EXPERIENCES FROM 2 CCC PILOT PROJECTS ON MONITORING AND VERIFICATION OF CODE COMPLIANCE 8 (2003).

¹⁶³ STUDENTS AND SCHOLARS AGAINST CORPORATE MISBEHAVIOR, LOOKING FOR MICKEY MOUSE'S CONSCIENCE: A SURVEY OF THE WORKING CONDITIONS OF DISNEY FACTORIES IN CHINA 6-9 (2005).

¹⁶⁴ Jenny Wai-ling Chan, Paper Presented at the Sweatshop Watch and Marianas Fund of the Tides Foundation Conference, Colorado, Gender and Global Labor Organizing: Migrant Women Workers of Garment Industry in South China (May, 2005) (Presenting research gathered with the Chinese Working Women Network).

¹⁶⁵ *Id.*

¹⁶⁶ KERNAGAHAN ET AL., *supra* note 36, at 19.

¹⁶⁷ RICHARD JOHNSTONE AND NEIL GUNNINGHAM, REGULATING WORKPLACE HEALTH AND SAFETY: SYSTEMS AND SANCTIONS 112 (1999).

¹⁶⁸ Neil Gunningham, *Integrating Management Systems and Occupational Health and Safety Regulation*, 26 J.L. SOC'Y at 2, 192 (1999).

¹⁶⁹ IAN AYRES AND JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 19-53 (1995).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 299 (2002); Richard Johnstone and Rick Sarre, *Regulation: Enforcement and Compliance*, 11 AUSTRALIAN INSTITUTE OF CRIMINOLOGY (Working Paper 2004).

Underlying the enforcement pyramid is the threat of adverse legal sanctions. The enforcement pyramid involves a carrot and stick approach where the stick remains a crucial aspect of the model.¹⁷³ Johnstone argues:

At the heart of the enforcement pyramid is a paradox – the greater the capacity of the regulator to escalate to the top of the pyramid, and the greater the available sanctions at the top of the pyramid, the more duty holders will participate in co-operative activity at the lower regions of the pyramid.¹⁷⁴

The top of the enforcement pyramid is premised on the basis legal sanctions will deter corporations from non-compliance. Where the enforcement pyramid's carrots do not motivate compliance, then arguably the fear of the stick remains the primary way to force compliance.¹⁷⁵

The situation with CSC9000T is similar to the regulatory pyramid. For CSC9000T to effectively operate it is essential that inspections, monitoring and reporting on labor conditions are accurate. The accurate information can then be used to identify educational interventions and to punish non-compliance where appropriate. Based upon the above analysis it appears the CSC9000T model has significant problems with the quality of its factory auditing. Until the assurance problems with CSC9000T are addressed private regulation social auditing should be continued. Indeed, if the fear from blue trade barriers was one motivation for the introduction of CSC9000T, could the reduction in private regulation reduce Chinese support for this scheme the problems with CSC9000T have been described above. If the pressure from private regulation is removed then would the incentive remain to improve the ability of CSC9000T to accurately report on labor rights? Moreover, if private regulation does not continue, how will the accuracy of CSC9000T reports be independently verified? One of the major benefits of private regulation is its independence and ability to drive public regulatory reform. Due to the concerns with CSC9000T it is critical for private regulation to continue to operate as a powerful driver for reforms. Integrative linkage contains effective regulatory structures from private and public jurisdictions. It is critical for private regulation to grow and develop within any integrative linkage model to resist the threats posed by state involvement. Whether those threats be intentional or accidental, private regulation has often developed due to state failures and private regulation should remain extremely active in case of future state failures.

IV. Conclusion

The regulation of labor conditions in international trade broadly has the same regulatory facets as any regulatory regime. The facets of positing standards, monitoring and enforcement are however far more challenging for regulating labor in international trade. This paper has focused upon how the international community and China has responded to the growth of sweatshops in China.

¹⁷³ Paul Teague, *New Employment Times and the Changing Dynamics of Conflict Resolution Work: the Case of Ireland*, 28 COMP. LAB. L. & POL'Y J. 587 (2006).

¹⁷⁴ Richard Johnstone, *From Fiction to Fact - Rethinking OHS Enforcement ANU National Research Centre for Occupational Health and Safety Regulation 17* (Working Paper No. 11, 2003).

¹⁷⁵ Neil Gunningham, *Occupational Health and Safety Regulation: Two Paths to Enlightenment*, 19 COMP. LAB. L. & POL'Y J. 547, 571 (1998).

Part I of this paper used the enforcement of OSH in China as a case study to emphasize enforcement problems with Chinese labor laws. Part II then analyzed how the international community has become increasingly concerned with the growth of sweatshops and has recognized that states and corporations should refrain from being complicit in labor and human rights abuses. This recognition, combined with a failure of public regulation in many developing states, has resulted in various private regulatory vehicles emerging. The emergence of private regulation represents a threat to the sovereignty to states such as China. Part III analyzed how China has regarded the growth of private regulation over Chinese factories with great concern. While the existence of private regulation may reduce the instances of sweatshops, it also has the potential of reducing China's legitimate comparative advantage and resulting in the development of blue trade barriers. In response to the threat from private enforcement, amongst other things, China has embraced corporate social responsibility. To further its corporate social responsibility objectives China has introduced the CSC9000T as an integrative linkage model to improve labor conditions.

The operation of CSC9000T has the potential of improving the accuracy of auditing reports of Chinese factories. To realize this intention however serious concerns with the auditing process must be addressed. First, how are third party auditors selected and monitored for ability? How are conflicts of interest managed between third party auditors and factories? Do the audits adopt a reliable process to reduce factory fraud and to maximize the quality of reports? Ultimately China needs to determine if CSC9000T is focused as an integrative linkage to improve labor rights or to prevent the threat posed by independent auditors.

CSC9000T does not accredit factories but offers reports based upon performance management. The lack of accreditation should be regarded as a significant weakness with CSC9000T. The lack of accreditation became a major concern with another integrative linkage in the United Nations Global Compact. Serious assurance problems emerged with the United Nations Global Compact, where companies that used the scheme were sometimes accused of bluewashing their corporate social responsibility reporting.¹⁷⁶ The allegation of bluewashing meant that corporations social and environmental reporting was simply a public relations exercise that was unreliable and participating in the United Nations Global Compact was an effort to gain unjustified credibility.¹⁷⁷ The term blue was used to reflect the color of United Nations peace keepers' helmets. The question for CSC9000T moving forward is, if their auditing becomes renowned for being unreliable, might it be said that corporations that are participating in CSC9000T are simply red and Gold washing their social and environmental reports to give them the image of credibility? To avoid this problem CSC9000T will need to adopt the approach of continuous improvement. To ensure such change occurs, and that CSC9000T is fully implemented in the future, civil society, trade unions and other interested groups must continually monitor the operation of CSC9000T. This level of monitoring occurred with the United Nations Global Compact. When problems emerged with the United Nations Global Compact, pressure from civil society resulted in changes to the scheme.¹⁷⁸ As shown by the machinations surrounding the United Nations Global Compact, the

¹⁷⁶ For a discussion of how the term "bluewashing" has emerged to describe corporations that participate in the United Nations Global Compact as a public relations exercise with no intention of improving their ethical conduct, see CORPORATE WATCH, TANGLED UP IN BLUE (2000); Sean D. Murphy, *Essay in Honor of Oscar Schachter: Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389, 413 (2005); Alexis M. Taylor, *UN Reports: the UN and the Global Compact*, 17 N. Y. L.SCH. J. HUM. RTS. 975, 981 (2001).

¹⁷⁷ *Id.*

¹⁷⁸ For a discussion of how the United Nations Global Compact has responded to the substantial criticism surrounding Bluewashing and introduced additional integrity measures, such as the new complaints mechanism, see United Nations

role of private regulation forced the public United Nations Global compact to reform the rules of that scheme. Similar to the United Nations Global Compact integrative linkage, the role of civil society surround the CSC9000T should remain vigilant and continue to criticize public regulation and integrative linkages. Integrative linkages are made up of public and private regulation. It is critical that both private and public regulations are improved so that regulators are motivated to seek greater respect for labor rights by the pressure and innovation from private regulation.

Global Compact, Note on Integrity Measures, http://www.unglobalcompact.com/docs/aboutthe_gc/2.3/im290605.pdf. Evaristus Oshionebo observes that this complaints procedure is neither judgmental nor punitive: "The complaint mechanism is essentially meant to facilitate mutual resolution of problems rather than to compel compliance," Evaristus Oshionebo, *The U.N. Global Compact and Accountability of Transnational Corporations: Separating Myth from Realities*, 19 FLA. J. INT'L L. 1 (2007).