

Chapter 7

Gap Inc.'s Code of Conduct for Treatment of Overseas Workers

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Introduction

Gap Inc. is a U.S.-based company that operates a chain of more than 4,200 retail clothing stores around the world, under the Gap, Old Navy and Banana Republic names.¹ The company's annual revenues have recently exceeded US\$13 billion. It employs approximately 165,000 people. None of its employees make any clothing. Rather, Gap Inc. does business with more than 3,500 manufacturers operating in 50 countries who supply the company with the clothing it sells.²

In the early 1990s, following criticisms of the labor conditions prevailing within the apparel industry, Gap Inc. became one of many multinational corporations to develop codes of conduct relating to treatment of those workers.³ Gap Inc.'s *Sourcing Principles and Guidelines* were originally established in 1993. In 1996, following a negative publicity campaign spearheaded by non-governmental organizations (NGOs) alleging violations of the *Sourcing Principles and Guidelines* at Mandarin International — a Taiwan-owned garment factory in El Salvador that provided clothing on contract to Gap Inc. — the retailer introduced a new, more rigorous *Code of Vendor Conduct*. Several aspects of Gap Inc.'s initiative are noteworthy:

- Unlike codes designed to apply to an entire sector or to all members of an association, Gap Inc.'s code was developed and implemented by a single firm; nevertheless, the code is expressly designed to apply to firms *other than* Gap Inc. — to those that supply products to Gap Inc. In this sense it is a multifirm initiative.
- The code exemplifies the “leveraging” ability that companies can wield through their procurement activities to induce behavioural changes by other private sector actors.
- Gap Inc. is one of the first companies with a labour code to integrate the participation of NGOs into compliance verification of selected suppliers.
- The code is explicitly designed to have multijurisdictional application to supplier companies no matter where they are located. Indeed, given the global nature of the garment manufacturing industry, a code that applied only within a single jurisdiction would have limited effect.

1. Statistics are culled from Gap Inc., *Annual Report 2001*, available at the company's corporate Web site at <http://media.corporate-ir.net/media_files/IROL/11/111302/fin_annual_01.pdf>.

2. Gap Inc., *Ethical Sourcing*, formerly available at <www.gapinc.com>.

3. Others include Levi-Strauss, Nike, Reebok, Sears, Wal-Mart and Starbucks. See generally, L. Compa and T. Hinchliffe Darricarrere, “Private Labor Rights Enforcement Through Corporate Codes of Conduct,” in L. Compa and S. Diamond, *Human Rights, Labor Rights, and International Trade* (Philadelphia: University of Pennsylvania Press, 1996), pp. 181–197.

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Although the labour-oriented subject matter of codes of conduct such as Gap Inc.'s is addressed in international and domestic laws — in numerous international human rights and labour conventions, as a condition of favoured treatment in the domestic trade law of countries such as the United States, and in the domestic labour legislation of developed and developing countries — the primary impetus for firms putting such codes in place would not appear to be legal in nature, but rather a desire to be seen as “doing the right thing” in the eyes of customers, and thus attracting or maintaining a client base. In fact, effective government enforcement of such labour-oriented rights has been elusive to date; thus, voluntary approaches may stand a better chance of implementation than a purely statutory approach.

In this chapter, analysis is undertaken of the background conditions that led to Gap Inc. preparing a code, the process of code development, the components of the code, implementation of the code, and the strengths and weaknesses of Gap Inc.'s approach, with a view to determining the broader implications of such initiatives. Throughout the chapter, reference will be made both to the original *Sourcing Principles and Guidelines* and the new *Code of Vendor Conduct*. It is the use of third-party compliance verification as part of the *Code of Vendor Conduct* program that breaks new ground in the area of multijurisdictional codes, and thus the *Code of Vendor Conduct* and its related third-party verification program are the focal points of analysis.

A basic conclusion emerging is that, in a globalized economy, the attention of Western consumers is increasingly focussing on the ethical dimensions of how products are made, and the need for companies to uphold basic labour and environmental standards in all their operations, wherever they are located. Companies such as Gap Inc., which have put global codes in place and are beginning to work with human rights and labour organizations on code implementation, are attempting to respond to these concerns. In so doing, they are providing evidence of what can and cannot be accomplished in this domain through voluntary, market-based approaches, against a variable backdrop of domestic and overseas legal regimes. These and other points are discussed further in the body of the chapter.

Background Conditions

To understand how and why Gap Inc.'s original *Sourcing Principles and Guidelines* and the replacement *Code of Vendor Conduct* were developed, this section examines both the market and the legal environments in which they emerged. Given that Gap Inc. is a U.S. company, and U.S. NGOs and trade laws have been driving forces behind the development of the Gap Inc. codes, the focus of attention is on that country's players and laws.

The Market Environment

A discussion of market conditions can usefully be divided into supply-side and demand-side considerations. Looking first to supply-side factors, many aspects of the garment industry's labour-intensive production and assembly have moved out of high-wage, developed countries in recent years to developing countries in Central and South

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America and Asia.⁴ These locations are attractive, not as an access point to the local market but as a source of plentiful, low-wage labour, and thus serve as a manufacturing site for the export (Western) market.⁵

The depressed economies, mass unemployment, extreme poverty, corruption, and underdeveloped legal systems of many developing countries provide an environment ripe for human rights (including worker) abuse. By the mid-1990s, reports of child and prison labour, overworked and underpaid employees, and restrictions on labour union activities in developing countries had become commonplace in the Western media⁶ and in government hearings.⁷ Although the focus of this study is on codes of conduct pertaining to worker treatment *overseas*, it is worth pointing out that garment worker abuse within North America has also been well documented. For example, *The Economist* reported that, in 1995, California state officials freed 72 Thai immigrants from a sweatshop in Los Angeles. They had been held captive and forced to work for up to 17 hours a day, and were being paid between \$0.60 and \$1.60 an hour.⁸ When such worker abuse can take place in developed countries such as the United States — countries with healthy economies, high standards of living, generally well-resourced governments with extensive human rights and health and safety laws, and only occasional incidents of public-servant corruption — it is apparent that the potential for abuse and difficulty in finding effective solutions is arguably far greater in the conditions of developing countries.

A number of factors make it difficult for retailers to effectively monitor the activities of their contractors. It is not uncommon for large garment retailers to enter into contracts with a myriad of supplier factories located in a large number of countries, as evidenced by Gap Inc.'s 3500 suppliers in 50 countries. Factories can range widely in size, and many make clothing for more than one company. For example, in addition to supplying clothing to Gap Inc., Mandarin International has also made clothing for such companies as JC Penney, and Eddie Bauer.⁹ Over the course of a week, workers may manufacture different shirts for different retailers. As is discussed below, this can make consistent application of retailer-based labour codes problematic. Retailers often

4. See, generally, A. Mody and D. Wheeler, "Towards a Vanishing Middle: Competition in the World Garment Industry," *World Development* 15 (1987), p. 1269. See also C. Green, "At the Junction of the Global and Local: Transnational Industry and Women Workers in the Caribbean," in L. Compa and S. Diamond, eds., *ibid.*, pp. 118–141.

5. As discussed in P. Wilson, *Exports and Local Development: Mexico's New Maquiladoras* (Austin, Tex.: University of Texas Press, 1992), p. 9.

6. See, e.g., A. Borgman, "Garment Workers Show U.S. the 'Child Behind the Label'," *Washington Post*, July 24, 1995; M. Gibb-Clark, "Sweatshops Leave Big Gap in Workers' Rights," *The Globe and Mail*, August 16, 1995; P. Edwards, "'Virtual Slavery' in Sweatshops," *Toronto Star*, August 16, 1995.

7. For example, the Subcommittee on Sustainable Human Development of the House of Commons (Canada) Standing Committee on Foreign Affairs and International Trade, which looked at ending child labour exploitation. See the report of the Subcommittee, *Ending Child Labour Exploitation — A Canadian Agenda for Action on Global Challenges* (February 1997), available at <www.parl.gc.ca/committees352/fore/reports/5_1997-02/fore-05-cov-e.html>.

8. "Dress Code: Stamping out Sweatshops," *The Economist*, April 19, 1997, p. 28.

9. C. Forcese, "Overcoming the Gap: New 'Gap' Code of Conduct Plugs Holes," *Amnesty International Legal Network Newsletter* (Ottawa: Amnesty International, 1996), p. 1.

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purchase clothing through buyers who may or may not actually see the factory locations or conditions in which garments are made. As a result, at a practical level, a host of factors — the long-distance retailer-supplier relationship and varied languages and cultures involved, the diversity of contractors who may work with a single retail firm, and the use of intermediary buyers — detract from the ability of retailers in the U.S. and elsewhere not only to make demands concerning worker treatment but also to ensure that those demands are met.

The apparel industry is also noted for the fierce competition between developing countries for apparel contracts. Jobs and capital are highly mobile. When labour is more expensive in one country, there is often another that is cheaper just down the road. Countries such as El Salvador compete with even poorer countries such as Honduras and Nicaragua “where wages are lower and the population even poorer and more eager to work.”¹⁰

Turning to an examination of the demand side of the equation, the increased interest being expressed by some retail firms in how their products are made reflects growing interest by Western consumers in such matters. A Reebok spokesman is reported as saying, “Consumers today hold companies accountable for the way products are made, not just the quality of the product itself.”¹¹ Another factor at play is interjurisdictional — the perceived unfairness of companies meeting rigorous labour, environmental and other standards only in their facilities located in developed countries, and not in their operations located in developing countries. As Warren Allmand, President of the Canadian-based International Centre for Human Rights and Democratic Development put it, “It is no longer enough to say ‘When in Rome, do as the Romans do.’ The question is rather, Can companies who are responsible at home be irresponsible abroad?”¹² Studies in recent years have suggested that consumers are willing to pay higher prices for apparel that is not manufactured in sweatshops. For example, as part of the U.S. government-spearheaded Apparel Industry Partnership announced in August 1996 (now known as the Fair Labor Association), a survey was reported as suggesting that three quarters of America’s shoppers would willingly pay higher prices for clothes and shoes bearing a “No Sweat” label.¹³ Whether survey results translate into actual sales remains to be seen.

As is discussed in greater detail later in the chapter, institutional investors and individual shareholders may represent another source of market pressure for action with respect to worker treatment. Unions in developed countries are also beginning to take an increasing interest in the plight of their fellow workers in developing countries. Some commentators have noted that, in recent years, U.S. unions have moved aggressively to

10. L. Kaufman and D. Gonzalez, “Labor Standards Clash With Global Reality,” *New York Times*, April 24, 2001.

11. Compa and Hinchliffe Darricarrere (footnote 3), p. 183.

12. W. Allmand, “Foreword,” in C. Forcese, ed., *Commerce With Conscience? Human Rights and Corporate Codes of Conduct* (Montréal: International Centre for Human Rights and Democratic Development, 1997), p. 8.

13. As reported in *The Economist* (footnote 8). The Apparel Industry Partnership (now the Fair Labor Association) is discussed in Kernaghan Webb and David Clarke, “Voluntary Codes in the United States, the European Union and Developing Countries,” Chapter 13, below (referred to as “Other Jurisdictions,” below).

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develop international solidarity programs with foreign workers and unions.¹⁴ It is perhaps self-evident that improving the working conditions and wages of workers in developing countries is likely to decrease the attractiveness of firms “outsourcing” work overseas, and this might, in the longer term, mean more jobs for union workers in developed countries. As discussed below, one American labour organization (the National Labor Committee)¹⁵ has played a key role in spurring Gap Inc. to use third-party monitors in its supplier factories.

The Legal Environment

The shift to using labour in developing countries has been further encouraged through structural changes to the trade-oriented framework laws of many countries. Particularly since the Reagan administration of the 1980s, there has been increased emphasis in American trade policy away from direct government aid and intervention, toward granting preferential treatment of imports from developing countries that agree to work toward better protection of labour (and other) rights.¹⁶

Many developing countries have changed their tariff schedules to make investment in their countries more profitable. “Export processing zones” have been established within many developing countries. Perhaps the most well known export processing zones are the *Maquiladoras*, located on the Mexico-U.S. border.¹⁷ By agreement between participating developing countries and developed countries, firms within the export processing zones are allowed to process goods for export without paying duties on imported components.¹⁸ While management decisions, the source of capital, raw materials and technology originate largely outside the developing countries (and that is where much of the profit and finished products are destined), the export processing zones represent an infusion of much-needed jobs and foreign capital into developing countries’ economies.¹⁹ There are now export processing zones in some 35 countries.²⁰

In 1971, the Generalized System of Preferences (GSP) was authorized under the General Agreement on Tariffs and Trade. The GSP grants tariff preferences to developing countries to foster exports and economic development. Participating developing countries are required to eliminate or reduce significant barriers to trade in goods, services and investment, and to provide adequate and effective means for foreign nationals to secure, exercise and enforce exclusive intellectual property rights. All of

14. Compa and Hinchliffe Darricarrere (footnote 3), p. 182.

15. See the National Labor Committee’s Web site, <www.nlcnet.org>.

16. D. Ramnarine, “The Philosophy and Developmental Prosects of the CBI,” in A. Bakan et al., eds., *Imperial Power and Regional Trade: The Caribbean Basin Initiative* (Waterloo, Ont.: Wilfrid Laurier University Press, 1993), p. 83.

17. As for the Mandarin facility, it is located in a free trade zone in San Marcos, El Salvador. See Forcese (footnote 9), p. 27.

18. Wilson (footnote 5), p. 9.

19. Green (footnote 4), p. 120.

20. Wilson (footnote 5), p. 9.

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these factors make it easier for multinationals to do business in participating developing countries.²¹ Under the GSP program, specified products imported from more than 140 designated developing countries and territories are granted duty-free treatment.²²

Under U.S. law, the beneficiary country must undergo an annual review in order to preserve eligibility for GSP status. Among other things, this review involves demonstrating that the country is taking steps to afford internationally recognized worker rights.²³ However, due to language ambiguities and the discretionary nature of the grant of GSP status, some commentators have been critical of the program,²⁴ although others describe the review process as beneficial.²⁵

Regional initiatives of the United States, such as the Caribbean Basin Initiative (CBI), operate in a similar manner to the GSP, and have helped encourage the location of garment factories in these regions.²⁶ Apparel imported to the U.S. from the Caribbean increased from 5.5 percent of all CBI imports in 1984 to 48 percent in 1998.²⁷ As with the GSP, the CBI program includes an ambiguous discretionary power authorizing the President to take into account the extent to which workers are afforded “reasonable workplace conditions and enjoy the right to organize and bargain collectively.”²⁸

In addition, the U.S. government has, for many years, encouraged American businesses to adopt voluntary codes of practice pertaining to labour and other matters for their operations abroad. Examples include the *Sullivan Principles* (a code first drafted in 1977 that sought to promote racial equality in South Africa), the *MacBride Principles* (a 1984 code intended to overcome antipathy between the Protestant majority and Roman Catholic minority of Northern Ireland), and the *Slepak Principles* and *Miller Principles* (which promoted human rights in the former Soviet Union and China, respectively).²⁹ Most recently, the Apparel Industry Partnership has been spearheaded by the U.S. federal

21. For more on the GSP, see *Quantifying the Benefits Obtained by Developing Countries from the Generalized System of Preferences*, note by the Secretariat of the United Nations Commission for Trade and Development, October 7, 1999, available at <www.unctad.org/en/docs/poitcdtsbm52.en.pdf>.

22. *Ibid.*

23. *Generalized System of Preferences Renewal Act of 1984*, Pub. L. No. 98-573, tit. V, 98 Stat. 3018 (codified at 19 USC § 2461–2465) (Supp. III, 1985). Under § 2462(a)(4), “internationally recognized worker rights” include the right of association, the right to organize and bargain collectively, a prohibition on the use of any form of forced or compulsory labour, a minimum age for the employment of children, and acceptable conditions of work with respect to minimum wages, hours of work and occupational safety and health.

24. P. Alston, “Labor Rights Provisions in US Trade Law,” *Human Rights Quarterly* 15 (1993), p. 21.

25. See, e.g., Forcese (footnote 9), p. 5. According to Forcese, in Canada, under the *Customs Tariff*, GSP benefits have been extended to developing countries, but without any legislative requirements necessitating consideration of labour conditions in the exporting nation.

26. See, generally, W. Corbett, “Shortcomings of the Caribbean Basin Initiative,” *Law and Policy in International Business* 23 (1992), p. 953; United States International Trade Commission, Office of Economics, *Impact of the Caribbean Basin Economic Recovery Act on U.S. Industries and Consumers* (1992), pp. 8–9.

27. U.S. Trade Representative, *Third Report to the Congress on the Operation of the Caribbean Basin Economic Recovery Act*, October 1, 1999, p. 17, available at <www.ustr.gov/regions/whemisphere/camerica/3rdreport.pdf>.

28. *Caribbean Basin Economic Recovery Act*, Pub. L. No. 9867, tit. II, 97 Stat. 384 (1983) (codified at 19 USC § 2702 (c)(8)) (Supp. IV 1986).

29. See, generally, J. F. Perez-Lopez, “Promoting International Respect for Worker Rights Through Business Codes of Conduct,” *Fordham International Law Journal* 17 (1993), pp. 1–23.

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government.³⁰ Other international and intergovernmental bodies have also developed labour-oriented codes of conduct, guidelines, conventions and declarations for use by multinationals:³¹

- In the early 1970s, the United Nations drafted (but did not formally adopt) the *Code of Conduct on Transnational Corporations*, which addressed human rights and fair treatment of workers.
- The Organisation for Economic Co-operation and Development (OECD) established *Guidelines for Multinational Enterprises* in 1976, which included provisions pertaining to workers' rights. The Guidelines have recently been revised and strengthened.³²
- The International Labor Organization (ILO) has adopted numerous labour-related conventions and standards, with heavy emphasis on worker protection.³³

Within developing countries, the willpower, resources and infrastructure necessary to ensure governmental protection of worker rights is often lacking. Governments may be falling over themselves to attract new contracts and jobs and thereby pump needed money into the economy, ties to factory owners may be uncomfortably close, labour ministries may be hopelessly understaffed or indifferent, and attempts to expose bad working conditions may be suppressed.³⁴ While a rigorously enforced regulatory regime is clearly the preferred alternative, in these types of circumstances, a voluntary code such as Gap Inc.'s may be more effective in the immediate term at inducing its suppliers to respect labour standards by these supplier companies than inadequately enforced legislated standards.

Process of Code Development

Gap Inc.'s original *Sourcing Principles and Guidelines* were prepared internally in 1993. Research has revealed no evidence of there being a public consultation process, or outside involvement of NGOs or government officials in the development of the *Sourcing Principles and Guidelines*. In the mid-1990s, labour groups — in particular the U.S.-based National Labor Committee (NLC) — began to examine the implementation of workers' rights-oriented codes, including Gap Inc.'s *Sourcing Principles and Guidelines* initiative. The NLC's attention became focussed on one particular Gap Inc. contractor factory: the Mandarin International facility. One young woman who worked at the Mandarin factory, and who reported numerous breaches of the *Sourcing Principles and Guidelines*, was sponsored by the NLC in a tour of the U.S. and Canada to discuss

30. For more on the Apparel Industry Partnership, see Webb and Clarke, "Other Jurisdictions," Chapter 13, below.

31. The following is derived from Compa and Hinchliffe Darricarrere (footnote 3), pp. 183–185.

32. For the text of the OECD Guidelines, see <www.oecd.org/daf/investment/guidelines>.

33. The texts of ILO legal documents are available at <www.ilo.org/public/english>.

34. Kaufman and Gonzalez (footnote 10).

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her plight. This resulted in considerable media coverage.³⁵ Media scrutiny intensified in the fall of 1995. *New York Times* columnist Bob Herbert visited the Mandarin factory in October, reporting on overworked and underpaid women supporting malnourished families.³⁶ The president of the Mandarin factory was reported as saying that if the wages were any higher American retailers would take their business elsewhere.³⁷

Labour, religious, women's, student, consumer and human rights groups petitioned Gap Inc. to acknowledge the problems at the factory. The NLC publicly contemplated bringing a suit in the U.S. for consumer fraud.³⁸ Gap Inc. responded with a counterthreat of a libel suit should the NLC continue in its accusations.³⁹ Neither legal action materialized. Instead, in November 1995, Gap Inc. announced that it would no longer place orders from Mandarin. However, Gap Inc. was urged to address the problems instead, and thus avoid punishing the Mandarin workers. Gap Inc. officials eventually met with the NLC and two representatives of the Presbyterian Church to work out a settlement. On December 15, 1995, in a Statement of Resolution, the parties announced agreement on three broad points, as follows:

- The factory owners agreed to meet with non-working union officials and workers to negotiate and resolve their differences, with a view to reinstating seven non-working union leaders and other members.
- Gap Inc. agreed to work with U.S. groups such as the Interfaith Center on Corporate Responsibility (ICCR)⁴⁰ and the Business for Social Responsibility (BSR)⁴¹ Education Fund to explore the viability of an independent industry monitoring program in El Salvador (this is the genesis of the American Independent Monitoring Working Group, or IMWG, discussed below); meanwhile, Gap Inc. and the NLC agreed to use the Human Rights Ombudsman's offices in El Salvador and other Central American countries to monitor factory compliance with the *Sourcing Principles and Guidelines*. The involvement of ICCR in independent monitoring is noteworthy because it indicates some awareness and concern among the investment community — and not just the labour, human rights and consumer communities — about the issue. Market pressure from investors and shareholders represents yet another lever to stimulate private sector action in ways that further public policy objectives.

35. Alleged breaches of the code included payment of wages below an adequate level, overworking of employees, such as shifts lasting up to 21 hours, the use of child workers, improper payment of overtime, harassment, physical punishment, and the dismissal of employees who attempted to unionize. See such press coverage as Borgman, Gibb-Clark and Edwards (footnote 6).

36. B. Herbert, "Not a Living Wage," *New York Times*, October 9, 1995.

37. *Ibid.*

38. Forcese (footnote 9), p. 3.

39. National Labor Committee, press release, October 26, 1995, p. 2.

40. ICCR is a coalition of Protestant, Jewish and Roman Catholic institutional investors from the U.S. and Canada that uses its investments to hold corporations accountable for their effect on society and the environment. See the ICCR's Web site at <www.iccr.org>.

41. BSR is a U.S.-based organization that helps companies develop policies and practices that contribute to the sustained and responsible success of their enterprises. See BSR's Web site, <www.bsr.org>.

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- Gap Inc. agreed to re-approve the Mandarin factory for production of Gap Inc. garments when it felt confident that Mandarin could meet or exceed its *Sourcing Principles and Guidelines*, and there were other positive signs of progress concerning fair treatment of workers in El Salvador.

Following the Statement of Resolution, Gap Inc. took these steps:

- It worked with the IMWG to explore the feasibility of independent monitoring (January–March 1996). In January 1996, a month after the Statement of Resolution was released, the IMWG began negotiating the terms for an acceptable third-party monitoring arrangement. As part of these efforts, some members of the IMWG travelled to El Salvador to meet with factory managers and workers, and confer with representatives of various local religious, labour, government, and human rights organizations.
- It signed a resolution on worker-management relations with managers, workers and current and former union leaders at Mandarin to strive for the creation of a humane and productive business (March 22, 1996).
- It consented to the formation of a team of local independent monitors in El Salvador to help ensure that Mandarin stays in compliance with its code (March 22, 1996). The monitoring group, called the El Salvador GMIES,⁴² consisted of representatives of Tutela Legal (the human rights office of the Catholic Archdiocese of San Salvador), the Institute of Human Rights of Central American University, and a labour studies institute known as CENTRA.
- It hired two Central American “sourcing compliance” officers whose sole responsibility was to ensure that Gap Inc. contractors operate in full compliance with local laws and Gap Inc.’s standards (April 1996).
- It replaced its *Sourcing Principles and Guidelines* with the *Code of Vendor Conduct*.⁴³

According to some reports, the move to the use of third-party monitoring by Gap Inc. was resisted by other organizations, such as the U.S. National Retailers Association.⁴⁴ The Association’s objection related to the fact that factories such as Mandarin actually do garment work for a number of companies simultaneously, so that Gap Inc.’s agreement with Mandarin would affect other retailers as well.

It appears that the next step in the evolution of monitoring programs is to attempt to encourage sustainable worker policies that continue within particular supplier facilities after contracts with leading Western name-brand apparel companies have ended. Over the past three years, Gap Inc. (along with Nike) has piloted this concept through its financial and logistical support of an organization called Global Alliance for

42. An acronym for *El Grupu de Monitoreo Independiente de El Salvador*.

43. Information derived from Gap Inc., “To Our Customers,” May 1996; Letter from Interfaith Center on Corporate Responsibility, April 19, 1996, Re: Independent Working Group Progress Report.

44. Forcese (footnote 9), p. 1.

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Workers and Communities (GA).⁴⁵ As is indicated on the Global Alliance Web site, the GA works through a two-step process that begins and ends with the workers themselves. The first step is to give voice to the concerns and aspirations of factory workers, through worker surveys, in-depth interviews and focus groups. Second, is the design and delivery of education, training, personal development and other programs that respond directly to workers' identified needs, both inside and outside the workplace. The GA publishes regular public reports and updates on its work, and posts assessment tools and results, as well as full country reports, on its Web site. The long-term goal of the GA is to develop practical and sustainable multisector partnerships that deliver mutual benefits to workers, factory owners, local NGOs and global companies.⁴⁶

The controversies that swirled around Gap Inc. in the mid- to late 1990s seem to have died down somewhat in recent years. The American IMWG worked in apparent obscurity, releasing a public report in May 2001 (discussed in the section on implementation, below). According to the most recent information from Gap Inc., the company now employs vendor compliance officers throughout the world, representing 25 nationalities (though an exact number of individuals is not provided).⁴⁷

Components of the Code of Vendor Conduct⁴⁸

As mentioned above, one aspect of the fallout from the negative publicity associated with Gap Inc.'s activities in El Salvador in the mid-1990s was the introduction of a new *Code of Vendor Conduct*, to replace the first-generation *Sourcing Principles and Guidelines*. On the surface, there is a good deal of similarity between the two codes. Both articulate objectives calling for an ethical workplace, and stipulate that those contractors who fail to live up to the conditions risk losing Gap Inc. as a purchaser. Both address a nearly identical set of issues — e.g. discrimination, forced labour, child labour, working conditions, wages and hours, environment, freedom of association and compliance.

However, there are significant differences. First, remedying a deficiency of the *Sourcing Principles and Guidelines* revealed by the unfavourable media coverage of 1995, the *Code of Vendor Conduct* includes a section on monitoring and enforcement. The section reads as follows:

45. The GA was launched in April 1999 to improve the workplace experience and life opportunities for workers in developing countries, and to promote collaborative multisector efforts in support of these activities. A partnership of foundations, global companies and international institutions, the GA places particular emphasis on reaching young adult workers involved in global productions and service supply chains worldwide. GA partners include the International Youth Foundation, the World Bank, Gap Inc., Nike, St. John's University and Penn State University.

46. For more information, see <www.theglobalalliance.org>.

47. See Gap Inc., *Our People and Partners*, available at <www.gapinc.com>.

48. Citations in this section are from Gap Inc.'s *Code of Vendor Conduct*, available at <www.dol.gov/ILAB/media/reports/iclp/apparel/5c7.htm>.

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As a condition of doing business with Gap, each and every factory must comply with this Code of Vendor Conduct. Gap will continue to develop monitoring systems to assess and ensure compliance. If Gap determines that any factory has violated this Code, Gap may either terminate its business relationship or require the factory to implement a corrective action plan. If corrective action is advised but not taken, Gap will suspend placement of future orders and may terminate current production.

This provision is rather open-ended, particularly the statement that Gap Inc. “will continue to develop monitoring systems.” However, given that the viability of NGO monitoring was intended to be subject to fairly long-term study, this is perhaps not surprising. According to communications by the authors with Gap Inc. compliance officials, Gap Inc.’s own internal monitoring program has grown since the development of the Code, in the sense that encouraging factories to adopt internal monitoring departments has also become more common as a way to further “develop monitoring systems.”

The key difference between *Sourcing Principles and Guidelines* and the *Code of Vendor Conduct* is the amount of detail that each document presents. While the *Sourcing Principles and Guidelines* reads like a public relations pamphlet, the language of the *Code of Vendor Conduct* more closely resembles that of a legal document. For example, the *Sourcing Principles and Guidelines* provision pertaining to working conditions consists of one paragraph, and is very general. It requires that factories be clean, safe, and well-lit. In contrast, section VII of the *Code of Vendor Conduct* — pertaining to working conditions — fills three-and-a-half pages of text, and is very specific. There are prohibitions on “corporal punishment or any other form of physical or psychological coercion,” and 16 other mandatory requirements pertaining to all manner of factory conditions, as well as another 16 requirements pertaining to housing (when applicable). Unlike the *Sourcing Principles and Guidelines*, the *Code of Vendor Conduct* is to be translated into the language of the workers in each factory, and posted throughout each facility. For consumers, a plain-language English version of the *Code of Vendor Conduct* is available, and related information can be obtained from Gap Inc.’s corporate affairs Web site.⁴⁹

Nevertheless, the *Code of Vendor Conduct* does have a number of ambiguities and weaknesses. For example, with respect to wages, the requirement in section VI that workers be paid “at least the minimum legal wage or a wage that meets local industry standards, whichever is greater,” may prove to be of marginal protection if the local minimum wage or local industry standards are below the poverty line (as is common⁵⁰). There is no provision in the *Code of Vendor Conduct* requiring review and revision of the Code after a set period, no requirement of publication of compliance data, and no whistleblower protection for employees who report incidents of code non-compliance.

49. See <www.gapinc.com>.

50. *The Economist* (footnote 8), p. 28.

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Gap Inc. set out the following approach for dealing with cases of non-compliance:

When a compliance issue is identified, corrective action is required. Typically, this results in continuous improvement at a factory over time. But, if serious violations occur or a pattern of non-compliance emerges at an approved factory, we may suspend production or terminate business. For example, we terminated business at 15 factories in China for falsifying payroll records. In 2001, we quit doing business with vendors representing more than 120 factories worldwide for compliance-related reasons.⁵¹

There remains some degree of ambiguity in this approach (e.g. what constitutes a “serious violation”?) but, as with regulatory enforcement contexts, some discretion is arguably necessary to give parties the flexibility to facilitate creative solutions.⁵²

Implementation

The media coverage of the Mandarin factory’s non-compliance with Gap Inc.’s *Sourcing Principles and Guidelines* pointed to a major deficiency with an *ad hoc* and purely internal auditing approach. As has been discussed, since then, a more systematic, and widespread internal compliance system has been put in place, with vendor compliance officers working for Gap Inc. throughout the world. But what about the third-party monitoring, a process that was to begin with the Mandarin facility and then extend to other facilities if it proved viable?

In its May 2001 report, the IMWG summarized the progress to date:

Originally designed to respond to a crisis, independent monitoring has evolved into a method of providing consistent, systematic, on-going compliance with applicable national law and Gap Inc.’s Code of Vendor Conduct.⁵³

Over the years, the independent monitoring process has continued to be conducted by the El Salvador local independent monitoring group (GMIES):

GMIES began visiting the factory shortly after the March 22 [1996] agreement was reached. At first, the visits occurred about three times per week, and focused on worker interviews. Later, the visits became less frequent. GMIES has monitored the range of issues covered in Gap Inc.’s Code of Vendor Conduct and applicable laws. It has

51. See <www.gapinc.com>.

52. For discussion of discretion in regulatory enforcement contexts, see, e.g., K. Webb, “Between Rocks and Hard Places: Bureaucrats, Law and Pollution Control,” in R. Paehlke and D. Torgerson, eds., *Managing Leviathan: Environmental Politics and the Administrative State* (Kitchener, Ont.: Broadview Press, 1993), pp. 201–227.

53. Independent Monitoring Working Group, *Public Report*, May 14, 2001, p. 2, available at <www.somo.nl/monitoring/reports/IMWG-report.pdf>.

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accomplished this through a variety of means including regular on-site visits, worker interviews, meetings with management, formal surveys, monthly meetings attended by the independent monitors, management, union representatives and Gap Inc. representatives.⁵⁴

The El Salvador independent monitors are also available to hear complaints from workers.⁵⁵

Following initial start-up problems related to the devastation caused by Hurricane Mitch in 1998, and difficulties finding local non-governmental partners similar to those carrying out monitoring in El Salvador, the American IMWG established local monitoring of Gap Inc.'s supplier operations in Honduras in 1999,⁵⁶ and Guatemala in June 2000.⁵⁷ In April 2001, monitoring was expanded to other El Salvador factories supplying Gap Inc., and the American IMWG began exploring "independent sources of funding to support the work of the monitors in the three countries."⁵⁸ The American IMWG resolved to disband at the end of 2001, having agreed that it had succeeded . . .

... in exploring the viability of independent monitoring in Central America, as evidenced by the establishment of pilot projects in each of the countries where the IMWG had made an effort to do so. Indeed, the IMWG succeeded in establishing the first independent monitoring project anywhere, which has resulted in a demonstration that a diverse range of civil society organizations can work in a transparent, collaborative manner to promote the observance of fair working conditions that promote a productive and harmonious workplace.⁵⁹

A key potential problem with the use of local third-party monitors revolves around the question of who bears the cost of monitoring. Effective compliance monitoring is an onerous task, requiring both expertise and time to carry out in a proper manner. On the one hand, no funding from Gap Inc. to third-party monitors may be viewed as necessary to ensure the continued credibility of such surveillance activities. On the other, if Gap Inc. does not pay, who does? In El Salvador, the local monitors were originally funded through a charitable foundation, but this proved to be unfeasible over time. Now, the monitors operate under an arrangement whereby Gap Inc. provides the necessary funding to an intermediary, which in turn pays the monitors; this, according to the report, "remove[s] the possibility of direct influence on the monitors by the company."⁶⁰

54. *Ibid.*, p. 8.

55. Kaufman and Gonzalez (footnote 10).

56. Independent Monitoring Working Group (footnote 53), p. 13.

57. *Ibid.*, p. 10.

58. *Ibid.*, p. 16.

59. *Ibid.*

60. *Ibid.*, p. 14.

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The independent monitoring activity in El Salvador, Honduras and Guatemala could be taken as evidence that independent monitoring⁶¹ is a workable option. However, these activities can fairly be described as a pilot project operating in a handful of factories in three countries. Outside the pilot project, monitoring for compliance to the *Code of Vendor Conduct* is performed by vendor compliance officers working for Gap Inc. Is it feasible to extend the full independent monitoring and associated management of labour disputes found in El Salvador, Honduras and Guatemala to all of Gap Inc.'s 4,000 suppliers around the world? The costs of doing so have been estimated by some commentators to be around 4.5 percent of Gap Inc.'s annual profit⁶² — a significant burden if competitors do not engage in similar activities. As discussed below, industry-wide code programs have now moved to the forefront, in apparent recognition of some of the cost and other limitations of single-firm apparel code initiatives.

Conclusions

In 1995, a worker in Mandarin's factory in San Salvador making apparel for Gap Inc. earned \$0.55 an hour, was compelled to spend 18-hour days in an unventilated factory, with no drinkable water, and could be denied bathroom breaks if bosses were displeased.⁶³ As of 2001, at the same factory, while the wages have only gone up \$0.05 an hour, workers now have coffee breaks and lunch on an outside terrace cafeteria, bathrooms are unlocked, the factory is ventilated and clean, and employees can complain to a board of independent monitors. "It's not paradise," reports Carolina Quinteros, co-director of the Independent Monitoring Working Group of El Salvador, "But at least it works better than others down here. They don't have labor or human rights violations."⁶⁴

The Gap Inc.'s *Code of Vendor Conduct* represents a marked improvement over the first-generation *Sourcing Principles and Guidelines* in its detail and assertive language, although it lacks mandatory review and publicity requirements and whistleblower protection. As for the wage protections, as is apparent from the \$0.05 an hour wage increase from 1995 to 2001, improvements may be slow and modest. Clearly, the use of third-party monitoring can be considered a breakthrough that, in the event it were effectively carried out and expanded to all Gap Inc. contractors, would increase the likelihood that Gap Inc. officials and Gap Inc.'s contractors would treat the *Code of Vendor Conduct* and its implementation seriously. In turn, this may increase worker confidence in the initiative.

The experience of Gap Inc. in the evolution and development of its code may demonstrate a somewhat perverse phenomenon affecting companies that adopt socially oriented codes, which might be referred to as the "roach motel" syndrome. Roach motels

61. The IMWG has defined *independent monitoring* as "...an effective process of direct observation and information-gathering by credible and respected institutions and individuals to ensure compliance with corporate codes of conduct and applicable laws to prevent violations, process grievances, and promote humane, harmonious, and productive workplace conditions." Cited in Forcese (footnote 9), p. 29, and repeated in IMWG, *ibid.*, p. 3.

62. Kaufman and Gonzalez (footnote 10).

63. The following before-and-after description is taken directly from Kaufman and Gonzalez, *ibid.*

64. *Ibid.*

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are devices used to rid dwellings of unwanted insects. They consist of small boxes with several holes and an attractive scent. The scent lures insects in, and they are subsequently killed by an insecticide. Hence, insects can check in to a roach motel, but they can never leave. It is possible that a similar effect is at work with socially oriented codes. Thus, the initial commitment to abide by a code is likely to be comparatively easy, and compliance with the code may attract minimal attention and have little positive effect on sales. But any evidence of foot-dragging or renegeing on commitments can have a negative media and consumer impact and may compel the firm to adopt a more aggressive code and carry out associated implementation activity. Opting out or relaxing the code in many cases is not a real option (i.e. checking out of this “motel” is particularly difficult).⁶⁵

The *Code of Vendor Conduct* can be seen as one of an increasing number of market-based initiatives being developed to address problems of worker abuse in developing countries. Through its purchasing power, Gap Inc. is able to contractually impose conditions concerning workplace treatment on supplier factories located all over the world. While the standards are not perfect, the second-generation *Code of Vendor Conduct* can be viewed as a serious attempt to address many of the major issues associated with maintaining a humane workplace, and a marked improvement over the original guidelines. Efforts by Gap Inc. to integrate NGOs into compliance monitoring represent a potentially significant move away from a purely internal program that lacked credibility and toward an accountable self-regulatory regime. That said, the *ad hoc* nature of the NGO involvement, and the need for NGOs to obtain independent funding assistance to engage in their activities, are issues needing a more long-term solution.

At a fundamental level, it is important to stress that market-driven programs such as Gap Inc.’s *Code of Vendor Conduct* will never represent a complete solution to the problem of abusive treatment of employees in less developed countries. For one thing, Gap Inc.’s code only applies to Gap Inc. contractors: workers who are employed in the making of non-export commodities, or firms who are not participating in the program, will not be directly affected by such initiatives. Moreover, there is no guarantee that, over time, consumers will, through their purchasing decisions, continue to support firms that attempt to safeguard the interests of workers in this way.

Clearly, the most appropriate solution is the full implementation of international conventions on workers’ rights, and domestic enforcement of human rights and worker safety legislation, buttressed through trade laws encouraging compliance with such laws. Unlike these public law solutions, market-driven programs represent an attempt to harness an additional lever — that of consumer marketplace demand — to address the same problem. While driven by market demand, Gap Inc.’s code is specifically designed to operate within the conventional legal system, albeit using *private*, not public law

65. Gap Inc. has continued to face occasional unfavourable publicity, despite the establishment of its third-party monitoring program and its worldwide system of internal monitors. In 1999, Gap Inc. and numerous other U.S. apparel manufacturers were the object of several lawsuits brought by NGOs over the labour practices of the companies’ suppliers on the Western Pacific island of Saipan. Many of the companies agreed to a settlement that is said to include the establishment of third-party monitoring of Saipan factories by a group called Verité. See Global Exchange, *Top U.S. Clothing Retailers Agree to Settle Saipan Garment Worker Lawsuits*, available at <www.globalexchange.org/campaigns/sweatshops/saipan/pr032800.html>.

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mechanisms (i.e. contractual instruments enforceable through the ordinary civil courts).⁶⁶ These market-driven initiatives are intended to reinforce the legislative regimes in place (as seen in the code requirements that contractors adhere to all local environmental, workplace and labour laws), not replace such regimes. Gap Inc.'s senior vice-president for global affairs confirms this point:

We are not the all-powerful Oz that rules over what happens in every factory. Do we have leverage? Yes. Is it as great as our critics believe? Not by a long shot. ... We can't be the whole solution. The solution has to be labor laws that are adequate, respected and enforced.⁶⁷

While Gap Inc.'s precedent-setting agreement to work with civil society organizations from both North and South in monitoring could hardly be described as an unmitigated success, a good argument can be made that it has shown the way for other initiatives, including COVERCO (a Guatemalan-based independent monitoring group),⁶⁸ commercial apparel monitoring agencies such as Verité⁶⁹ and the Apparel Industry Partnership/American Fair Labor Association (AIP/FLA).⁷⁰ The development and implementation of the AIP/FLA initiative — with its use of an industry-wide voluntary standard, an institutionalized multistakeholder monitoring and enforcement group, and a high-profile label — seem to build on and be entirely compatible with Gap Inc.'s program. Although Gap Inc. is not a member of the AIP/FLA, it is reasonable to suggest that the media scrutiny of Gap Inc.'s initiative, and Gap Inc.'s willingness to bring NGOs into compliance verification, has provided impetus for the development of the AIP/FLA. Retailer acceptance of the need for a rigorous approach, and labour, human-rights and consumer group support for such programs, is likely to be enhanced when the leaders in each of these fields are meaningfully involved in their articulation and implementation. The likelihood of consumer acceptance may also be improved when a single, highly publicized label, standard and approach is adopted. The role of the U.S. government in assembling the AIP/FLA, provides an example of how governments can participate in and encourage the development of market-driven voluntary code initiatives.

Against a backdrop of Gap Inc.'s code and independent monitoring, the AIP/FLA initiative and other experiences, public policy commentators are now beginning to suggest innovative ways of combining the power of the marketplace with enhanced legal regimes, to create effective new hybrids.⁷¹ In so doing, they are arguably

66. The use of contractual mechanisms to enforce voluntary codes is discussed in Kernaghan Webb and Andrew Morrison, "The Law and Voluntary Codes: Examining the 'Tangled Web'," Chapter 5, above.

67. Kaufman and Gonzalez (footnote 10).

68. For discussion of COVERCO, see H. Fuentes and D. Smith, "Independent Monitoring in Guatemala: What Can Civil Society Contribute?" in R. Thamotheram, ed., *Visions of Ethical Sourcing* (London: Financial Times Prentice Hall, 2001), pp. 36–42.

69. For discussion of Verité's work in China, see H. White, "Monitoring in China," in Thamotheram, ed., *ibid.*, pp. 43–49.

70. See comments to this effect by Sam Brown of the Fair Labor Association in Kaufman and Gonzalez (footnote 10). The AIP/FLA is discussed in Webb and Clarke, "Other Jurisdictions," Chapter 13, below.

71. A. Fung, D. O'Rourke, and S. Sabel, "Realizing Labor Standards: How Transparency, Competition, and Sanctions Could Improve Working Conditions Worldwide," *Boston Review* 26 (2000), available at <<http://bostonreview.mit.edu/BR26.1/fung.html>>.

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acknowledging the value of voluntary measures such as that of Gap Inc.'s, while attempting to build on them to devise more robust, sustainable solutions that work in an increasingly globalized marketplace.

Perhaps this is an appropriate note on which to end this chapter. Gap Inc.'s *Code of Vendor Conduct* and its use of NGOs in monitoring should not be considered as substitutes for effective implementation of law, nor as permanent solutions. To factory owners, workers, governments and NGOs in El Salvador and other developing countries Gap Inc.'s initiative acts as a positive model that perhaps can be emulated with appropriate adjustments by others. To Western retailers, the code and monitoring initiative paved the way for more sophisticated industry-wide labelling initiatives. For public policy makers and commentators, Gap Inc.'s efforts are, it is hoped, a point of departure for imaginative, sustainable solutions that can draw together the legal and market instruments available in effective, sustainable hybrids.

