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# THE FUTURE OF THE STUDENT ANTI-SWEATSHOP MOVEMENT: PROVIDING ACCESS TO U.S. COURTS FOR GARMENT WORKERS WORLDWIDE

ALLIE ROBBINS

On December 16, 2011, the United States Department of Justice issued a positive business review letter stating that universities may individually decide to license their apparel only to brands whose supplier factories pay workers a living wage, respect the right to organize unions, and provide safe and healthy working conditions.<sup>1</sup>

This letter marks a huge moment for the student anti-sweatshop movement, and has served as a catalyst for renewed discussion on the future of the movement. In this article, I explore the idea that jobber agreements—agreements between brands and unions governing working conditions in supplier factories—may be the best way forward for the next phase of international solidarity campaigns by the student anti-sweatshop movement.<sup>2</sup>

In Part I, I provide a short history of the student anti-sweatshop movement within the United States.<sup>3</sup> In Part II, I examine the possibility that a series of jobber agreements could be signed between brands and a consortium of unions around the world, which coupled with university policies, would require that collegiate apparel be produced in factories that respect workers' rights.<sup>4</sup> In Part III, I address the question of why access to U.S. Courts is so important.<sup>5</sup> Part IV looks at the notion that jobber agreements would provide garment workers with access to United States

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<sup>1</sup> Press Release, U.S. Dep't. of Justice, Justice Department Will Not Challenge Worker Rights Consortium's Designated Suppliers Program For Collegiate Apparel, Antitrust 11-1656 (Dec, 16, 2011), <http://www.justice.gov/opa/pr/2011/December/11-at-1656.html>.

<sup>2</sup> This idea is not an original one. It has been discussed by USAS and USAS' allies as a next step. I believe the origin of the idea can be credited to international solidarity guru Jeffrey Hermanson.

<sup>3</sup> See *infra* Part I.

<sup>4</sup> See *infra* Part II.

<sup>5</sup> See *infra*, Part III.

courts as third-party beneficiaries.<sup>6</sup> In Part V, I caution that forum selection clauses are crucial as recent forum non conveniens jurisprudence has not looked favorably upon foreign plaintiffs suing U.S. corporations.<sup>7</sup> Part VI briefly discusses the practical implementation of jobber agreements in the global collegiate apparel industry.<sup>8</sup>

PART I  
HOW WE GOT HERE: A BRIEF HISTORY OF THE STUDENT ANTI-  
SWEATSHOP MOVEMENT IN THE UNITED STATES

As in many social movements throughout U.S. history, college students have played a critical role in the anti-sweatshop movement in the United States. It is precisely because this has been a movement—and not merely a stagnant organization—that it has been so successful. The history of the movement has been one of continuous adaptation as multinational corporations seek to evade negative publicity and abdicate responsibility for the conditions under which their goods are produced.

United Students Against Sweatshops (USAS) was formed in 1997 by a group of undergraduate students who wanted to ensure that the apparel that bore their schools' logos was made under conditions that respected the rights of the people who made the apparel.<sup>9</sup> USAS members recognized early on that workers' rights are human rights and that the conditions in garment factories were unacceptable.<sup>10</sup> The first nationwide campaign centered around pressuring colleges and universities to sign codes of conduct that outlined the conditions under which their collegiate apparel was to be manufactured.<sup>11</sup> The USAS model acknowledged the unique power that students possess within the college and university setting, and developed from the recognition that educational institutions have a responsibility to ensure that the apparel they license is made under safe and adequate conditions. A brand<sup>12</sup> is legally permitted to produce apparel bearing that school's logo only when it purchases a license from a college

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<sup>6</sup> See *infra* Part IV.

<sup>7</sup> See *infra* Part V.

<sup>8</sup> See *infra* Part VI.

<sup>9</sup> Telephone interview with Benjamin McKean, former Nat'l Organizer for United Students Against Sweatshops (Aug. 31, 2011).

<sup>10</sup> See *infra* Part V.

<sup>11</sup> Telephone interview with Benjamin McKean, *supra* note 9.

<sup>12</sup> Throughout this article, the terms brand, licensee, and manufacturer may be used interchangeably. I prefer the term brand because it highlights the fact that most of these companies are merely names – the design and production are contracted out to subcontractors around the globe. In addition, a large reason behind the success of anti-sweatshop organizing can be traced to the importance these companies place on their brand image.

or university.<sup>13</sup> Thus, schools hold tremendous power in the global garment industry. USAS's code of conduct campaign marked the first time that anyone attempted to hold colleges and universities accountable for how they handled this power.<sup>14</sup>

This endeavor was far from inconsequential, as the collegiate apparel industry has been valued at \$4 billion in the United States alone.<sup>15</sup> Despite staunch resistance from university administrators and the brands to whom they license their logos,<sup>16</sup> USAS held protests and sit-ins on campuses across the country.<sup>17</sup> Students at seven universities held sit-ins during the spring semester of 1999, with students at the University of Arizona sitting in for a total of 225 hours.<sup>18</sup> The next spring, fifteen more schools followed suit.<sup>19</sup> The students won. Today, hundreds of colleges and universities have codes of conduct that serve as guidelines for the conditions under which their collegiate apparel must be made, and university administrators have a responsibility to the people who produce goods bearing their school's

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<sup>13</sup> Glenn S. Bacal, *Collegiate Trademark Licensing: The Basic Rules of the Game*, INTELLECTUAL PROPERTY DEPT. (Jan. 11, 2007), <http://www.asu.edu/counsel/brief/trademark.html>.

<sup>14</sup> See *United Student Against Sweatshops*, UNITED STEELWORKERS, [http://www.usw.org/our\\_union/allies\\_and\\_partners?id=0006](http://www.usw.org/our_union/allies_and_partners?id=0006) (last visited Mar. 27, 2011) (explaining that because students knew "that their universities had the power to demand that apparel bearing their logo be made in a factory where workers rights are protected," the students demanded the schools adopt a code of conduct for licenses and developed a code of conduct monitoring system to enforce the adopted codes of conduct.).

<sup>15</sup> Peter Drier, *Is the Perfect Factory Possible?*, THE NATION (Oct. 19, 2011), <http://www.thenation.com/article/164072/perfect-factory-possible>. The high value of the collegiate apparel industry is somewhat unique to the United States, as our nation's obsession with collegiate athletics renders collegiate apparel quite valuable. See Christopher Candland, *What Do Corporate Codes of Conduct Do? The Effectiveness of Codes in Improving Internationally-Recognized Core Labor Standards in Thai Production of U.S. Collegiate Apparel and Footwear* (Sept. 3, 2004), <http://www.wellesley.edu/Polisci/Candland/codes.pdf> (explaining that "the collegiate apparel industry was valued at \$2.5 billion" in 1999, accounting for one percent of the U.S. apparel industry).

<sup>16</sup> Opposition initially had three phases. First the brands denied there were any labor issues at their supplier factories at all. Then the brands denied they were responsible for the problems. Then the brands began to adopt corporate social responsibility language and alter the way they interacted with university administrators. Interview with Benjamin McKean, *supra* at 9.

<sup>17</sup> Duke University students held the first sit-in, which lasted thirty-one hours. Denise K. Magner, *Duke Students Stage Sit-In to Insure That Campus Apparel Doesn't Come From Sweatshops*, THE CHRON. OF HIGHER EDUC. (Feb. 1, 1999), <http://chronicle.com/article/Duke-Students-Stage-Sit-In-to/112614/>.

<sup>18</sup> Aaron Kreider, *Sit In! A Tactical Analysis*, CAMPUS ACTIVISM (Jan. 19, 2005), <http://www.campusactivism.org/uploads/sit-in-tactical-analysis.pdf>.

<sup>19</sup> *Id.*

logo.<sup>20</sup>

One of the key components of this code of conduct campaign was quarterly disclosure of the names and locations of the factories producing collegiate apparel.<sup>21</sup> The structure of the global garment industry was (and remains today) such that a major collegiate apparel brand, such as Nike or Russell, produces its collegiate apparel at hundreds, sometimes thousands, of factories worldwide and moves production to different factories every few months.<sup>22</sup> The brands generally do not own these factories, but subcontract production to supplier factories owned by middlemen. To have an impact in this industry, therefore, USAS activists had to identify which factories were producing collegiate apparel and understand the nature of those factories' production cycles.<sup>23</sup> Thus, along with codes of conduct, USAS demanded that the brands producing collegiate apparel disclose to their university licensors the names and addresses of all factories producing collegiate apparel for that brand every quarter.<sup>24</sup> This requirement quickly became even more contentious than the regulatory provisions of the codes of conduct. Brands launched a major opposition claiming that this information was a trade secret and that its release would destroy the global garment industry and lead to industrial espionage.<sup>25</sup> Despite this opposition, students were successful. Major collegiate apparel brands now provide the names and locations of the factories producing collegiate apparel to their university licensors.<sup>26</sup> The universities, in turn, provide this information to

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<sup>20</sup> Sarah Chavez, *Workers Rights Consortium and University Logos* (2007), available at <http://irps.ucsd.edu/assets/020/8408.pdf>.

<sup>21</sup> David J. Doorey, *Can Factory Disclosure Improve Labor Practices in the Apparel Industry? A Case Study of Nike and Levi-Strauss*, 4 COMP. RESEARCH IN LAW & POL. ECON. 1, 13-15 (2008); see also UNITED STUDENTS AGAINST SWEATSHOPS, CAMPUS ORGANIZING MANUAL, 15, available at <http://www.bsos.umd.edu/aasp/chateauvert/411/usaskit.pdf>.

<sup>22</sup> Allie Robbins, *Could Sourcing From Union Shops Be Against the Law?*, 5 ORIG. LAW REV. 46, 60-62 (2009).

<sup>23</sup> *Id.* at 55.

<sup>24</sup> *Id.*

<sup>25</sup> While it was not fully clear at the time what the brands meant by this, after receiving the data, students surmised that the brands did not want consumers to know that the same workers who manufactured their goods were producing goods for other brands in those same factories. This, the brands feared, would begin to erode the consumer confidence in the uniqueness of the brand's product. Interview with Benjamin McKean, *supra* note 9. It is worth mentioning that if jobber agreements were adopted, it could once again lead to greater transparency in the garment industry as any brand that violates an agreement by refusing to pay a premium to provide for a living wage may be required, through the discovery process, to reveal even more information about its financial structure.

<sup>26</sup> This is often done through the licensing and marketing firm The Collegiate Licensing Company, which acts as an intermediary between brands and university licensing officials.

the public.<sup>27</sup> This means that if workers at a garment factory are organizing, USAS members can know which universities' apparel is being made in that factory and can adjust their organizing strategy accordingly. USAS's disclosure victory paved the way for factory disclosure throughout the rest of the global garment industry as well. For example, since 2005, the International Textile, Garment & Leather Workers' Federation has made great strides in obtaining factory location information from major garment producers worldwide.<sup>28</sup>

Students did not stop their organizing efforts there; the next problem for student organizers was deciding what to do with this information. Even with knowledge of which factories were supposed to abide by the codes of conduct the universities adopted, and information about specific factories that were not complying, USAS alone lacked the resources and expertise to enforce the codes of conduct.<sup>29</sup> In what was perhaps USAS's boldest move, students decided to develop an organization that would focus specifically on monitoring the working conditions in factories that produced collegiate apparel.<sup>30</sup> In 1999, students began to lay the groundwork for the formation of the Worker Rights Consortium (WRC).<sup>31</sup> That same year, USAS members began demanding their schools affiliate with the WRC,<sup>32</sup> even before the WRC held its founding conference.<sup>33</sup> The WRC officially opened its doors in 2000.<sup>34</sup> Today, university administrators, students, and labor rights experts govern the WRC.<sup>35</sup> No brands are permitted to have

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<sup>27</sup> *About the Factory Disclosure Database*, WORKER RIGHTS CONSORTIUM, (last visited May 30, 2012), [http://workersrights.org/search/about\\_fdd.asp](http://workersrights.org/search/about_fdd.asp).

<sup>28</sup> *Factory Lists*, ITGLWF, <http://www.itglwf.org/lang/en/factories-list.html> (last visited Feb. 23, 2011).

<sup>29</sup> Robbins, *supra* note 22, at 55.

<sup>30</sup> At the same time, President Clinton's Apparel Industry Partnership was becoming the Fair Labor Association (FLA), and began to court universities to join its governing body. Students quickly realized the FLA was simply an attempt by brands to control the movement against sweatshops "in a way that couldn't hurt them." Interview with Benjamin McKean, *supra* note 9.

<sup>31</sup> See Ryan Gabrielson, *SAS Publicly Announces Support of Workers Rights Consortium*, WILDCAT ONLINE NEWS (Nov. 16, 1999), [http://wc.arizona.edu/papers/93/60/08\\_1\\_m.html](http://wc.arizona.edu/papers/93/60/08_1_m.html) (describing USAS' endorsement of the WRC).

<sup>32</sup> Another round of sit-ins commenced and were met with staunch university opposition. At the University of Wisconsin–Madison, for example, fifty-four students were pepper sprayed, assaulted, and arrested during a sit-in. Ian Trupin, *Trupin '13: Celebrating 10 Years of the Worker Rights Consortium*, THE BROWN DAILY HERALD (Sept. 27, 2011), <http://www.browndailyherald.com/trupin-13-celebrating-10-years-of-the-worker-rights-consortium-1.2638819>.

<sup>33</sup> The organizing history behind the WRC is truly a testament to the power of student organizing. Students developed the idea for the WRC and forced their universities to affiliate, before the organization formally existed.

<sup>34</sup> *History*, WORKER RIGHTS CONSORTIUM, <http://workersrights.org/about/history.asp> (providing the history of WRC).

<sup>35</sup> *Governance*, WORKER RIGHTS CONSORTIUM, <http://workersrights.org/about/govern.asp>. (last visited July 13, 2011).

any involvement in the governance of the organization.<sup>36</sup> Affiliate universities pay an annual fee to the WRC and provide factory disclosure information.<sup>37</sup> The WRC in turn works with international labor rights experts to monitor conditions in garment factories around the world. Presently, the WRC has 181 university affiliates and five high school affiliates,<sup>38</sup> and employs staff in eight countries.<sup>39</sup>

Through their collaboration, USAS and the WRC have helped garment factory workers worldwide attain better working conditions, organize unions, and obtain higher wages.<sup>40</sup> This has been done primarily through solidarity with individual factory struggles.<sup>41</sup> The WRC conducts investigations of factory compliance with codes of conduct and makes recommendations to its university affiliates regarding which type of action should be taken.<sup>42</sup> USAS members support worker organizing through campus activism that results in universities pressuring brands to step in and remedy code of conduct violations.<sup>43</sup> Those brands then require factories to recognize the workers' union, pay higher wages, fix unsafe working conditions, or otherwise respond to the demands of the workers.<sup>44</sup>

While this has been effective in many cases, USAS members have also seen factories shut down shortly after workers successfully organize for their rights, as brands pull their orders in search of unorganized workforces and lower costs.<sup>45</sup> Adding to the volatile nature of the industry, on January

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<sup>36</sup> *Frequently Asked Questions*, WORKERS RIGHTS CONSORTIUM, <http://workersrights.org/faq.asp> (last visited Feb. 23, 2011) (explaining that “the WRC is governed by a 15-member board, including five representatives of university administrations elected by the University Caucus, five representatives of United Students Against Sweatshops and five representatives of the WRC Advisory Council, an international body of human rights and labor rights experts.”).

<sup>37</sup> *Id.*

<sup>38</sup> *WRC Affiliated Colleges and Universities*, WORKER RIGHTS CONSORTIUM, <http://workersrights.org/about/as.asp> (last visited Feb. 21, 2011).

<sup>39</sup> *Contact Us*, WORKER RIGHTS CONSORTIUM, <http://workersrights.org/contact/> (last visited July 13, 2011).

<sup>40</sup> See, e.g., Robert J.S. Ross, *A Tale of Two Factories: Successful Resistance to Sweatshops and the Limits of Firefighting*, 30 LABOR STUDIES JOURNAL 65, 65-66 (2006) (providing examples of successful worker campaigns that obtained union recognition and benefits).

<sup>41</sup> The WRC's first factory investigation took place in Mexico, at the Kukdong Factory. Myra McGriff, *Nike Strike Testes WRC's Procedures*, THE OBSERVER (Feb. 16, 2001), available at, <http://www.nd.edu/~observer/02162001/News/6.html>.

<sup>42</sup> *Factory Investigations*, WORKERS RIGHTS CONSORTIUM, <http://workersrights.org/Freports/index.asp#freports> (last visited Mar. 22, 2013).

<sup>43</sup> Robbins, *supra* note 22, at 56-57.

<sup>44</sup> Doorey, *supra* note 21, at 15.

<sup>45</sup> See, e.g., *Nike Supplier Closes Unionized Factory, Shifts Work to Vietnam*, PEACEWORK MAGAZINE (Oct. 2007), <http://www.peaceworkmagazine.org/nike-supplier-closes-unionized-factory-shifts-work-vietnam>.

1, 2005 the Multi-Fiber Arrangement (MFA), a series of quotas governing how many garments each country could export, completely phased out.<sup>46</sup> The anti-sweatshop movement feared that the MFA phase out would worsen the environment for garment workers by consolidating garment production in a few countries based on lower workers' rights standards, instead of permitting production in hundreds of countries worldwide.<sup>47</sup>

Brands' continuous efforts to avoid enforcement of the code of conduct and the phase out of the MFA created a desire for a more comprehensive anti-sweatshop program that would prohibit companies from shutting down factories to cut costs or to avoid dealing with an organized workforce.<sup>48</sup> In 2005, USAS partnered with unions in the U.S. and throughout the world, as well as other allies in the anti-sweatshop movement, to develop a structural response known as the Designated Suppliers Program (DSP).<sup>49</sup> According to a proposal written at the launch of the DSP:

The program calls for universities to source their apparel from designated supplier factories that "have been determined by universities to have affirmatively demonstrated full and consistent respect for the rights of their employees." In addition to adhering to standards embodied in university codes of conduct, *factories will also have to evidence a respect for rights of association and pay a living wage.* The USAS DSP further stipulates that *university licensees will pay these factories prices for their products sufficient to allow factories to achieve these standards.* Prices will represent modest increases over industry norms, and *licensees will be expected to maintain the kind of long-term relationships with these factories necessary to allow for a reasonable degree of financial stability and job security.* These factories will produce primarily or exclusively for the university logo goods market.<sup>50</sup>

In a nutshell, universities adopting the DSP would commit to having an increasing percentage of their licensed apparel manufactured in factories that respect basic worker rights. In order to accomplish this, brands would be required to pay a premium to ensure the provision of a living wage and

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<sup>46</sup> Telephone interview with Jessica Rutter, former National Organizer for United Students Against Sweatshops, August 31, 2011.

<sup>47</sup> *Id.*

<sup>48</sup> Robbins, *supra* note 22, at 62 (explaining that without comprehensive enforcement, companies would shut down factories that respect workers' rights because it was cheaper to produce elsewhere or easier to avoid negotiation with an organized workforce).

<sup>49</sup> *Id.* at 2.

<sup>50</sup> Purmina Bose, *From Agitation to Institutionalization: The Student Anti-Sweatshop Movement in the New Millennium*, 15 IND. J. GLOBAL LEGAL STUD. 213, 232-233 (2008) (emphases added).

maintain long-term relationships with supplier factories to improve sustainable wages and working conditions.<sup>51</sup> Despite years of successful organizing, the DSP has not been fully implemented, largely due to unfounded concerns about anti-trust laws.<sup>52</sup> Similar to their response to USAS' initial demands for codes of conduct and factory disclosure, brands also argued it would be impractical to implement the DSP and that it would upend the entire garment industry.<sup>53</sup> Nike, Adidas, and Reebok went on a tour of college campuses, speaking to administrators, holding events, and meeting with licensing committees in an attempt to dissuade university officials from adopting the principles of the DSP.<sup>54</sup> Presently, more than fifty schools have agreed to the framework of the DSP, including some big names in college athletics such as the entire University of California system, Duke University, and the University of Washington.<sup>55</sup> Unfortunately, the Program has largely remained stagnant for six years, as fear generated by brands has successfully stalled implementation.<sup>56</sup> On December 16, 2011, the United States Department of Justice ("DOJ") released a business review letter finding the provisions of the DSP lawful and in compliance with anti-trust laws.<sup>57</sup> This is a tremendous victory as private plaintiffs have never succeeded when challenging initiatives protected by a DOJ Business Review clearance.<sup>58</sup> Student activists are currently working to determine how to proceed. What remains clear, however, is that work of the past six years cannot be undone and a new organizing model, one maintaining the basic tenets of the DSP, must emerge.

Over the past few years, USAS has largely returned to individual factory solidarity campaigns, and has continued to have success with this model despite continued attempts by brands to abdicate their responsibility and

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<sup>51</sup> Robbins, *supra* note 22, at 58.

<sup>52</sup> Brands raised the concern that if multiple universities agree to the conditions of the Designated Suppliers Program and decided to source only from factories on a list of "good factories" that meet worker rights standards there would be unlawful collusion. This, in turn, created reluctance on the part of universities to go ahead with the Program. ROBBINS, *supra* note 22, at 63-70.

<sup>53</sup> Interview with Jessica Rutter, *supra* note 46.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Robbins, *supra* note 22, at 63.

<sup>57</sup> Press Release, U.S. Dep't. of Justice, Justice Department Will Not Challenge Worker Rights Consortium's Designated Suppliers Program For Collegiate Apparel, Antitrust 11-1656 (Dec. 16, 2011), *available at* <http://www.justice.gov/opa/pr/2011/December/11-at-1656.html>.

<sup>58</sup> Memorandum from Scott Nova on Business Review Process for the DSP to WRC Affiliate Universities and Colleges (Dec. 16, 2011), *available at* <http://workersrights.org/university/memo/121611.html>.

out-organize student activists.<sup>59</sup> Recently, for example, USAS used the power of its universities to not only force Russell Athletic to reopen a factory in Honduras that had been shut down after workers successfully unionized, but also to persuade the brand not to fight unionization at its seven other factories in Honduras.<sup>60</sup> In addition, the WRC has continued its factory monitoring efforts and, in the summer of 2011, successfully pressured the June Textile Factory in Cambodia to pay severance to workers that made collegiate apparel. In the same summer, the WRC also successfully pressured Nike to compensate workers after PT Kizone, a collegiate apparel factory in Indonesia, closed its doors.<sup>61</sup> Recently, USAS has launched a similar campaign against Adidas in response to the brand's refusal to pay severance to 2800 Indonesian factory workers whose factory was shut down.<sup>62</sup> While these victories are laudable and profoundly change lives, the larger question remains of how to effectively create change in the global garment industry in a manner that does not permit brands to undo those victories as soon as they feel the spotlight is off of a particular factory. The procurement of a positive business review letter from the DOJ renders the moment ripe for a restructuring of the student anti-sweatshop movement.

## PART II

### THE PROPOSAL: JOBBER AGREEMENTS

The answer to what the anti-sweatshop movement must do next may lie in the movement's own national history. Jobber agreements (also known as Hazantown Agreements after the case that solidified a union's right to target jobbers),<sup>63</sup> were a key tactic used by the International Ladies Garment Workers' Union to hold brands accountable for the working

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<sup>59</sup> Robbins, *supra* note 22, at 61.

<sup>60</sup> Steven Greenhouse, *Labor Fights Ends in Win for Students*, NEW YORK TIMES (Nov. 17, 2009), available at <http://www.nytimes.com/2009/11/18/business/18labor.html> (describing the shutdown of a Russell Athletic factory in Honduras after the workers unionize and an agreement by Russell Athletics to reinstate the workers and permit unionization in its other Honduras factories).

<sup>61</sup> *News & Updates*, WORKER RIGHTS CONSORTIUM, [http://www.workersrights.org/reports/WRC%20Assessment%20re%20PT%20Kizone%20\(Indonesia\)%201-18-12.pdf](http://www.workersrights.org/reports/WRC%20Assessment%20re%20PT%20Kizone%20(Indonesia)%201-18-12.pdf) (last visited May 30, 2012).

<sup>62</sup> badidas: all in sweatshops?, United Students Against Sweatshops, [www.badidas.com](http://www.badidas.com), last visited March 22, 2013. Thus far, Cornell University, Oberlin College, the University of Washington, Rutgers University, Georgetown University, the College of William and Mary, Santa Clara University, and Penn State have all cut their licensing contracts with Adidas in response to this campaign.

<sup>63</sup> See *Danielson v. Joint Bd. of Coat, Suit & Allied Garment Workers' Union*, 494 F.2d 1230 (1974) (where "Hazantown Agreements" collective bargaining agreements specific to the garment industry, originated).

conditions in the factories to which they subcontract beginning in the early twentieth century.<sup>64</sup> The term jobber refers to those companies that subcontract production of the garments they later sell to retailers (or universities).<sup>65</sup> These are the brands whose names most consumers recognize, such as Nike, Adidas, and Champion. According to a recent jobber agreement between Liz Claiborne and the Union of Needletrades Industrial and Textile Employees (UNITE), a jobber is defined as “one who does not manufacture garments in its own shop but who has all of its garments produced (sewn, finished, pressed and sometimes cut) by contractors and who may or may not employ cutters and/or sample makers and/or distribution workers or others.”<sup>66</sup> Similar to other jobber agreements, the Liz Claiborne agreement states:

This Jobbers Agreement governs the overall relationship between the Company and the Union including the Company's use of contractors to produce its garments in the continental United States. The terms of this Agreement are applicable solely in the continental United States and shall have no force and effect to any entities or operations outside of the continental United States.<sup>67</sup>

Such agreements have successfully allowed unions in the United States to organize garment factories, even when those factories are not owned by the brands themselves, and subsequently force companies to provide decent wages and benefits to garment workers in the United States. Since most garment production has been moved outside of the United States,<sup>68</sup> the key to improving working conditions in the apparel industry may be to expand the scope of jobber agreements to include workers in subcontracted factories around the world.<sup>69</sup> These agreements differ from collective

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<sup>64</sup> *The Ladies' Garment Worker*, MONTHLY NEWSLETTER (Internat'l Ladies' Garment Workers' Union), Oct. 1916, at 22.

<sup>65</sup> See, e.g., *Jobbers Agreement By & Between: Liz Claiborne, Inc., & Union of Needletrades, Industrial & Textile Employees* (June 1, 2000), <http://contracts.onecle.com/liz/unite.jobbers.2000.06.01.shtml>.

<sup>66</sup> *Id.* at 4.

<sup>67</sup> *Id.* at 5.

<sup>68</sup> Scott Nova, *Outsourcing Tragedy: On the 100<sup>th</sup> Anniversary of Triangle Shirtwaist, Workers Are Still Dying in Garment Factory Fires*, THE HUFFINGTON POST (Mar. 25, 2011), [http://www.huffingtonpost.com/scott-nova/outsourcing-tragedy-on-the\\_b\\_840558.html](http://www.huffingtonpost.com/scott-nova/outsourcing-tragedy-on-the_b_840558.html).

<sup>69</sup> The manufacturing industry may see even more outsourcing of jobs if the Senate passes the “Protecting Jobs from Government Interference Act,” which was passed by the House of Representatives on September 15, 2011 as H.R. 2587. This bill eliminates the power of the National Labor Relations Board to force a company to reopen a factory or production line that was closed in violation of the National Labor Relations

bargaining agreements (the traditional contract between unions and companies that delineate working conditions) because they cover conditions in supplier factories not directly owned by the brand.

Under this proposal, brands would sign jobber agreements with unions both in the United States and around the world. Presumably, several unions from different countries would sign the same basic agreement with addendums delineating living wages based on local conditions and laws. For example, Nike could sign a contract with unions in the U.S., Honduras, and the Dominican Republic, requiring all of Nike's supplier factories in each of the three countries to comport with the terms set forth in the jobber agreement. Following this model, entire regions of the world could become subject to contracts between brands and unions. These contracts would set baseline working conditions in the garment industry and outline the responsibilities of multinational corporations in ensuring that those standards are met. Following the model set forth by the DSP, students could demand that universities only license their logo to companies that sign such jobber agreements.<sup>70</sup> In this way the collegiate apparel industry would become saturated with factories that respect the rights of their employees. The basic provisions of the jobber agreements would most likely mirror those set forth in the DSP, including respect for the right to organize and freedom of association, long-term brand/factory relationships, payment of a premium to provide a living wage, equality for women workers, and the maintenance of adequate health and safety conditions.

As each university would individually adopt this requirement, as they did with the DSP, anti-trust concerns are moot.<sup>71</sup> Instead of presenting legal impediments, as brands erroneously claimed the DSP did, this proposal actually provides garment workers with additional legal protections they do not currently enjoy. If such jobber agreements were in place, garment workers in factories subject to these agreements would then be able to avail themselves of the protections of the U.S. court system as third party

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Act. As a consequence, it will make it easier for employers to move jobs out of the United States. See Press Release from Kimberly Freeman Brown, Exec. Dir., Kimberly Freeman Brown on H.R. 2587, American Rights at Work (Sept. 15, 2011), <http://www.americanrightsatwork.org/press-center/2011-press-releases/statement-by-kimberly-freeman-brown-on-hr-2587-20110915-1047-418-418.html>.

<sup>70</sup> This is where the power dynamic that has led USAS to fifteen years of success comes in. Students would pressure universities to only license their logo to brands that sign jobber agreements (and only for production in those factories subject to the jobber agreement). In order to remain competitive, therefore, brands would have to sign jobber agreements. Workers and the WRC could then enforce those agreements.

<sup>71</sup> If each university individually adopts a policy requiring a certain percentage of its licensed apparel to be produced by brands that have signed jobber agreements, the anti-trust concerns of universities colluding with one another will no longer be valid as each school will be making independent decisions about its own licensing. Each school already retains the right to license its logo to whomever it chooses. This is merely a component of that right.

beneficiaries. They would no longer have to rely solely on the limited resources and organizing prowess of university students in the United States, but would themselves have legal recourse to hold brands accountable.

### PART III WHY ACCESS TO U.S. COURTS IS CRITICAL

Garment workers could benefit greatly from bringing their claims in U.S. courts because of the corruption and anti-union violence present in many countries around the world. The desire to allow potential breach of contract lawsuits to be brought in U.S. courts is not about forum shopping for the best law; indeed, enforcement of U.S. labor laws and the strength of the U.S. labor movement have been declining in recent decades,<sup>72</sup> and many countries have much stronger labor laws than the U.S.<sup>73</sup> Instead, the desire to allow garment workers to bring their claims in U.S. courts is about protecting the life and liberty of garment workers who are brave enough to stand up for their rights. According to the World Trade Organization, the top fifteen exporters of clothing are China, the European Union, Hong Kong, Turkey, India, Bangladesh, Vietnam, Indonesia, United States, Mexico, Thailand, Pakistan, Malaysia, Tunisia and Morocco.<sup>74</sup>

The International Trade Union Confederation reported that labor activists in China frequently face harassment and repression<sup>75</sup> Striking workers have been beaten and subject to violent and deadly reprisals, while labor leaders have been detained and incarcerated for their organizing efforts.<sup>76</sup> China forbids the existence of independent trade unions altogether, and only permits workers to join the All China Federation of Trade Unions.<sup>77</sup> In Hong Kong, “workers and unions continue to have little opportunity to defend their rights in practice, and collective bargaining

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<sup>72</sup> See, Alejandro Reuss, *What's Behind Union Decline in the United States?*, DOLLARS & SENSE (Mar. 31, 2011).

<sup>73</sup> See, e.g., Laura Clawson, *German Auto Manufactures High Profits and High Pay Show Why U.S. Labor Laws Need to Be Stronger*, DAILY KOS (DEC. 28, 2011) [http://www.dailykos.com/story/2011/12/28/1049409/-German-auto-manufacturers-high-profits-and-high-pay-show-why-US-labor-laws-need-to-be-stronger?via=blog\\_1](http://www.dailykos.com/story/2011/12/28/1049409/-German-auto-manufacturers-high-profits-and-high-pay-show-why-US-labor-laws-need-to-be-stronger?via=blog_1) (pointing out that “the German constitution itself includes a second mechanism for keeping employees involved in the decisions of the firm for which they work”).

<sup>74</sup> World Trade Organization, *International Trade Statistics 2010* at 14 (2010), [http://wto.org/english/res\\_e/statis\\_e/its2010\\_e/its10\\_toc\\_e.htm](http://wto.org/english/res_e/statis_e/its2010_e/its10_toc_e.htm).

<sup>75</sup> Int'l Trade Union Confederation [ITUC], *Annual Survey of Violations of Trade Union Rights* 132 (2011), <http://survey.ituc-csi.org/>.

<sup>76</sup> *Id.*, at 134-135.

<sup>77</sup> SOLIDARITY CTR, JUSTICE FOR ALL THE STRUGGLE FOR WORKER RIGHTS IN CHINA (2004), *available at*, <http://solidaritycenter.org/content.asp?contentid=928>.

rights are regularly ignored.”<sup>78</sup> In 2010, judicial harassment toward trade unions continued in Turkey, despite a Constitutional amendment.<sup>79</sup>

Violence against those who stand up for their rights at work is far too common. In India in 2010, for example, police and companies violently arrested and harassed union leaders.<sup>80</sup> In addition, the garment industry in India has seen a wave of suicides.<sup>81</sup> In India, there is no legal obligation in the private sector for employers to recognize unions or collectively bargain with their employees, and labor protections are diminished even further inside Export Processing Zones, where many supplier factories are situated.<sup>82</sup> The situation for garment workers in Bangladesh is no better. In April 2010, garment workers faced murders and arrests when they protested to demand a minimum wage.<sup>83</sup> Stories like this are commonplace in nearly all of the world’s leading textile and apparel exporting countries. Workers in Vietnam, Indonesia, Mexico, Thailand, Pakistan, Malaysia, Tunisia, and Morocco also face brutal violence and detention of trade union activists.<sup>84</sup> Organizing for basic workers’ rights is thus a very risky undertaking.

It is not simply the repression of workers’ rights that is a concern in many garment-producing nations. Judicial corruption further underscores why access to U.S. courts is crucial:

A functioning judiciary is the guarantor of fairness and a powerful weapon against corruption. But people’s experiences in many countries fall far short of this ideal. In some countries the majority of those who had contact with courts encountered bribe demands, and the total amount paid in bribes can reach staggering proportions. Corruption in the judiciary goes beyond the bribing of judges. Court personnel are paid off to slow down or speed up a trial, or to make a complaint go away. Judges are also subject to

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<sup>78</sup> ITUC, *supra* note 755, at 138.

<sup>79</sup> *Id.* at 221-225 (workers were laid off or forced to resign and join “management friendly organisations,” due to union membership).

<sup>80</sup> *Id.* at 140 (“In the two years ending in September 2010, 910 garment workers, including members of their family, in Tirupur, Tamil Nadu, committed suicide. Garment factories in Tirupur produce about ninety percent of all India’s cotton knitwear exports.”).

<sup>81</sup> *Id.* at 141.

<sup>82</sup> Int’l Trade Union Confederation [ITUC], *Internationally Recognized Core Labour Standards in India: Report for the WTO General Council Review of the Trade Policies of India*, (Sep. 2011) available at [www.ituc-csi.org/IMG/pdf/final\\_India\\_TPR\\_Report\\_3.pdf](http://www.ituc-csi.org/IMG/pdf/final_India_TPR_Report_3.pdf).

<sup>83</sup> ITUC, *supra* note 75 at 123 (explaining that garment workers were demanding “a [monthly] minimum wage of BDT 5,000 [US\$66.62]” and noting that, during the protests, “six workers were killed and many injured,” while “[t]rade union leaders were arrested [and] tens of thousands of garment workers charged in connection with the protests”).

<sup>84</sup> *Id.*

pressure from above, with legislators or the executive using their power to influence the judiciary, starting with skewed appointment processes.<sup>85</sup>

In Thailand, for example, a separate court system known as the Labor Courts presides over labor law issues in the private sector.<sup>86</sup> The Labor Courts function as a tripartite body with a judge from the Ministry of Justice presiding alongside one associate judge elected by employer associations and one associate judge elected by labor associations.<sup>87</sup> In 2006, the U.S. Department of State found frequent abuse in the judicial system, and employers often did not pay workers their awards in full.<sup>88</sup> An investigation by the Thai Senate found that “as many as half of the 200 associate judges in the Central Labor Court might have paid bribes to influence their election as judges.”<sup>89</sup> Many judges admitted to buying their posts, and the Senate committee found that judges who bribed their way into office enjoyed connections with powerful people in business, often siding with employers in labor disputes.<sup>90</sup> Further, the Ministry of Labor has been criticized for its failure to verify the legitimacy of corporate registration documents.<sup>91</sup> This environment can hardly be described as one that would provide garment workers with a fair process for adjudicating a claim based on the breach of a jobber agreement.

Thailand is not unique in this regard. Many other leading garment-producing countries have notoriously corrupt judicial systems as well. In Morocco, for example, the King appoints all government officials, including judges.<sup>92</sup> The influence of the King and his Minister of Justice retain the power to step in and obstruct inquiries at any point, and they exert that power frequently on behalf of the influential in Moroccan

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<sup>85</sup> Transparency Int’l, *Annual Report 2010*, 39, available at [http://www.transparency.org/publications/annual\\_report](http://www.transparency.org/publications/annual_report).

<sup>86</sup> SOLIDARITY CTR., JUSTICE FOR ALL THE STRUGGLE FOR WORKER RIGHTS IN THAILAND 38 (2007), available at <http://solidaritycenter.org/content.asp?pl=910&sl=910&contentid=911>.

<sup>87</sup> *Id.*

<sup>88</sup> U.S. Dep’t of State Bureau of Democracy, Human Rights, & Labor, *Country Reports on Human Rights Practices: Thailand, 2006*, available at <http://www.state.gov/g/drl/rls/hrrpt/2006/78792.htm>.

<sup>89</sup> SOLIDARITY CTR., *supra* note 86, at 39.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* (noting that there was no verification to ensure the authenticity and genuineness of the companies and employer associations as well as the signatures on incorporation and registration documents).

<sup>92</sup> Transparency Int’l, *Global Corruption Report 2007: Corruption in Judicial Systems* 233, [http://www.transparency.org/whatwedo/pub/global\\_corruption\\_report\\_2007\\_corruption\\_and\\_judicial\\_systems](http://www.transparency.org/whatwedo/pub/global_corruption_report_2007_corruption_and_judicial_systems) (last visited Mar. 22, 2013).

society.<sup>93</sup> Turkey's judicial system relies largely on a series of self-selected, unregulated expert witnesses because of limited judicial expertise, resources, and time.<sup>94</sup> Consequently, judges accept the reports of private experts whose reports are often patently false.<sup>95</sup> Public perception, even among those involved in the legal system, is that Turkey's judiciary is extremely corrupt, second only to the tax department as the most corrupt sector.<sup>96</sup> In 1999, Professor Hayrettin Ökçesiz of Akdeniz University conducted a survey of 666 lawyers which revealed ninety-five percent claimed corruption existed in the judiciary. Following the survey, Professor Ökçesiz was subjected to investigation and has not continued to further research the issue.<sup>97</sup>

In Bangladesh, a 2010 survey by Transparency International's Bangladesh chapter found that eighty-eight percent of individuals who had interacted with the judiciary said they were exposed to corruption, and it was ranked as the country's most corrupt institution.<sup>98</sup> Bribing judicial officials is commonplace, with bribes averaging twenty-five percent of annual income of those who have used the court system.<sup>99</sup> Extremely heavy caseloads coupled with the rarity of disciplinary proceedings contribute to this climate of bribery and corruption.<sup>100</sup>

Bribery is commonplace in other garment-producing countries as well. In India, for example, personnel at all levels of the judiciary regularly accept bribes.<sup>101</sup> One survey found that over half of the money paid in bribes went to lawyers, while the remaining portions were paid to court officials, judges, and middlemen.<sup>102</sup> Similarly, in Pakistan, bribes are paid to judges, court employees, public prosecutors, opponent's lawyers, and witnesses at a price of almost 2.5 times the amount paid in bribes in other public institutions.<sup>103</sup> Chronic backlogs, leading to substantial delays in both criminal and civil cases, leave Pakistan's judiciary ripe for this type of

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<sup>93</sup> *Id.* at 233-235.

<sup>94</sup> *Id.* at 280.

<sup>95</sup> *Id.* (judges commonly accept private experts' reports, and rarely discount such patently false testimony, because they "don't have the expertise to decide technical issues or the time to go to the scene of a crime and there is no pool of professionals to do it for them.").

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* (Since Professor Hayrettin Ökçesiz of Akdeniz University was subjected to investigation because of this survey, no one has continued to pursue this research).

<sup>98</sup> TRANSPARENCY INTERNATIONAL, *supra* note 85, at 40.

<sup>99</sup> TRANSPARENCY INTERNATIONAL, *supra* note 92, at 179.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 215.

<sup>102</sup> *Id.* (explaining that the estimated annual bribes in India are paid in the following proportions: "[sixty-one]percent to lawyers; [twenty-nine]percent to court officials; [five] percent to judges; and [five] percent to middlemen").

<sup>103</sup> *Id.* at 244.

corruption.<sup>104</sup> In Mexico, the situation is similarly troubling. In 2010, court decisions were noticeably susceptible to improper influence.<sup>105</sup> Civil society organizations pointed to corruption, judicial inefficiency, and a lack of transparency in the judiciary as major contributing problems.<sup>106</sup> The judiciaries of China, Indonesia, Malaysia, Tunisia, and Vietnam also suffer from a lack of independence and improper influence by executive branch officials, political parties, and private business interests.<sup>107</sup>

This is merely a snapshot of anti-union violence and judicial corruption in many garment-producing nations. While US employers have propped up a multi-billion dollar industry around union busting, labor leaders are not beaten or incarcerated on a regular basis and it is relatively uncommon for judicial officials to accept bribes.<sup>108</sup> To bring a lawsuit against a major multinational corporation takes courage. To file such a claim in the court of a country whose government regularly permits or sponsors violence against trade unionists is to risk one's life. Opening themselves up to judicial and public scrutiny within their home countries may prove extremely dangerous for workers in some of the world's leading garment producing nations. This burden may be somewhat ameliorated if a lawsuit is brought in the United States, where the proceedings are not as readily subject to the intimidation of corrupt, anti-union government officials.

Alien Tort Claims Act cases often involve foreign plaintiffs suing in U.S. courts for violations of human rights, and alien plaintiffs would likely not adjudicate in the situs state as it "would not only be disadvantageous, but perhaps deadly."<sup>109</sup> The same holds true for these cases. If not able to sue in a U.S. courtroom, outside of the direct influence of corrupt government officials, garment workers would be exposing themselves to rampant corruption, forced payment of bribes, and quite possibly physical assault.<sup>110</sup>

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<sup>104</sup> *Id.* at 247.

<sup>105</sup> U.S. Dep't. of State, *Country Report on Human Rights 2010: Mexico*, at 13 (Apr. 8, 2011), <http://www.state.gov/g/drl/rls/hrrpt/2010/> (reflecting that civil society organization reports demonstrated court decisions were overly "susceptible to improper influence by" state and local level "private and public entities").

<sup>106</sup> *Id.*

<sup>107</sup> U.S. Dep't of State, *2010 Country Reports on Human Rights Practices* (Apr. 8, 2011), *available at*, <http://www.state.gov/g/drl/rls/hrrpt/2010/index.htm>.

<sup>108</sup> ITUC, *supra* note 75, at 115.

<sup>109</sup> Matthew R. Skolnik, *The Forum Non Conveniens Doctrine in Alien Tort Claims Act Cases: A Shell of Its Former Self After WIWA*, 16 EMORY INT'L L. REV. 187, 208 (2002) ("even if they were legally able to do so, few alien plaintiffs would attempt to adjudicate international human rights law in the situs state" because of the likely, unfavorable consequences.").

<sup>110</sup> Of course, the Foreign Corrupt Practices Act forbids U.S. companies from bribing foreign officials, both directly and through intermediaries. Thus, if workers were forced to sue in a corrupt environment and a U.S. brand paid bribes to judicial official they could be charged and imprisoned in the United States. This would not, however, result

Thus, it is imperative that garment workers be able to sue for breach of jobber agreements in U.S. Courts if they choose to do so.<sup>111</sup>

PART IV  
THIRD PARTY BENEFICIARIES: MAKING SURE GARMENT WORKERS  
QUALIFY

Generally, only the parties to a contract can recover for breach of that contract. However, the law has provided avenues for recovery for those outside of the two contracting entities when a party is deemed a third-party beneficiary of the contract, as federal and most state courts follow the Restatement (Second) of Contracts on this matter.<sup>112</sup> New York, long the center of the fashion industry, and a state that many garment manufacturers still call home,<sup>113</sup> also follows the Restatement rule.<sup>114</sup> As both federal courts and New York courts have adopted the Restatement approach, this article analyzes the issue of whether garment workers in subcontracted factories would be considered third party beneficiaries to a jobber agreement between a manufacturer and a union in the context of the Restatement's standard.

According to the Restatement (Second) of Contracts,

- (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
  - (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
  - (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

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in any improvement in working conditions inside the garment factory. 15 U.S.C. § 78dd-1 (2011).

<sup>111</sup> This is not to say that some foreign legal systems would not provide a judiciary less prone to corporate sympathy than that of the United States. However, since jobber agreements would be signed in the United States and most collegiate apparel brands are headquartered in the U.S., U.S. courts make the most sense.

<sup>112</sup> FEDERAL PRACTICE MANUAL FOR LEGAL AID ATTORNEYS § 5.3.A (Jeffrey S. Gutman ed., 2011), available at <http://federalpracticemanual.org/node/31> ("The federal courts and most state courts follow the Restatement (Second) of Contracts in determining the viability of any third-party beneficiary claim.").

<sup>113</sup> See, Della Hasselle, *Designers Abandon Garment District as Groups Fight to Save It*, DNA INFO (Aug. 31, 2001), <http://www.dnainfo.com/20110831/midtown/designers-leave-garment-district-as-groups-fight-save-it>.

<sup>114</sup> *LaSalle Nat'l Bank v. Ernst & Young*, 729 N.Y.S.2d 671, 676 (App. Div. 2001) ("For cases in which the claimant is not a party to the contract, but claims third-party rights therefrom, New York has adopted the standard set forth in the Restatement (Second) of Contracts.").

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.<sup>115</sup>

The New York Court of Appeals, summarizing the Restatement standard, requires parties asserting third-party beneficiary rights under a contract to establish:

(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for their benefit and (3) that the benefit to them is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate them if the benefit is lost.<sup>116</sup>

The court will look to evidence of intent to determine whether an intended beneficiary exists.<sup>117</sup> According to New York's First Department, "the best evidence of the contracting parties' intent is the language of the agreement itself."<sup>118</sup>

Language evidencing an intent for garment workers to be third-party beneficiaries of the contract can be expressly included in the jobber agreements. This would be ideal, as it would render any brand motions on this issue subject to summary judgment. Many contracts do specifically reference individuals or organizations as intended third party beneficiaries directly in the contract language, so its inclusion need not be seen as entirely unique. In the absence of such obvious language, however, drafters of jobber agreements would be wise to include language specifically delineating the reasoning for each clause of the contract. For example, if a provision were included that required brands to maintain long-term relationships with supplier factories, it should specifically be stated that this is "to ensure that supplier factories receive enough orders at adequate prices to enable them to provide their employees with stable employment." Similarly, a requirement that brands pay enough to allow factories to provide a living wage to its employees could be couched in language that makes clear that the requirement exists, "so that employees are able to earn a living wage and supply their families' basic needs." This language would serve as a further indicator of the parties' intent to directly benefit supplier factory employees.

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<sup>115</sup> Restatement (Second) of Contracts § 302 (2011).

<sup>116</sup> Mendel v. Henry Phipps Plaza W., Inc., 844 N.E.2d 748, 785 (N.Y. Ct. App. 2006).

<sup>117</sup> Richard Siegler & Eva Talel, *Construction Defects: Third-Party Beneficiaries*, 227 N.Y.L.J. 83(2002), available at <http://www.stroock.com/SiteFiles/Pub604.pdf> ("if a beneficiary would be reasonable in relying on a promise as manifesting an intention to confer a right on him, he is intended beneficiary").

<sup>118</sup> Edge Mgmt. Consulting Inc. v. Blank, 807 N.Y.S.2d 353, 369 (App. Div. 2006).

Absent such express language, subcontracted employees could still be considered third party beneficiaries to a jobber agreement, provided there is evidence of the contracting parties' desire to empower them with such rights. Contracts need not explicitly identify third party beneficiaries.<sup>119</sup> Instead, a court will consider circumstances indicating "that the promisee intends to give the beneficiary the benefit of the promised performance."<sup>120</sup> The court will consider whether the "manifestation of the intention of the promisor and promisee is sufficient, in a contractual setting, to make reliance by the beneficiary both reasonable and probable."<sup>121</sup> Recently, for example, a New York District Court found that a woman arranging hospice care for her father demonstrated that her father was an intended third party even though the contract between the hospice care provider and her father did not specifically name her as a potential beneficiary.<sup>122</sup> The agreement itself named the woman as her father's primary caregiver, and the Court found this sufficient to hold that "the agreement specifically contemplated the provision of assistance to plaintiff, as primary caregiver, by members of the Hospice team."<sup>123</sup>

Further, the precise identity of a third party beneficiary need not be known at the time of the contract. Thus, the fact that a jobber agreement would cover a large number of factories, some of which the brand may not contract with at the time it signs the agreement, does not preclude employees of a supplier factory from exercising rights as third party beneficiaries. In 2011, for instance, the Third Department found that a company that leased a medical facility was a third party beneficiary to the contract between the landlord and the company hired to design and build the facility, even though the leasing company had not yet been formed at the time of construction.<sup>124</sup>

Of course, New York courts have not found that third parties were entitled to recovery in all cases. Some of those cases in which a third-party beneficiary was not recognized include situations in which the contract at issue specifically "provided that nothing contained in the contract 'shall create a contractual relationship with or a cause of action in favor of a third

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<sup>119</sup> *Finch, Pruyn & Co. v. M. Wilson Control Services Inc.*, 658 N.Y.S.2d 496, 498 (App. Div. 1997).

<sup>120</sup> *Cianciotto v. Hospice Care Network*, 927 N.Y.S.2d 779, 784 (Dist. Ct. 2011) (looking to the contractual setting and whether the manifestation of both parties intent was sufficient, will determine whether the beneficiary's reliance was both reasonable and probable).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Saratoga Schenectady Gastroenterology Assocs. v. Bette & Cring*, 921 N.Y.S.2d 393, 395 (App. Div. 2011).

party . . . .”<sup>125</sup> It is imperative, therefore, that negotiators of these jobber agreements not permit this type of language to enter the contract.

Other cases in which individuals were not granted third party beneficiary status have rested on whether the agreement was designed with an intent to benefit that person. New York courts have chosen not to confer third party beneficiary status in situations such as where a husband tried to assert that his LLC was an intended beneficiary of the separation agreement he entered into with his wife,<sup>126</sup> or where a subcontractor sought third party beneficiary status on a contract between a general contractor and the state, but failed to demonstrate that the contracts intended to benefit the subcontractor in more than an incidental way.<sup>127</sup> Additionally, the Fourth Department found an incidental benefit in an employment contract between an employer and employee, not the intent to confer a third-party benefit, where a couple was being sued by an employee who was injured while making a delivery at their home.<sup>128</sup> These cases reinforce the importance of intent in the third party beneficiary analysis and should serve as a caution to organizers to make sure that the language of jobber agreements clearly evidences an intent to confer third party beneficiary status on employees of supplier factories, such that workers’ reliance on the notion that brands have direct responsibility for ensuring the provisions of the jobber agreement are upheld in supplier factories is deemed reasonable.

Attempts by workers to sue the brands that contract with their employers are extremely rare. However, in 2009, the Ninth Circuit heard a case brought by employees of Wal-Mart suppliers in Bangladesh, China, Indonesia, Nicaragua, and Swaziland.<sup>129</sup> A component of their claim against Wal-Mart alleged that the workers were third-party beneficiaries of the code of conduct that Wal-Mart incorporated into contracts with all of its suppliers.<sup>130</sup> Plaintiffs alleged that they were third-party beneficiaries to Wal-Mart’s obligation to both inspect the facilities of its suppliers and to maintain the working conditions outlined in the code of conduct.<sup>131</sup> The Court held, however, that Wal-Mart did not actually have a duty to inspect the factories or require the maintenance of certain working conditions.<sup>132</sup> Specifically, the Court found, “[t]he language and structure of the agreement show that Wal-Mart reserved the right to inspect the suppliers,

<sup>125</sup> *See, e.g.,* Greece Cent. Sch. Dist. v. Tetra Tech Eng’rs., 911 N.Y.S.2d 563, 564 (App. Div. 2010).

<sup>126</sup> Reads Co. v. Katz, 900 N.Y.S.2d 131 (App. Div. 2010).

<sup>127</sup> IMS Engineers-Architects v. State, 858 N.Y.S.2d 486 (App. Div. 2008).

<sup>128</sup> Chavis v. Klock, 846 N.Y.S.2d 490 (App. Div. 2007).

<sup>129</sup> Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677 (9th Cir. 2009).

<sup>130</sup> *Id.* at 681.

<sup>131</sup> *Id.* at 681-82.

<sup>132</sup> *Id.* at 681.

but did not adopt a duty to inspect them.”<sup>133</sup> There is also recent precedent for garment workers from an Adidas supplier factory in Indonesia to be permitted to intervene as a third party a lawsuit between the University of Wisconsin and Adidas.<sup>134</sup> At issue in the suit between the University and one of its licensees is whether Adidas failed to comport with the wage and severance requirements laid out in the University’s code of conduct.<sup>135</sup>

Jobber agreements provide a distinct advantage over codes of conduct in this regard. The language of these agreements, tracking the language developed through the Designated Suppliers Program, would require that brands affirmatively undertake the duty to increase the prices they pay to supplier factories at a level sufficient for those suppliers to pay a living wage, as well as the responsibility to maintain long-term relationships with those supplier factories so that improved wages and working conditions can be sustained. Thus, beyond simply permitting inspection and crafting a set of standards, jobber agreements would require brands to take action. Language should also be included in the jobber agreements requiring brands to explicitly take steps to ensure that the right to organize is respected in its supplier factories. This language would clearly distinguish jobber agreements from codes of conduct, such as that of Wal-Mart, and would alleviate the Ninth Circuit’s concerns regarding the existence of an affirmative contractual duty.

## PART V

### FORUM NON CONVENIENS: A CAUTIONARY TALE

*Forum non conveniens* is a legal claim raised by a defendant who feels that being subject to a lawsuit in a United States court is inconvenient. Most *forum non conveniens* arguments are circumvented in breach of contract cases by the inclusion of forum selection clauses directly in the contract.<sup>136</sup> The policy behind this phenomenon largely centers around courts’ desire to uphold the provisions of contracts as parties agreed to them. The Southern District of New York recently found, for example:

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<sup>133</sup> *Id.* at 681-82.

<sup>134</sup> Noah Goetzel, *Court Says Former Adidas Workers Can Testify in Suit*, THE BADGER HERALD, Jan. 24, 2013, available at: [http://badgerherald.com/news/2013/01/24/court\\_says\\_former\\_ad.php#.URat\\_ERu\\_mg](http://badgerherald.com/news/2013/01/24/court_says_former_ad.php#.URat_ERu_mg)

<sup>135</sup> *Id.*

<sup>136</sup> In 2005, the Hague Conference on Private International Law recognized the importance of permitting contracting parties to choose where litigation should occur and adopted a Convention on Choice of Court Agreements. The United States has signed, but not ratified, this convention. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *Convention on Choice of Court Agreements*, available at [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=98](http://www.hcch.net/index_en.php?act=conventions.text&cid=98).

[W]here it can be said with reasonable assurance that at the time they entered the contract, the parties to a freely negotiated private international commercial agreement contemplated the claimed inconvenience, it is difficult to see why any such claim of inconvenience should be heard to render the forum clause unenforceable.<sup>137</sup>

As U.S. courts are often hostile to foreign plaintiffs suing U.S. corporations in the absence of a proper forum selection clause, jobber agreement negotiators must view recent *forum non conveniens* cases as a warning to take steps to ensure that a foreign union can sue a U.S. brand for violation of a jobber agreement in U.S. courts.<sup>138</sup> To ensure that a *forum non conveniens* claim by a brand is unsuccessful, jobber agreements must explicitly include a provision stating both that U.S. law governs the agreement, and that the parties are subject to suit for breach of contract within the courts of the United States. More specifically, these agreements should state that New York law presides over the agreements and that the brands subject themselves to the jurisdiction of New York Courts. As stated earlier, many major garment brands are headquartered in New York, so New York is an obvious choice for the convenience of these companies.<sup>139</sup> New York also has the added distinction of upholding mandatory forum selection clauses as a matter of law.<sup>140</sup>

Absent a sound forum selection clause, a U.S. brand could make a *forum non conveniens* argument and attempt to remove a breach of contract case from the jurisdiction of United States courts.<sup>141</sup> *Forum non conveniens* may be raised by a defendant who feels as though “a more appropriate forum may hear the claim.”<sup>142</sup> Often, defendants make a *forum non conveniens* argument because they believe that a plaintiff will not re-file the case and

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<sup>137</sup> Eastman Chem. Co. v. Nestle Waters Mgmt. & Tech., 2011 U.S. Dist. LEXIS 99123, 6 (S.D.N.Y. Aug. 29, 2011).

<sup>138</sup> See, e.g., Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) (demonstrating that the Court prioritizes preventing forum shopping over the plaintiff’s convenience).

<sup>139</sup> If a non-New York brand (such as Nike, which is headquartered in Oregon) insists on including choice of law and choice of forum clauses for the state in which they are headquartered, that state’s laws must be looked at by the unions involved in negotiating the jobber agreement. Many companies have offices in New York, even if they are headquartered elsewhere, so NY is not likely to be inconvenient. This article is limited to analyzing New York jurisprudence.

<sup>140</sup> N.Y. Gen. Oblig. Law § 5-1402 (McKinney 2011).

<sup>141</sup> Presumably, the brand would argue the case is better suited to be heard in the country where the factory is located.

<sup>142</sup> John R. Wilson, *Coming to America to File Suit: Foreign Plaintiffs and the Forum Non Conveniens Barrier in Transnational Litigation*, 65 OHIO ST. L.J. 659, 661 (2004).

the litigation will end.<sup>143</sup> This may be an increasingly valid argument as several countries, particularly in Latin America, have adopted statutes prohibiting the filing of a case once that case has been dismissed in a foreign jurisdiction.<sup>144</sup> In contrast, “where a party to a contract has agreed in advance of litigation to submit to the jurisdiction of a court, she is later precluded from attacking that court’s jurisdiction on grounds of *forum non conveniens*.”<sup>145</sup> Including choice of law and forum selection clauses within jobber agreements is particularly important in light of recent *forum non conveniens* jurisprudence.

The most recent United States Supreme Court case to address the issue of *forum non conveniens* held that it is a threshold issue, and thus may be decided upon without a court first resolving whether it has subject matter jurisdiction over the case.<sup>146</sup> The *forum non conveniens* doctrine gives trial courts significant deference, as higher courts reverse such decisions only if the trial court clearly abused its discretion.<sup>147</sup> According to the Supreme Court, “[a] federal court has discretion to dismiss a case on the ground of *forum non conveniens* ‘when an alternative forum has jurisdiction to hear the case, and . . . trial in the chosen forum would establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff’s convenience, or . . . the chosen forum is inappropriate because of considerations affecting the court’s own administrative and legal problems.’”<sup>148</sup>

The Court went on to say that although the defendant carries a heavy burden when opposing the plaintiff’s chosen forum, this burden lessens when the plaintiff’s choice is not its home forum.<sup>149</sup> Although the Supreme Court has provided that an adequate alternative forum must exist, and a series of private and public interest factors must be considered,<sup>150</sup> many

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<sup>143</sup> Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1130 (2010).

<sup>144</sup> *Id.* at 1093.

<sup>145</sup> *Nat’l Union Fire Ins. Co. of Pittsburgh v. Worley*, 690 N.Y.S.2d 57 (App. Div. 1999).

<sup>146</sup> *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 425 (2007).

<sup>147</sup> *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981).

<sup>148</sup> *See Sinochem*, 549 U.S. at 423 (emphasis omitted) (such requirements include an alternative forum where jurisdiction exists and prejudice and inconvenience would occur in the chosen forum or administrative and legal problems would arise and adversely affect the chosen forum).

<sup>149</sup> *Id.* at 430 (emphasis omitted) (noting that there is a presumption in the plaintiff’s favor, but that it “applies with less force” when the plaintiff does not choose its home forum).

<sup>150</sup> “An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the

courts have not directly applied these factors and “the forum non conveniens doctrine does not lend itself to the development of a comprehensive legal model for predicting the outcomes of forum non conveniens decisions.”<sup>151</sup> As such, it is best to analogize to a series of cases with what would likely be similar facts—those cases brought under the Alien Tort Claims Act.<sup>152</sup>

The Alien Tort Claims Act, originally part of the Judiciary Act of 1789, states, “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>153</sup> Since the seminal case of *Filartiga v. Pena-Irala*,<sup>154</sup> plaintiffs have used the Alien Tort Claims Act to bring claims in U.S. courts for the violation of human rights in other nations.<sup>155</sup> Workers rights are human rights, and although the cases at issue would be brought for breach of contract and not tort claims, many of the injuries would be similar. If brands fail to comply with the terms of jobber agreements and do not provide a healthy, safe, working environment in their supplier factories, workers could suffer physical injury, long-term health consequences, and even death. Forced confinement and slavery are remarkably common in the garment industry as well.<sup>156</sup>

The idea that workers rights are human rights is internationally recognized. According to Amnesty International:

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enforceability of a judgment if one is obtained . . . Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.” *Gulf Oil v. Gilbert*, 330 U.S. 501, 508-09 (1947).

<sup>151</sup> Christopher A. Whytock, *Politics and the Rule of Law in Transnational Judicial Governance: The Case of Forum Non Conveniens* (Duke Univ. Working Paper, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=969033](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=969033).

<sup>152</sup> The underlying legal claims arise from different causes of action—one torts and one breach of contracts. However, the *forum non conveniens* arguments would be similar as both would consist of foreign plaintiffs suing U.S. corporations for failing to fulfill their obligations, resulting in the deprivation of the human rights of citizens of foreign countries.

<sup>153</sup> Alien’s Action for Tort, 28 U.S.C. § 1350 (2011).

<sup>154</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>155</sup> *Id.*

<sup>156</sup> See, e.g., Brian Byrnes, *Victims Break Chains of Slavery*, THE CNN FREEDOM PROJECT ENDING MODERN DAY SLAVERY (Apr. 18, 2011), <http://thecnnfreedomproject.blogs.cnn.com/2011/04/18/victims-break-chains-of-slavery/> (providing stories of exploited victims, stressing the vast number of clandestine factories).

Under international law, all workers have a human right to organize and to bargain collectively. These rights are an essential foundation to the realization of other rights, and are enshrined in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, as well as conventions adopted by the International Labor Organization.<sup>157</sup>

The International Covenant on Economic, Social, and Cultural Rights, which along with the International Covenant on Civil and Political Rights, and the Universal Declaration of Human Rights, make up the International Bill of Human Rights, provides,

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays<sup>158</sup>

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<sup>157</sup> *Workers Have a Right to Organize*, AMNESTY INTERNATIONAL (Feb. 19, 2011), <http://blog.amnestyusa.org/us/workers-have-a-right-to-organize/> (emphasis omitted). It is worth noting, however, that the U.S. has not ratified International Labor Organization Conventions 87 or 98 (dealing with the freedom of association and right to organize respectively), the International Covenant on Economic, Social and Cultural Rights, or the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

<sup>158</sup> Int'l Covenant on Econ., Soc. & Cultural Rights, G.A. RES. 2200A (XXI), at art. 7 (Dec. 16, 1966), available at <http://www2.ohchr.org/english/law/cescr.htm>; see also 993 U.N.T.S. 14531, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en) (reflecting that the United States has signed but not ratified the Covenant).

In Article 8, the Covenant provides,

1. The States Parties to the present Covenant undertake to ensure:
  - (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.<sup>159</sup>

Thus, the right to form and join trade unions is a fundamental human right. If brands refuse to honor the terms of jobber agreements, which would require that supplier factories respect the right to organize and collectively bargain, it would therefore be a violation of internationally recognized human rights norms.

Unfortunately, however, recent Second Circuit opinions have limited and significantly weakened the ability of foreign plaintiffs to bring human rights claims through the Alien Tort Claims Act against U.S. corporations. In 2000, the United States Court of Appeals for the Second Circuit upheld plaintiffs' choice of forum where the defendants were foreign corporations alleged to have collaborated with the Nigerian government in the perpetuation of human rights abuses in Nigeria.<sup>160</sup> In *Wiwa v. Royal Dutch Petroleum Co.*,<sup>161</sup> the Court "emphasize[d] the U.S. interest in adjudicating human rights violations and appear[ed] to raise the bar for granting forum non conveniens dismissals."<sup>162</sup>

Quickly, however, the Court moved to limit its holding in *Wiwa*. The following year, the United States District Court for the Southern District of New York found that the U.S. interest in adjudicating human rights violations emphasized in *Wiwa* is only significant in cases that involve torture and thus implicate the Torture Victims Protection Act.<sup>163</sup> Further reducing the Alien Tort Claims Act, the Court then found environmental torts not to come under the protection of the Act because "plaintiffs have not demonstrated that high levels of environmental pollution within a nation's borders, causing harm to human life, health, and development,

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<sup>159</sup> Int'l Covenant, *supra* note 158, at art. 8.

<sup>160</sup> *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).

<sup>161</sup> *Id.*

<sup>162</sup> Jeffrey E. Baldwin, *International Human Rights Plaintiffs and the Doctrine of Forum Non Conveniens*, 40 CORNELL INT'L L.J. 749, 759 (2007).

<sup>163</sup> *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001) (dismissing a case on grounds of forum non conveniens which was brought by the citizens of Peru and Ecuador against Texaco, Inc. for the pollution of rainforests and rivers).

violate ‘well-established, universally recognized norms of international law.’”<sup>164</sup>

The Court returned to its *Wiwa* analysis in 2003, but only because the case involved allegations of “genocide, war crimes, torture, and enslavement,” which the court found to be “*jus cogens*”<sup>165</sup> violations of international law.”<sup>166</sup> In 2006, the Court further limited the opportunity for an Alien Tort Claims Act plaintiff to survive a *forum non conveniens* motion by finding that “the controlling question is not whether the United States has some interest in adjudicating the case but whether the U.S. interest outweighs the alternative forum’s interest.”<sup>167</sup> In that case, the Court found the interest of the United States was outweighed by Turkey, and consequently granted the defendant’s *forum non conveniens* motion.<sup>168</sup> The case involved Turkish plaintiffs suing Coca-Cola (a United States corporation) after managers at one of Coca-Cola’s Turkish bottling plants allegedly assaulted employees who were engaged in a non-violent labor demonstration.<sup>169</sup>

Most recently, in 2008, the Court further weakened *Wiwa*, in a case brought by a group of “Kurdish women whose husbands were allegedly imprisoned, tortured, and killed by the Saddam Hussein regime in Iraq.”<sup>170</sup> The plaintiffs alleged “violations of the law of nations and the Torture Victims Protection Act (“TVPA”) under the Alien Tort Claims Act (“ATCA”) . . . and common law torts under New York law, for allegedly providing ‘kickbacks’ to the Hussein regime in connection with their participation in the United Nations Oil-for-Food Program . . . .”<sup>171</sup> The Court dismissed the case on *forum non conveniens* grounds finding, “where, as here, there is an adequate foreign forum with a profound interest in adjudicating the dispute and litigation here would be significantly less convenient, the abstract interest of the United States in enforcing international law does not compel an assertion of jurisdiction.”<sup>172</sup> Referring to the interest of the United States as abstract, and failing to frame that interest in terms of human rights, likely foreshadows further retreat from

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<sup>164</sup> *Flores v. S. Peru Copper Corp.*, 253 F. Supp. 2d 510, 525 (S.D.N.Y. 2002) (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980)).

<sup>165</sup> *Jus cogens* refers to “A mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted.” BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>166</sup> *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp 2d 289, 339 (S.D.N.Y. 2003).

<sup>167</sup> Baldwin, *supra* note 162, at 766.

<sup>168</sup> *Turedi v. Coca Cola Co.*, 460 F. Supp. 2d 507 (S.D.N.Y. 2006).

<sup>169</sup> *Id.*

<sup>170</sup> *Mastafa v. Australian Wheat Bd. Ltd.*, 2008 U.S. Dist. LEXIS 73305, 1 (S.D.N.Y. 2008).

<sup>171</sup> *Id.* at 1–2.

<sup>172</sup> *Id.* at 33.

the position of permitting foreign plaintiffs to bring suit in the United States for human rights abuses committed abroad.

As the Second Circuit continues to roll back the availability of U.S. courts for plaintiffs alleging violations of international norms, it is critical that jobber agreements include both a choice of law provision and a forum selection clause in order to ensure access to U.S. courts for workers in supplier factories. Because the workers would be alleging a breach of contract and not a tort, they are not likely to run into as many difficulties as those plaintiffs alleging jurisdiction under the Alien Tort Claims Act. In the absence of a proper forum selection provision, the Second Circuit is likely to continue its trend of not looking favorably on foreign plaintiffs suing U.S. corporations. Although U.S. unions would also be signatories to the jobber agreements and could join such lawsuits as non-foreign plaintiffs, thereby giving plaintiffs' choice of forum greater deference, foreign unions would be remiss to rely solely on the often cautious general counsel's office of U.S. unions to determine whether to become party to a lawsuit.<sup>173</sup> Instead, they should insist on the inclusion of choice of law and forum selection provisions in all jobber agreements.<sup>174</sup>

The Supreme Court may be poised to make it even more difficult for foreign plaintiffs to bring suit in the United States under the Alien Tort Statute. On October 1, 2012, The Supreme Court reheard the case of *Kiobel v. Royal Dutch Petroleum*. This case was first heard in March of 2012, but the Court ordered the attorneys to re-file briefs on the issue of "Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. §1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."<sup>175</sup> The Court's decision that a presumption against extraterritoriality applies to the Alien Tort Statute may impact the ability of garment workers to sue in U.S. Courts where the brands whose garments they produce are not U.S. brands.<sup>176</sup> The Supreme Court's rollback of the

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<sup>173</sup> Theoretically, for example, a U.S. union could be in the middle of productive negotiations with a U.S. brand and decide that it did not want to risk jeopardizing this relationship by suing that brand for violations of a contract pertaining to a factory in another country.

<sup>174</sup> Of course, it would be wise for U.S. unions to join in any litigation brought under the jobber agreements because improving conditions in garment factories around the world would give companies less incentive to produce their apparel in other countries. This, in turn, could create more manufacturing jobs in the United States and would lead to an increase in membership for U.S. unions.

<sup>175</sup> Sarah A. Altschuller, *A Surprise Twist: U.S. Supreme Court Will Rehear Kiobel*, CORPORATE SOCIAL RESPONSIBILITY AND THE LAW, FOLEY HOAG, LLP, Mar 5, 2012, <http://www.csrandthelaw.com/2012/03/a-surprise-twist-u-s-supreme-court-will-rehear-kiobel/>.

<sup>176</sup> *Kiobel v. Dutch Royal Petroleum*, 2013 WL 1628935.

protections of the Alien Tort Statute makes it even more imperative that workers focus on contractual claims and that organizers succeed in requiring the adoption of comprehensive jobber agreements.

#### PART VI: PRACTICAL IMPLEMENTATION<sup>177</sup>

Implementation of jobber agreements in the collegiate apparel market will require multiple levels of strategic organizing on the part of both student and worker organizations. Initially, these groups will have to decide which brands to target first. The decision must be based on a number of factors, including which brands have the most influence in the collegiate apparel industry and which brands are most susceptible to public pressure. Two brands immediately come to mind: Nike and Knights Apparel. Nike is an obvious choice because it is extremely conscious of its public image and has fought for years against allegations of sweatshop abuses in its supplier factories. This sensitivity, and its history of engagement with university licensing officials, student activists, and unions in various countries around its corporate social responsibility programs renders Nike particularly well equipped for swift implementation of a jobber agreement.

Knights Apparel, while not a brand whose name is well known to most consumers, “is the leading supplier of college-logo apparel to American universities . . . .”<sup>178</sup> The company has already shown a commitment to exploring some of the tenets of a jobber agreement, including payment of a premium by brands to factories to ensure that employees of those factories earn a decent wage, and a willingness to allow the Worker Rights Consortium to monitor factory conditions. In 2003, workers at the BJ&B factory in Alta Gracia, Dominican Republic organized a union and forced their employer, who produced for major collegiate apparel brands such as Nike and Reebok, to pay them higher wages, provide clean water, and improve conditions.<sup>179</sup> In 2007, however, Nike and Reebok pulled all of their orders out of BJ&B, causing the factory to shut down, as it relied on those companies for a significant percentage of its total orders.<sup>180</sup> A couple

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<sup>177</sup> As an attorney, I recognize that practical implementation is better left to the organizers on the ground. However, as a former organizer myself, I cannot resist the temptation to provide a few skeletal thoughts. Most of these ideas have come from conversations with the organizers themselves.

<sup>178</sup> Steven Greenhouse, *Factory Defies Sweatshop Label, but Can It Thrive?*, NY TIMES (Jul. 17, 2010), [http://www.nytimes.com/2010/07/18/business/global/18shirt.html?page\\_wanted=all](http://www.nytimes.com/2010/07/18/business/global/18shirt.html?page_wanted=all).

<sup>179</sup> Ross, *supra* note 40, at 67-68.

<sup>180</sup> *Abandoning BJ&B Union Workers*, UNITED STUDENTS AGAINST SWEATSHOPS, available at <http://usas.org/campaigns/sweat-free-campus/dont-pay-the-fla/about-the-fla/corporate-cover-up-3-bjb-factory-case/>.

of years later, after continued organizing by both students and workers, the employees who were laid off from BJ&B were hired by the Alta Gracia factory, which is owned by Knights Apparel. This factory pays its “employees nearly three and a half times the prevailing minimum wage,” respects the employees’ union, and has opened itself up to continuous monitoring of working conditions by the WRC.<sup>181</sup> Joseph Bozich, the CEO of Knights Apparel, regularly touts the company’s efforts at Alta Gracia.<sup>182</sup> An agreement to replicate these conditions in all of Knights Apparel’s supplier factories would push the company even farther, compelling it to demonstrate that it is truly committed to the people who make their products.

Knights Apparel and Nike are merely suggestions, of course. Any determination of a target must be made in consultation with the workers whose unions would be signing the first agreements and must take into consideration what brands are producing collegiate apparel in their countries, and in what quantities. A small group of unions would most likely have to be convened in order to make initial implementation possible. Once this group of unions joins together, they can create a consortium that would coordinate negotiations, implementation, and future participation by other unions and brands. Unions with which USAS already has a working relationship are likely candidates for early collaboration, such as unions in Haiti,<sup>183</sup> Honduras,<sup>184</sup> the Dominican Republic,<sup>185</sup> Kenya,<sup>186</sup> and the United States.<sup>187</sup> Representatives from these unions

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<sup>181</sup> Greenhouse, *supra* note 1788.

<sup>182</sup> See, e.g., Greenhouse, *supra* note 1787 (“Alta Gracia . . . [is] revered as protector of the Dominicans. (“alta gracia” translates to “exalted grace.”)).

<sup>183</sup> USAS and the WRC have a long-standing relationship with Batay Ouvriye. See, e.g., *WRC Factory Investigation Grupo M/Codevi*, WORKER RIGHTS CONSORTIUM (Feb. 15, 2006), <http://workersrights.org/Freports/GrupoM.asp>.

<sup>184</sup> USAS worked closely with the Central General de Trabajadores de Honduras (CGT) union federation on its most recent high-profile factory solidarity campaign at the Jerzees Nuevo Dia in Honduras. See, e.g., *Victory at Jerzees Nuevo Dia! Groundbreaking Contract Signed at Russell Plant in Honduras*, UNITED STUDENTS AGAINST SWEATSHOPS (May 23, 2011), <http://usas.org/2011/05/23/victory-at-jerzees-nuevo-dia-groundbreaking-contract-signed-at-russell-plant-in-honduras/>.

<sup>185</sup> USAS activists have worked with FEDOTRAZONAS, a union in the Dominican Republic, since the late 1990s. See *After a Decade of Struggle, Dominican Republic Worker Activists Make College Apparel Again*, UNITED STUDENTS AGAINST SWEATSHOPS (July 19, 2010), <http://usas.org/2010/07/19/worker-activists-make-college-apparel/>.

<sup>186</sup> USAS activists have engaged in a number of factory solidarity campaigns with the Tailors and Textile Workers Union in Kenya, and has sent interns to the country. See, e.g., *Justice at Rising Sun!*, JUSTICE AT RISING SUN BLOG (Nov. 17, 2006), <http://justiceatrisingsun.blogspot.com/2006/11/justice-at-rising-sun.html>.

<sup>187</sup> USAS was created out of the experience of summer interns at UNITE, and has strong relationships with a number of U.S. unions including the International Brotherhood of Teamsters, the United Steelworkers, and the Communication Workers

would need to decide exactly how a consortium could operate to further all of their interests and how negotiations would take place. Presumably, the consortium would choose representatives to enter into negotiations. Brands would then negotiate with the consortium directly, and multiple member unions would become signatories to each agreement.

Students' primary role would be to run a two-layered campaign, simultaneously targeting both brands and their university administrators. On the one hand, students would demand their universities agree to only source collegiate apparel from brands that have signed jobber agreements. This could be implemented gradually with the percentage of collegiate apparel required to be produced by brands that signed on to jobber agreements increasing as the number of brands who have signed the agreements increases. Individual universities would decide whether or not to adopt a policy requiring licensees to sign jobber agreements. Universities that have already expressed a commitment to the principles of the DSP should consider the jobber agreement approach an extension of the DSP and thus ought to readily adopt policies requiring licensees to sign jobber agreements.<sup>188</sup> Each university would, in turn, put additional pressure on brands that want to continue to produce collegiate apparel, as the school's new policy of sourcing primarily from brands that have signed jobber agreements would push orders towards those brands that have adopted jobber agreements.

In addition to organizing on campus, students would target the brands directly and urge them to sign on to jobber agreements. USAS has a long history of this type of organizing, and can pressure brands by threatening to attack their image not only on campuses, but also in retail stores, at company events, and on the internet through social media websites and other online organizing techniques. Students can also reach out to their allies in community anti-sweatshop groups, unions that represent workers in other industries, and student and community groups in other countries

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of America. USAS has also collaborated on solidarity campaigns with garment factory workers in the United States. See, e.g., *Hats Off: A U.S. Cap Company Gets a Hard Look from Universities*, WALL STREET JOURNAL (Apr. 2, 2002), <http://www43.homepage.villanova.edu/louis.giglio/index2.html>.

<sup>188</sup> These schools include Brandeis University, Brown University, California State University – Fullerton, Columbia University, Cornell University, DePaul University, Duke University, Fordham University, Georgetown University, Grand Valley State University, Hamilton College, Indiana University, Marquette University, Oberlin College, Purdue University, Regis University, Santa Clara University, Seattle University, Skidmore College, Smith College, Syracuse University, the State University of New York at Albany, the entire University of California system, the University of Connecticut, the University of Iowa, the University of Maine – Farmington, the University of Miami, the University of Michigan, the University of North Carolina at Chapel Hill, the University of Wisconsin – Madison, Ursinus College, Washington State University, and Western Washington University. *College and University Policy Statements*, WORKER RIGHTS CONSORTIUM, <http://www.workersrights.org/dsp.asp> (last visited June 5, 2012).

where these brands sell goods, and enlist their organizing assistance. All of this organizing will be done alongside garment workers organizing at the factory level and in their communities where brands value their image as benevolent employers. Given that supplier factory owners would also reap the benefits of higher premiums and long-term relationships (which would allow their factories to stay open longer and permit better planning as they could count on consistent orders), factory managers may also begin to encourage brands to sign jobber agreements.

#### CONCLUSION

United Students Against Sweatshops is arguably the most successful student activist organization in modern history. Their ability to alter the way consumers view the role and responsibilities of multinational corporations in global systems of production is unprecedented. In addition, their ability to use a solidarity model to effect concrete change in the lives of garment workers (as well as university employees and workers in the communities in which they live) is remarkable. USAS has continuously altered its organizing strategy to meet the ever-changing challenges of the global supply chain. Adopting a strategy of pursuing jobber agreements is a logical next step. Jobber agreements would give garment workers far greater recourse than they currently possess, and would provide an avenue for increased accountability among collegiate apparel brands. The agreements could be drafted relatively easily in a manner that renders moot all preliminary legal concerns and permits employees of supplier factories to have their cases against major apparel brands heard in U.S. courts on the merits. The collegiate apparel industry is a microcosm of the larger global garment industry, which has been the prototype for global supply chain production in countless other industries. As such, the impact of the success of jobber agreements in the collegiate apparel industry could reverberate exponentially, serving as a model for organizers in other manufacturing industries.