Boston College International and Comparative Law Review

Volume 37 | Issue 2 Article 6

5-15-2014

Making Chocolate Sweeter: How to Encourage Hershey Company to Clean Up Its Supply Chain and Eliminate Child Labor

Kathryn Manza
Boston College Law School, kathryn.manza@bc.edu

MAKING CHOCOLATE SWEETER: HOW TO ENCOURAGE HERSHEY COMPANY TO CLEAN UP ITS SUPPLY CHAIN AND ELIMINATE CHILD LABOR

KATHRYN MANZA*

Abstract: Child labor is a complex issue that deeply permeates cocoa production in West Africa. Multinational corporations, such as Hershey Company, are often in the best position to address child labor because these human rights violations occur within their own supply chains. The U.S. legislature can encourage multinational corporations to address child labor through mandatory public disclosure and due diligence. This mandatory disclosure may encourage multinational corporations to use fair trade certification or sponsorship programs—solutions that keep children away from hazardous occupations while still addressing the root cause of child labor, poverty.

INTRODUCTION

On October 31, 2012, American children filled Halloween bags with Hershey's Chocolate Kisses, Kit Kat Bars, and Reese's Peanut Butter Cups.[1] All of these Halloween staples originated from Hershey Company's (Hershey) expansive portfolio.[2] Hershey is the leading chocolate manufacturer in North America, controlling 42 percent of the market for chocolate products in the United States and generating over $6 billion in annual revenues.[3] Furthermore,

---

* Kathryn Manza is the Executive Note Editor for the *Boston College International & Comparative Law Review*.

[1] *See* Jennifer Booton, *Hershey Stirs Up Stronger 3Q Profit, Says Halloween Off to Good Start*, FOX BUSINESS (Oct. 25, 2012), http://www.foxbusiness.com/industries/2012/10/25/hershey-stirs-up-stronger-3q-profit-says-halloween-off-to-good-start/ (last visited Mar. 14, 2014); Joseph Harry, *Go Trick-Or-Treating with Hershey's for Short-Term Gains*, SEEKING ALPHA (Oct. 5, 2012), http://seekingalpha.com/article/906381-go-trick-or-treating-with-hershey-s-for-short-term-gains (last visited Mar. 14, 2014).

[2] *See* Harry, *supra* note 1.

[3] Eleanor Bloxham, *Chocolate and Child Labor: A Hurdle for Hershey*, FORTUNE (Nov. 16, 2012), http://management.fortune.cnn.com/2012/11/16/hershey-child-labor-suit/ (last visited Feb. 21, 2014); Iulia Filip, *Hershey Co. Sued for Info on Child Labor*, COURTHOUSE NEWS SERV. (Nov. 5, 2012), http://www.courthousenews.com/2012/11/05/51961.htm (last visited Mar. 14, 2014).

Hershey is an American icon, frequently considered one of the country's favorite brands of chocolate.[4]

As American children enjoyed their Halloween treats, however, most did not know that the chocolate dissolving on their tongues was partially produced by other children laboring under difficult conditions in West Africa.[5] The day after Halloween 2012, the Louisiana Municipal Police Employees' Retirement System, which owns 1,800 shares in Hershey, filed a complaint against the corporation in Delaware's Chancery Court.[6] The shareholders sought to enforce their rights to inspect Hershey's corporate books[7] in order to investigate whether Hershey's Board of Directors permitted the company to integrate illegal child labor into its business model.[8] The shareholders argued that the Board's actions could damage Hershey's brand and reputation, and furthermore would breach the Board's fiduciary duties to Hershey and its shareholders.[9] The shareholders also argued that an inspection of Hershey's books and records would help them decide whether to file a subsequent derivative suit on behalf of the company.[10]

This complaint arose more than a decade after the company signed a protocol pledging to terminate any use of slave and child labor by 2005.[11] This lawsuit suggests that the voluntary agreement was insufficient to prevent a brand children love from exploiting children across the Atlantic Ocean.[12] Her-

---

[4] *See* Shivani Ganguly, *Hershey: What Happened to Putting a Smile on Children's Faces?* SUSTAINABLE BRANDS (Nov. 20, 2012), http://www.sustainablebrands.com/news_and_views/articles/hershey-what-happened-putting-smile-childrens-faces (last visited Mar. 14, 2014); Charles B. Stockdale, *America's Favorite Chocolate Brands*, FOX BUSINESS (Apr. 6, 2012), http://www.foxbusiness.com/industries/2012/04/06/americas-favorite-chocolate-brands/ (last visited Mar. 14, 2014).

[5] *See* Bloxham, *supra* note 3; Filip, *supra* note 3.

[6] Angela Ramos, *Shareholder Suit of Hershey Co Alleging Child Labor/Trafficking in Supply Chain*, EXAMINER (Nov. 10, 2012), http://www.examiner.com/article/shareholder-suit-of-hershey-co-alleging-child-labor-trafficking-supply-chain (last visited Mar. 14, 2014); Filip, *supra* note 3.

[7] *See* Ramos, *supra* note 6; Filip, *supra* note 3; *see also* DEL. CODE ANN. tit. 8 § 220 (2010). Section 220 of Delaware General Corporate Law provides limited rights to shareholders to inspect a corporation's "books and records." *Id.* § 220(b). Section 220(c) gives shareholders permission to apply to the Court of Chancery for an order to compel an inspection if the corporation does not allow the shareholder to inspect the requested records or reply to the demand within five business days. *Id.* § 220(c).

[8] Verified Complaint Pursuant to 8 Del. C. § 220 To Compel Inspection of Books and Records ¶ 1, La. Mun. Police Employees' Ret. Sys. v. Hershey Co., No. 7996 (Del. Ch. 2012).

[9] *Id.* ¶ 2.

[10] *Id.* ¶ 8.

[11] *Id.* ¶ 2; CHOCOLATE MFG. ASS'N, PROTOCOL FOR THE GROWING AND PROCESSING OF COCOA BEANS AND THEIR DERIVATIVE PRODUCTS IN A MANNER THAT COMPLIES WITH ILO CONVENTION 182 CONCERNING THE PROHIBITION AND IMMEDIATE ACTION FOR THE ELIMINATION OF THE WORST FORMS OF CHILD LABOR 3 (2001), *available at* http://www.cocoainitiative.org/images/stories/pdf/harkin%20engel%20protocol.pdf [hereinafter Protocol].

[12] Verified Complaint, *supra* note 8, ¶ 1; Protocol, *supra* note 11, at 1; Ramos, *supra* note 6.

shey's struggle to meet these expectations also provides a vehicle to explore even larger questions: how well can companies regulate themselves through the motivations of corporate social responsibility (CSR) and the marketplace?[13] Should legislatures impose hard law measures rather than soft law targets?[14]

This Note proceeds in three parts. Part I provides a background on CSR in the United States today and charts Hershey's work over the past decade to reduce the use of child labor in its cocoa production. Part II tracks legislators' escalating use of due diligence to obtain public policy objectives and provides an overview of international law on child labor. Part III recommends that multinational firms stay proactive about child labor in order to avoid harm to their brand and corporate reputation. Additionally, legislators should encourage companies to do so by mandating supply chain due diligence and offering tax breaks, among other incentives, to companies that become fair trade-certified.

I. BACKGROUND

A. The Elusive Concept of CSR

"Corporate social responsibility," one writer for *Forbes*' CSR blog bluntly wrote, "is not going to solve the world's problems."[15] In his book charting Levi Strauss & Company's (Levi's) attempts to incorporate ethics into a multinational business operation, Karl Schoenberger seemed inclined to agree.[16] He wrote:

> Corporations are incapable, almost by design, of exercising moral and ethical judgments . . . They react when coerced into accountability by some external force—a legal constraint or the scandal of a negative advocacy campaign. Even for companies with the most noble of intentions, the unwritten laws of the free market do not provide a mechanism to reconcile the true cost of social responsibility with the fundamental need to be profitable. In other words . . . an

---

[13] *See* KARL SCHOENBERGER, LEVI'S CHILDREN: COMING TO TERMS WITH HUMAN RIGHTS IN THE GLOBAL MARKETPLACE, at ix (2000); Christopher Whelan & Neta Ziv, *Law Firm Ethics in the Shadow of Corporate Social Responsibility*, 26 GEO. J. LEGAL ETHICS 153, 155(2013).

[14] *See* James M. Roberts & Andrew W. Markley, *Why the U.S. Should Oppose International Corporate Social Responsibility (CSR) Mandates*, HERITAGE FOUND. (May 4, 2012), http://www.heritage.org/research/reports/2012/05/why-the-us-should-oppose-international-corporate-social-responsibility-csr-mandates#_ftnref32 (last visited Mar. 14, 2014) (arguing that the United States should not pursue mandatory CSR policies for American companies).

[15] James Epstein-Reeves, *Six Reasons Companies Should Embrace CSR*, FORBES (Feb. 21, 2012), http://www.forbes.com/sites/csr/2012/02/21/six-reasons-companies-should-embrace-csr (last visited Mar. 14, 2014).

[16] *See* SCHOENBERGER, *supra* note 13, at ix.

> organization's instinct to succeed prevails over any lofty principles it might espouse.[17]

Despite the obvious limitations of CSR, over the last twenty years consumers and managers alike have rapidly developed the notion that companies should give back to the communities, employees, and the environments with which they do business.[18] Many current CSR programs are considered tools to improve a firm's reputation and brand recognition, but critics remain concerned that anything beyond this could be an improper use of shareholders' money.[19] This can lead to paradoxical efforts as corporations launch well-publicized charity initiatives while still contributing to human rights violations through their own business operations.[20]

Nevertheless, an evolving view of CSR—one seemingly espoused by the Hershey shareholders in their complaint—compels companies to improve the well being of individuals in their own supply chains.[21] This view promotes the concept that a company should be held accountable not just to shareholders but also to other actors in a corporate enterprise, such as employees, suppliers, and

---

[17] *Id.*

[18] Peter Gjørtler, *Recent European Union Initiatives & the Danish Experience*, 21 IND. INT'L & COMP. L. REV. 435, 435 (2011); Morten T. Hansen et al., *Can Companies Both Do Well and Do Good?* CEO.COM (Jan. 7, 2013), http://www.ceo.com/flink/?lnk=http%3A%2F%2Fblogs.hbr.org%2Fcs%2F2013%2F01%2Fcan_companies_both_do_well_and.html&id=295589 (last visited Mar. 14, 2014); *see also* Whelan & Ziv, *supra* note 13, at 942 (detailing how consumers help keep corporations accountable by expressing purchasing preferences through their wallets, boycotts, and public information campaigns).

[19] *See* Roberts, *supra* note 14; Alaa Rady, *Is Corporate Social Responsibility Stealing Money from Shareholders?* FAST CO. (Feb. 10, 2011), http://www.fastcompany.com/1725752/corporate-social-responsibility-stealing-money-shareholders (last visited Mar. 14, 2014).

[20] *See* RAISE THE BAR HERSHEY, STILL TIME TO RAISE THE BAR: THE REAL CORPORATE SOCIAL RESPONSIBILITY REPORT FOR THE HERSHEY COMPANY 9 (2011), *available at* http://www.raisethebarhershey.org/wp-content/uploads/2011/09/HersheyReport2011.pdf [hereinafter STILL TIME TO RAISE THE BAR] (explaining how Hershey donates to various children's charities in the United States and West Africa as part of its social responsibility program, while neglecting to enforce policies that eliminate forced and child labor from its supply chain).

[21] *See* Verified Complaint, *supra* note 8, ¶ 1; Paul Klein, *Moving Beyond CSR: The Business of Social Change*, FORBES BLOG (Nov. 12, 2012,), http://www.forbes.com/sites/csr/2012/11/12/moving-beyond-csr-the-business-of-social-change/ (last visited Mar. 14, 2014). Klein's article explains the important role that supply chains play in a corporation's social responsibility and how views towards these supply chains are evolving:

> Improving supply chain operations has the potential to reduce costs and risk and make a meaningful social and environmental difference. Increasingly, supply chain managers are accountable for delivering more than economy and efficiency to the sourcing of products and to the logistics of delivery. They are also responsible for ensuring that suppliers have fair hiring policies and safe working conditions and that environmental impacts are reduced wherever possible.

Klein, *supra*.

people living in the communities where firms conduct their business.[22] These so-called "stakeholders" in the company are seen as having a "moral stake," rather than an "equity stake," in the company.[23]

To improve the well being of stakeholders in their supply chains, a company's vision of CSR must also extend to that company's suppliers.[24] Many companies today have codes of conduct, in which corporations ensure that their suppliers uphold the same standards of social responsibility to which corporations themselves adhere.[25] As companies began to outsource more jobs to a global network of contractors and suppliers, they become increasingly susceptible to litigation for human rights violations, which could wreak havoc on a brand's reputation.[26] Therefore, requirements formerly under the purview of public governance—such as environmental standards and workers' rights—are being replaced with private contracting.[27]

The theory that companies should concern themselves with "stakeholders" in their own supply chains does not rest on altruistic goals alone.[28] Current scholarship has also begun to suggest that companies can be profitable and compete effectively in the long term by prioritizing stakeholders' interests when constructing and implementing business plans.[29] In fact, many top-performing companies have built social purposes into their operations.[30] In a well-received article in the *Harvard Business Journal*, Rosabeth Moss Kanter stressed that "great

---

[22] SCHOENBERGER, *supra* note 13, at 23; Hansen, *supra* note 18; Sarah Jane Leake, *Shareholders v. Stakeholders: Managing Interests and Expectations on the Company Board*, BLOOMBERG LAW, http://about.bloomberglaw.com/law-reports/shareholders-v-stakeholders/ (last visited Mar. 14, 2014).

[23] SCHOENBERGER, *supra* note 13, at 23.

[24] *See* Whelan, *supra* note 13, at 2–4.

[25] *Id.* at 3–4.

[26] *See* SCHOENBERGER, *supra* note 13, at 56–58. For example, in 1999 two lawsuits filed in California against Gap Inc., Nordstrom Inc., Tommy Hilfiger USA, Oshkosh B'Gosh, and Wal-Mart argued that the companies should be held jointly liable for the human rights transgressions of their sewing factory contractors in Saipan. *Id*. at 67. The companies were exposed to negative publicity and forced to pay heavy fines to compensate the workers. *Id*. at 68–69.

[27] Whelan, *supra* note 13, at 4.

[28] *See* SCHOENBERGER, *supra* note 13, at 24; Rosabeth Moss Kanter, *How Great Companies Think Differently,* HARV. BUS. REV., Nov. 2011, at 66, 68 (arguing that a firm that takes a long term approach by investing in its employees and community can still be profit maximizing as a firm only concerned with making a profit).

[29] *See* SCHOENBERGER, *supra* note 13, at 24; Kanter, *supra* note 28, at 71 (illustrating how before a merger, Shinhan Bank negotiated with Chohung Bank's union, gave equal representation to both banks' managers on a management committee, increased employees' salaries, held a series of retreats to foster social bonding in order to integrate the two cultures, which lead to a successful merger where Shinhan outperformed the South Korean stock market).

[30] John Mackey & Raj Sisodia, *"Conscious Capitalism" Is Not an Oxymoron*, HARV. BUS. REV. BLOG NETWORK, (Jan. 14, 2013) http://blogs.hbr.org/cs/2013/01/cultivating_a_higher_conscious.html (last visited Mar. 14, 2013) (explaining how conscious companies like the Container Store, Starbucks, Trader Joe's, Patagonia, and Whole Foods Market attempt to follow a more conscious model of capitalism rather than simply trying to make a profit).

companies" make profits while also investing in employees and communities—in short, investing in the company's far-reaching future.[31]

Restructuring supply chains to demonstrate a company's commitment to its stakeholders, however, is not an easy task.[32] Policymakers note that international labor issues are extremely complicated and are the result of multiple cultural and economic factors.[33] International organizations recognize that child labor is an especially difficult issue because corporations do not want to deprive impoverished families of extra income,[34] but also recognize that children deserve an education free from debilitating work.[35] Corporations cannot fix these complicated social issues alone, but rather need to work in combination with local governments, NGOs, and other actors.[36]

B. Hershey Company and CSR

Milton Hershey, the celebrated founder of Hershey, demonstrated his commitment to children throughout his illustrious career.[37] In 1909, fifteen years after he started his chocolate factory, the entrepreneur founded the Hershey Industrial School for Orphans and put his personal fortune of $60 million

---

[31] *See* Kanter, *supra* note 28, at 68.

[32] *See* Klein, *supra* note 21.

[33] *See* TIAJI SALAAM-BLYTHER ET AL., CONG. RESEARCH SERV., RL 32990, CHILD LABOR IN WEST AFRICAN COCOA PRODUCTION: ISSUES AND U.S. POLICY 11 (2005); INT'L LABOR ORG., THE END OF CHILD LABOR: WITHIN REACH 65 (2006). The CSR Report for Congress elaborated on the reasons for child labor and trafficking in West Africa:

> The extent to which West African cocoa producers employ child labor is, in part, a function of economic factors. The extent of child trafficking is likewise affected by such factors, these include low cocoa prices, low incomes of family farmers, and large numbers of small holder farmers who cannot afford to engage hired labor . . . Cultural factors are involved too. Sociologists point out that not only is there a tradition of children participating in household and farm work from an early age (the IITA study), but there is a strong tradition in West Africa of child migration both within countries and across borders. Such migratory patterns make it difficult to monitor and control child trafficking. A study of Malian children points out that children are often sent to live outside the family, village or country for work, family solidarity, or education and concludes that migration is a rite of passage, and a financial necessity for many.

TIAJI SALAAM-BLYTHER ET AL., *supra*, at 11.

[34] *See* Verified Complaint, *supra* note 8, ¶ 21. Although this is often a delicate factor in the issue of child labor, it is not an issue in West Africa. *See id.* Most children working on cocoa farms in West Africa do not receive compensation for their labor, but rather are forced into work or assist with their families' farms. *Id.*

[35] Anna A. Kornikova, Note, *International Child Labor Regulation 101: What Corporations Need to Know About Treaties Pertaining to Working Youth*, 34 BROOK. J. INT'L L. 207, 222 (2008); Klein, *supra* note 21.

[36] *See* Klein, *supra* note 21.

[37] *See* Verified Complaint, *supra* note 8, ¶ 3.

in a trust for the school when he passed away.[38] Today, the Milton Hershey School provides almost 2,000 underprivileged children in Hershey, Pennsylvania with "free housing, education, and medical care."[39] Hershey Trust Company, which currently administers the school, is Hershey Company's largest shareholder.[40] Therefore, as the recent complaint by the Louisiana Municipal Police Employees' Retirement System points out, the school for underprivileged children in the United States may be partially funded by the labor of underprivileged children in West Africa.[41]

Hershey's 2011 CSR report stated "the well-being of children, especially those at risk [is] at the heart of [the company's] community efforts."[42] In addition to the Milton Hershey School in Pennsylvania, Hershey is involved with other international efforts to improve the lives of children, including funding a program to prevent young children from contracting malaria in the Ivory Coast, providing donations for North American children's hospitals, and funding a Filipino orphanage that caters to children with special needs.[43] In fact, *Forbes* ranked Hershey at the top of the list for brands with "ethical leadership" in 2011.[44]

Hershey's commitment to children through charity work, however, is juxtaposed with labor practices in its own supply chain in Africa.[45] West African countries, such as Ghana and the Ivory Coast, provide 70 percent of the world's cocoa supply.[46] Indeed, Hershey's 2011 CSR report identifies Ghana and the Ivory Coast as countries from which the company sources key ingredients, although the identity of its almost 10,000 cocoa suppliers remains undisclosed.[47] In 2011, nearly two million children, including "an estimated 819,921 in the Ivory Coast and 997,357 in Ghana," worked illegally on cocoa farms.[48] Only 5 to 10 percent of these children work for pay, while the rest are forced to work or assist with their families' farms.[49] These children are exposed to pesti-

---

[38] *Id.* ¶¶ 3, 11.

[39] *Id.* ¶ 11.

[40] *Id.* ¶ 12.

[41] *Id.*

[42] HERSHEY CO., CORPORATE SOCIAL RESPONSIBILITY PROGRESS REPORT 2011, at 44 (2011), *available at* http://www.thehersheycompany.com/assets/pdfs/hersheycompany/Hershey2011CSRReport.pdf.

[43] *Id.* at 54.

[44] Jennifer Rooney, *Forbes Top Brands: 'Ethical Leadership,'* FORBES (Oct. 5, 2011), http://www.forbes.com/sites/jenniferrooney/2011/10/05/top-brands-ethical-leadership/ (last visited Mar. 14, 2014).

[45] *See* Verified Complaint, *supra* note 8, ¶¶ 4–5.

[46] *Id.* ¶ 15.

[47] HERSHEY CO., *supra* note 42, at 8; *see* Verified Complaint, *supra* note 8, ¶ 25.

[48] Verified Complaint, *supra* note 8, ¶ 21.

[49] *Id.*

cides, wield dangerous equipment such as machetes, and move heavy loads, while at the same time enduring abuse and malnutrition.[50] In Ghana, almost 32 percent of rural children have endured injuries or illness while working.[51]

Starting in 2001, the media began to uncover the overwhelming use of illicit labor practices in West African cocoa farms.[52] This development provoked the U.S. Congress to propose an amendment to the Food and Drug Administration (FDA) and Related Agencies Appropriation Act, which would require labels on cocoa products that signified whether the supply chain was "slave-free."[53] The House passed Amendment 142, which provided the FDA with $250,000 in order to develop a label for chocolate products guaranteeing that child labor was not used in the growing and harvesting of cocoa.[54]

The cocoa industry lobbied heavily against the proposed amendment.[55] Consequently, after the House passed the bill, the Senate companion bill never even made it to the Senate floor.[56] Instead, chocolate companies, the International Labor Organization (ILO),[57] and members of Congress proposed eliminating these human rights violations without the interference of legislation.[58] On September 19, 2001, chocolate companies, including Hershey, signed the Harkin-Engel Protocol (Protocol).[59] The Protocol was "voluntary and non-legislative."[60] Signatories to the Protocol agreed to develop their own certification process that would ensure that the "worst forms of child labor," as defined

---

[50] Shima Baradaran & Stephanie Barclay, *Fair Trade and Child Labor*, 43 COLUM. HUM. RTS. L. REV. 1, 13 (2011).

[51] *Id.* at 56.

[52] Verified Complaint, *supra* note 8, ¶ 5.

[53] *Id.* ¶ 15; TIAJI SALAAM-BLYTHER ET AL., *supra* note 33, at 1.

[54] TIAJI SALAAM-BLYTHER ET AL., *supra* note 33, at 13.

[55] Verified Complaint, *supra* note 8, ¶ 16.

[56] TIAJI SALAAM-BLYTHER ET AL., *supra* note 33, at 1.

[57] Kornikova, *supra* note 35, at 217–18. The International Labor Organization (ILO) is an international body "that develops labor standards through adoption of conventions and recommendations and engages governments, employers, and workers in the standard-setting process in a model known as the tripartite structure." *Id.*

[58] *Id.*

[59] Verified Complaint, *supra* note 8, ¶ 16.

[60] TIAJI SALAAM-BLYTHER ET AL., *supra* note 33, at 6.

by the ILO,[61] were not used in cocoa production.[62] The self-imposed deadline for this public certification process was July 1, 2005.[63]

Despite Hershey's secrecy about its suppliers' practices, a precursory glance at the company's Supplier Code of Conduct appears to demonstrate Hershey's commitment to the Protocol.[64] The Code of Conduct illustrates the company's expectations that suppliers will "support and participate in industry efforts aimed at the elimination of the 'worst forms of child labor' wherever they exist in the supply chain."[65] The Code also mandates that "suppliers must not utilize or benefit in any way from forced or compulsory labor."[66]

The Complaint argues, however, that the Code is not as aggressive as it originally appears.[67] In order to do business with Hershey, potential suppliers only need to acknowledge the Code and state its "*intention* to comply with its requirements."[68] The Code does not even clarify whether it applies to raw materials like cocoa from West Africa.[69] Furthermore, Hershey has not released any information illustrating how the company administers the Code—casting doubt on whether the company enforces the Code and whether suppliers actually follow its provisions.[70]

Over a decade after Hershey signed the Protocol and Congress did not impose any hard law measures, little work has been accomplished to fulfill the Protocol's objectives to reduce the "worst forms of child labor" in West Africa.[71] In 2006, a year after Hershey should have already fulfilled the obligations of the Protocol, shareholders submitted a proposal to Hershey's Board of Directors expressing concern about the use of child labor in West Africa and re-

---

[61] ILO Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, June 17, 1999, S. Treaty Doc. No. 106-5 (1999), art. 3, *available at* www.ilo.org/public/English/standards/relm/ilc87/com-chic.htm [hereinafter ILO Convention]. "The worst forms of child labor" is defined in ILO Convention 182. *Id.* It encompasses "all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour" and "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety, or morals of children." *Id.* arts. 3(a), 3(d).

[62] Protocol, *supra* note 11, at 3.

[63] *Id.* at 3.

[64] *See* Verified Complaint, *supra* note 8, ¶ 25; Protocol, *supra* note 11, at 1; HERSHEY CO., SUPPLIER CODE OF CONDUCT REQUIREMENTS 1 (2010), *available at* http://www.thehersheycompany.com/assets/pdfs/hersheycompany/Hershey_CA-Disclosure.pdf.

[65] HERSHEY CO., *supra* note 64, at 1.

[66] *Id.*

[67] Verified Complaint, *supra* note 8, ¶ 64.

[68] HERSHEY CO., *supra* note 64, at 3.

[69] STILL TIME TO RAISE THE BAR, *supra* note 20, at 12.

[70] Verified Complaint, *supra* note 8, ¶ 65; STILL TIME TO RAISE THE BAR, *supra* note 20, at 12.

[71] Verified Complaint, *supra* note 8, ¶ 18; TIAJI SALAAM-BLYTHER ET AL., *supra* note 33, at 1.

questing that management report on Hershey's cocoa suppliers.[72] The board refused.[73]

In October 2012, Hershey released a statement that all of its cocoa would come from suppliers that meet international labor standards by 2020.[74] This fifteen-year extension from the deadline to which Hershey committed in the Protocol compelled Whole Foods to pull Scharffen Berger, a Hershey luxury brand, from its shelves until the company provided information on its CSR.[75] Thus, Hershey's perceived failure to hold its own supply chain accountable has already begun to damage the beloved brand's reputation.[76] Hershey's delay in implementing the Protocol, as well as the secrecy surrounding its suppliers, has provided both the company's shareholders and stakeholders little confidence that 2020 will be different from 2005.[77]

II. DISCUSSION

A. How Multinational Firms and the U.S. Government Currently Integrate the United Nation's Guiding Principles

Regardless of how the current litigation against Hershey develops, critics have argued that more needs to be done to stem the use of child labor in the cocoa industry.[78] Hershey itself conceded that the company would need until 2020 to become child labor free.[79] Since the chocolate companies signed the Protocol, they have made nearly $1 trillion.[80] These companies, however, have

---

[72] Verified Complaint, *supra* note 8, ¶ 26, Protocol, *supra* note 11, at 3.

[73] Verified Complaint, *supra* note 8, ¶ 26.

[74] *Hershey Accused of Using Cocoa Suppliers That Employ Child Labor*, HUFFINGTON POST (Nov. 2, 2012), http://www.huffingtonpost.com/2012/11/02/hershey-child-labor_n_2060702.html (last visited Mar. 14, 2014).

[75] *See* Protocol, *supra* note 11, at 3; *Hershey Accused, supra* note 74.

[76] *See* Verified Complaint, *supra* note 8, ¶¶ 2, 37; *Hershey Accused*, *supra* note 74.

[77] *See* Verified Complaint, *supra* note 8, ¶¶ 5, 37; *Hershey Accused*, *supra* note 74.

[78] *See* Baradaran & Barclay, *supra* note 50, at 19 ("2005 and 2006 ILO reports harshly criticize the chocolate industry for their dismal progress in reducing the use of child labor in its supply chain and its failure to implement the protocol's action steps."); Harry Stevens, *Child Labor Concerns Across Hershey's Supply Chain Prove It Pays to Be Proactive*, GREENBIZ.ORG (Oct. 19, 2012), http://www.greenbiz.com/blog/2012/10/18/child-labor-concerns-hershey-supply-chain (last visited Mar. 14, 2014) ("More than 1.8 million children in Ghana and Cote d'Ivoire are employed in cocoa-related agriculture, and most of them without pay . . . . Nearly every major cocoa buyer has been cited for labor abuses in the last decade.").

[79] Stevens, *supra* note 78.

[80] *Who Consumes the Most Chocolate?* CNN FREEDOM PROJECT (Jan. 17, 2012), http://thecnnfreedomproject.blogs.cnn.com/2012/01/17/who-consumes-the-most-chocolate/ (last visited Mar. 14, 2014).

used only 0.0075 percent of those profits to improve children's working conditions in West Africa.[81]

Multinational companies are often considered the primary beneficiaries of cheap labor practices.[82] Critics often express concern that corporations will take advantage of lenient labor regulations in other countries in order to reduce costs.[83] Addressing the relationship between corporations and their human rights practices, the U.N. Special Representative on Human Rights, Transnational Corporations, and Other Business Enterprises issued a report on March 21, 2011 to the U.N. Human Rights Council entitled "Guiding Principles on Business and Human Rights" (Guiding Principles).[84] The Guiding Principles rest on three pillars: for the state to protect against human rights abuses, for businesses to respect human rights, and for victims of human rights abuses to have greater access to effective remedies for their abuses.[85]

Some corporations have voluntarily implemented programs that fall in line with the Guiding Principles.[86] Levi Straus & Company set up an innovative sponsorship program that sent factory children to school while continuing to pay wages and benefits to their families until the children reached a legal age to work.[87] Companies have also complied with the spirit of the Guiding Principles by certifying their products through fair trade organizations.[88] Currently, the Fairtrade Labeling Organization International is the "only fair trade certification body working in the West African cocoa industry."[89] In order to receive free trade certification, cocoa farmers must refrain from any type of forced or child labor, protect workers from discrimination, and safeguard their ability to freely associate and collectively bargain.[90] Farmers who reach these standards are guaranteed a fair trade price floor for their produce and a social

---

[81] *Id.*

[82] *See* Baradaran & Barclay, *supra* note 50, at 20; Jonathan Todres, *The Private Sector's Pivotal Role in Combating Human Trafficking*, 3 CAL. L. REV. CIRCUIT 80, 80 (2012); Kemi Mustapha, Note, *Taste of Child Labor Not So Sweet: A Critique of Regulatory Approaches to Combating Child Labor Abuses by the U.S. Chocolate Industry*, 87 WASH. U. L. REV. 1163, 1169 (2010).

[83] Todres, *supra* note 82, at 80; Mustapha, *supra* note 82, at 1169.

[84] Special Representative of the Secretary General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 1, U.N. DOC A/HRC/17/31 [hereinafter *Guiding Principles*], *available at* http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf (Mar. 21, 2011); *see* Uche Ewelukwa Ofodile et al., *Corporate Social Responsibility*, 46 INT'L LAW. 181, 181 (2012).

[85] *Guiding Principles*, *supra* note 84, ¶ 6.

[86] *See* SCHOENBERGER, *supra* note 13, at 139–40 (detailing how Levi Strauss & Company voluntarily implemented an education program for children who were working in their factories); STILL TIME TO RAISE THE BAR, *supra* note 20, at 38 (providing information on fair trade certification).

[87] SCHOENBERGER, *supra* note 13, at 139–40.

[88] *See* Baradaran & Barclay, *supra* note 50, at 38.

[89] STILL TIME TO RAISE THE BAR, *supra* note 20, at 38.

[90] *Id.*

premium to fund community development products.[91] In order to receive the fair trade label, 100 percent of the produce must be certified.[92]

To offset some of the certification costs, the European Union provides "subsidies and tax benefits to companies that participate in fair trade."[93] The European Union is also committed to developing consumer awareness about fair trade by supporting studies on the impact of fair trade and encouraging funding for sustainability schemes that utilize fair trade.[94] In 2007 and 2008, for example, the European Union spent €19 million on education about fair trade.[95]

The Guiding Principles also recommend that states clearly express the expectation that any business domiciled in their jurisdiction will respect human rights along their supply chain—including operations in foreign countries.[96] The United States, where Hershey is incorporated, receives about 20 percent of total cocoa exports directly from the Ivory Coast.[97] Other countries that import cocoa from the Ivory Coast and Ghana, such as Canada and European countries, also supply U.S. companies with products processed from cocoa beans.[98]

The United States has attempted to use multiple strategies to combat international labor problems by applying pressure to companies that do business in the United States.[99] For example, the Sanders Amendment of 1997 to the Tariff Act of 1930 prohibited the importation of goods created by forced labor.[100] The Tariff Act was amended again in 2000 to specifically include goods created by forced or indentured *child* labor.[101] Senator Tom Harkin of Iowa also introduced the Child Labor Deterrence Act in 1992.[102] This act would have banned any goods produced using child labor and would have imposed harsh penalties on any violating companies.[103] Senator Harkin introduced the

---

[91] *Id.* The international standard minimum set by FLO is $1,750 per metric ton or $1,950 per metric ton if the cocoa is also organic. *Id.* If the world price, determined by the New York Board of Trade price, rises above $1,600 per metric ton, the fair trade price will match the world price. *Id.*

[92] *Id.*

[93] *See* Baradaran & Barclay, *supra* note 50, at 6.

[94] *See id.* at 59.

[95] *Id.*

[96] *Guiding Principles*, *supra* note 84, at 7.

[97] TIAJI SALAAM-BLYTHER ET AL., *supra* note 33, at 4; Verified Complaint, *supra* note 8, ¶ 1.

[98] TIAJI SALAAM-BLYTHER ET AL., *supra* note 33, at 4.

[99] *See* Drusilla K. Brown, *Global Trade and Child Labor*, *in* WORLD OF CHILD LABOR: A HISTORICAL AND REGIONAL SURVEY 67–70 (Hugh D. Hindman ed., 2009) (outlining various legislative efforts the United States has utilized to curb the use of child labor in other countries).

[100] Baradaran & Barclay, *supra* note 50, at 33.

[101] Trade and Development Act of 2000, 19 U.S.C. § 1307 (2006) (emphasis added); Mustapha, *supra* note 82, at 1173.

[102] Mustapha, *supra* note 82, at 1172 n.38.

[103] Baradaran & Barclay, *supra* note 50, at 33–34.

bill again in 1993, 1995, 1997, and 1999, but it failed to pass on all occasions.[104]

In the past few years, however, legislators have shown an increased willingness to compel corporations to perform the proper due diligence needed to understand the extent of human rights violations in their supply chains.[105] Through such disclosures, policy makers hope that public pressure will compel multinational corporations to eradicate labor problems.[106] To date, enacted legislation surrounding corporate due diligence and human rights has not targeted child labor.[107] Even so, since legislators have demonstrated an increasing willingness to use disclosure as an incentive to clean up supply chains, due diligence may be used in the future as a way to confront child labor as well.[108]

The first time legislators utilized due diligence to shed light on public companies' supply chains occurred when President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act into law on July 21, 2010.[109] Although most of the legislation intended to reform financial services regulations, a few provisions utilized public company reporting systems in an unprecedented way for public policy purposes.[110] For example, Section 1502 of the Dodd-Frank Act requires publicly traded companies to annually disclose whether they use any conflict minerals[111] from the Democratic Republic of the

---

[104] Mustapha, *supra* note 82, at 1172 n.38; CAROL BELLAMY, UNICEF, THE STATE OF THE WORLD'S CHILDREN 60 (1997), *available at* http://www.unicef.org/sowc97/ (click on PDF version and then Download Part 2 (593KB)).

[105] Sarah A. Altschuller, *Human Rights Due Diligence—An Emerging Requirement in State and Federal Legislation*, CORP. SOC. RESPONSIBILITY AND THE LAW FOLEY HOAG BLOG (Oct. 22, 2012), http://www.csrandthelaw.com/2012/10/human-rights-due-diligence-an-emerging-requirement-in-state-and-federal-legislation (last visited Mar. 14, 2014).

[106] Todres, *supra* note 82, at 96; TIMOTHY G. HOXIE ET AL., JONES DAY, CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT: NEW DISCLOSURE REQUIREMENTS FOR COMPANIES DOING BUSINESS IN CALIFORNIA TO TAKE EFFECT JANUARY 1, 2012 1 (2011), *available at* http://www.jonesday.com/files/Publication/2d2aa656-db14-4227-aec6-3464b6a117ea/Presentation/PublicationAttachment/173da43b-5ea6-4fe3-aafe-38c5cb6bb1e1/California%20Transparency.pdf; Amy K. Lehr, *Conflict Minerals and the New Financial Reform Legislation*, CORP. SOC. RESPONSIBILITY AND THE LAW FOLEY HOAG BLOG (Jul. 22, 2010), http://www.csrandthelaw.com/2010/07/conflict-minerals-and-the-new-financial-reform-legislation (last visited Mar. 14, 2014).

[107] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502 (2010) (requiring disclosure for use of conflict minerals in the DRC); The California Transparency in Supply Chains Act, CAL. CIV. CODE § 1714.43(a)(1) (Deering 2010) (requiring disclosure for forced or trafficked labor but omitting any reference to child labor specifically).

[108] *See* Altschuller, *supra* note 105.

[109] David M. Lynn, *The Dodd-Frank Act's Specialized Corporate Disclosure: Using the Securities Laws to Address Public Policy Issues*, 6 J. BUS. & TECH. L. 327, 327 (2011); Helene Cooper, *Obama Signs Overhaul of Financial System,* N.Y. TIMES, July 21, 2010, at B3 (referencing due diligence on firms' conflict mineral purchasing practices, which would include supply chain information).

[110] Lynn, *supra* note 109, at 327.

[111] Sarah A. Altschuller et al., *Corporate Social Responsibility*, 45 INT'L LAW. 181, 183 (2011). "Conflict minerals," including tantalum, cassiterite, wolmarite, and gold, are used in various products,

Congo (DRC) in their production.[112] Armed groups used the sale of conflict minerals to purchase weapons and perpetuate hostilities, including extreme levels of sexual violence.[113] If a company used conflict minerals from the DRC, Section 1502 requires a report describing any due diligence efforts implemented to investigate the minerals' chain of custody, which in turn could increase consumer awareness about the use of conflict minerals and thus perhaps discourage firms from continuing to purchase minerals from sources that benefit these armed groups.[114]

The Dodd-Frank Act does not prohibit companies from using conflict minerals.[115] Rather, it relies on the public nature of the reports to compel companies to clean up their supply chains and thus protect their reputation.[116] In fact, the Dodd-Frank Act mandates that the Securities and Exchange Commission (SEC) make the disclosures available online, thus allowing consumers to easily view the company's business practices and supply chain.[117]

The same year that President Obama signed the Dodd-Frank Act, California Governor Arnold Schwarzenegger signed the California Transparency Supply Chain Act (CTSPA).[118] The CTSPA requires specified companies that do business in California to disclose their procedures to audit their suppliers and any efforts they have taken to eradicate slavery and human trafficking.[119] The CTSPA went into effect January 1, 2012.[120] Like the Dodd-Frank Act, the CTSPA requires public disclosure.[121] Disclosures must be posted on the retail seller's or manufacturer's website with a prominent link to the requested information.[122]

Manufacturers first must disclose how they evaluate supply chains to find and eradicate human trafficking or forced labor.[123] If a third party did not make the verification, this also must be disclosed.[124] Second, manufacturers must

---

making the Dodd-Frank Act applicable to multiple industries, including mining, automotive, aerospace, and jewelry production. *Id.*

[112] Lynn, *supra* note 109, at 328.

[113] Dodd-Frank Wall Street Reform and Consumer Protection Act § 1502(a)–(b); Altschuller et al., *supra* note 111, at 183.

[114] Altschuller et al., *supra* note 111, at 183–84; Lynn, *supra* note 109, at 331.

[115] Lynn, *supra* note 109, at 336; Lehr, *supra* note 106.

[116] Lynn, *supra* note 109, at 336; Lehr, *supra* note 106.

[117] *See* Lynn, *supra* note 109, at 329, 331.

[118] Altschuller et al., *supra* note 111, at 185; Cooper, *supra* note 109.

[119] CAL. CIV. CODE § 1714.43(a)(1) (Deering 2010).

[120] Altschuller et al., *supra* note 111, at 185.

[121] *Compare* Dodd-Frank Act § 1502(b) (requiring companies to make disclosures to the SEC, which in turn puts these disclosures online), *with* CAL. CIV. § 1714.43(b) (requiring companies to put required information in a prominent place on their websites).

[122] CAL. CIV. § 1714.43(b).

[123] *Id.* § 1714.43(c)(1).

[124] *Id.*

disclose to what extent they conduct audits of suppliers in order to evaluate whether suppliers comply with the company's labor standards.[125] Third, manufacturers have to disclose whether they require suppliers to ensure that any materials used in the finalized products do not infringe on the exporting country's laws surrounding forced labor or human trafficking.[126] Fourth, they must disclose whether employees or contractors who fail to meet company standards on slavery and trafficking are held accountable within the company.[127] Finally, manufacturers must disclose how much training the company provides to employees and managers who administer the firm's supply chain on issues related to human trafficking and slavery.[128]

Like the Dodd-Frank Act, the CTSPA does not actually require that affected companies follow these five steps.[129] Rather, the CTSPA relies on the risk that not implementing any changes at all could ultimately cost the company more than following these five steps due to the damage to a brand's public image.[130] Through this public pressure, companies may be compelled to look at their own supply chains, follow the CTSPA's five steps, and combat slavery and human trafficking.[131] Thus, the CTSPA intends to apply public pressure on manufacturers by educating consumers and investors on companies' practices.[132] Anti-trafficking organizations can use the information displayed to encourage greater private sector involvement in combatting trafficking and slavery.[133] The California Attorney General can only grant injunctive relief under the CTSPA.[134] Observers are still unsure about how strictly the California Attorney General will choose to enforce the CTSPA or what type of injunctive relief will be sought.[135]

In 2011, the year after legislators enacted the Dodd-Frank Act and the CTSPA, Representative Carolyn Maloney introduced a bill, H.R. 2759, entitled the Business Transparency on Trafficking and Slavery Act.[136] The proposed federal legislation would apply to companies with annual worldwide gross profits above $100 million, and unlike the CTSPA, which only applies to re-

[125] *Id.* § 1714.43(c)(2).
[126] *Id.* § 1714.43(c)(3).
[127] *Id.* § 1714.43(c)(4).
[128] CAL. CIV. CODE § 1714.43(c)(5) (Deering 2010).
[129] Lehr, *supra* note 106; HOXIE ET AL., *supra* note 106, at 1.
[130] HOXIE ET AL., *supra* note 106, at 1; Todres, *supra* note 82, at 96.
[131] HOXIE ET AL., *supra* note 106, at 1.
[132] Jerilyn Klein Bier, *New Law Puts Spotlight on Supply Chain,* FIN. ADVISOR (Jan. 6, 2012), http://www.fa-mag.com/news/new-law-puts-spotlight-on-supply-chain-9362.html (last visited Mar. 14, 2014); Todres, *supra* note 82, at 81.
[133] Todres, *supra* note 82, at 81.
[134] *Id.* at 96.
[135] *Id.*
[136] *Id.* at 81; Cooper, *supra* note 109.

tailers and manufacturers, would apply to any publicly traded or private company currently required to submit annual reports to the SEC.[137] The bill would amend Section 13 of the Securities Exchange Act of 1934, and require publicly listed companies to disclose efforts to eradicate not just human trafficking and slavery like the CTSPA, but also forced labor and the worst forms of child labor, as defined by the ILO.[138]

B. International Law on Children's Rights

Although the Business Transparency on Trafficking and Slavery Act faces an uphill battle to get passed, the introduction of a bill utilizing due diligence demonstrates public policy leaders' increased concern about human rights in supply chains.[139] If this bill, or another bill concerning child labor in American companies' supply chains, is passed, a review of two international conventions on children, the United Nation's (U.N.) Convention on the Rights of the Child (UNCRC) and the ILO's Worst Forms of Child Labor Convention (ILO Convention), will shed insight on how international law has shaped the conversation surrounding children and child labor thus far.[140]

The UNCRC, although not ratified by the United States, provides a useful framework for balancing the varying policy considerations behind combating child labor.[141] The UNCRC requires that states recognize the child's right to be free from exploitation,[142] to survive,[143] and to enjoy an adequate standard of

---

[137] Altschuller, *supra* note 105. *Compare* CAL. CIV. § 1714.43(a)(1) (requiring every retailer and manufacturer doing business in the state with a certain annual worldwide profit to comply), *with* Business Transparency on Trafficking and Slavery Act, H.R. 2759, 112th Cong. § 2 (2011) (requiring any company required to file reports with the SEC to comply).

[138] H.R. 2759, 112th Cong. § 2 (2011); Todres, *supra* note 82, at 81. *Compare* H.R. 2759, 112th Cong. § 2 (2011) ("[requires companies to disclose efforts to eradicate] conditions of forced labor, slavery, human trafficking, and the worst forms of child labor within such person's supply chains"), *with* CAL. CIV. § 1714.43(a)(1) ("[requires companies to disclose] efforts to eradicate slavery and human trafficking from its direct supply chain").

[139] *See* Altschuller, *supra* note 105.

[140] *See* Kornikova, *supra* note 35, at 221–26 (providing information on both conventions within the larger framework of solving child labor).

[141] *Id.* at 223, n.124.

[142] Convention on the Rights of the Child art. 32(1), Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter COTRC]. Under the COTRC, states must protect children from exploitation, including "economic exploitation" and working in an environment that could be "hazardous . . . harmful to the child's health or physical, mental, spiritual, moral, or social environment," or interfere[s] with the child's education." *Id.*

[143] *Id.* art. 6(1–2). Article 6 of the COTRC mandates that "every child has the inherent right to life" and states "shall ensure to the maximum extent possible the survival and development of the child." *Id.*

living.[144] These rights under the UNCRC, however, often conflict.[145] Economic endeavors that enable a child to survive could also expose the child to dangerous work conditions.[146] Anticipating this issue, the U.N. also instituted the "best interests" principle, which mandates that the child's best interests are "a primary consideration" when implementing any policy that involves children.[147] The "best interests" principle allows states to consider any unique social and cultural obstacles while implementing the UNCRC's universally recognized principles.[148]

The United States gave greater support to, and ratified, the ILO Convention.[149] The ILO Convention strove to take "immediate and comprehensive action" in order to eliminate the "worst forms of child labor" for all children under the age of eighteen.[150] Article 3 defines "the worst forms of child labor" as "all forms of slavery or practices similar to slavery," including selling and trafficking children, debt bondage, and forced labor.[151] It also encompasses "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children."[152] Additionally, the ILO Convention reaffirmed both the importance of education and the need to provide for children's healthy integration into society while still addressing the poverty of their families.[153]

Children working in the chocolate industry in West Africa begin at very young ages and wield machetes and apply pesticides without protective equipment.[154] A study implemented in 2002 found that 64 percent of children on cocoa farms were under the age of fourteen, many of the children were reg-

---

[144] *Id.* art. 27(1). Article 27 of the COTRC ensures that states "recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development." *Id.*

[145] *See* Kornikova, *supra* note 35, at 223–24 (explaining how Bangladeshi manufacturers, attempting to comply with American standards of labor between 1992 and 1995, fired thousands of children from the factories, resulting in even worse working conditions for the children who turned to crime and prostitution to survive). States pursuing children's right to be free from exploitation, and thus eliminating child labor, often conflicts with children's right to survive and enjoy an adequate standard of living. *Id.*

[146] *Id.* at 224.

[147] COTRC, *supra* note 142, art. 3(1); Kornikova, *supra* note 35, at 224.

[148] Kornikova, *supra* note 35, at 225.

[149] *Id.* at 220. The United States ratified the ILO Convention but did not ratify the COTRC. *See id.* at 220, n.124

[150] ILO Convention, *supra* note 61, art. 2.

[151] *Id.* art. 3(a).

[152] *Id.* art. 3(d).

[153] *Id.* art. 7(c).

[154] INT'L PROGRAMME ON THE ELIMINATION OF CHILD LABOR, COMBATING CHILD LABOR IN COCOA GROWING 3 (2005), *available at* http://www.ilo.org/public//english/standards/ipec/themes/cocoa/download/2005_02_cl_cocoa.pdf.

ularly beaten, and only 34 percent of children working on cocoa farms attended school.[155] Additionally, between 30 percent and 50 percent of border guards and police officers in Burkina Faso and Mali reported child trafficking incidents in 2009, with the Ivory Coast and Ghana mentioned as intended destinations.[156] Therefore, the work conditions in the cocoa industry fulfill both definitions of the worst forms of child labor and require "immediate and comprehensive action."[157]

III. Analysis

If the voluntary Protocol was not enough to compel Hershey to eliminate the worst forms of child labor in a timely manner, what else should be done?[158] So far, international law does not have the teeth to seriously combat child labor, despite widespread support for the ILO Convention.[159] The ILO lacks power because the organization relies on moral persuasion rather than hard sanctions to encourage compliance.[160] Furthermore, even if the ILO Convention did contain penalties, the ILO still may choose not to enforce them in order to retain support in the international community.[161] The ILO Convention most likely will not be the main force of reform for this complex social problem.[162]

Governments of importing countries also encounter difficulties when addressing work environments in exporting countries.[163] Governments in developed countries, like the United States, face sovereignty barriers when attempting to regulate the behavior of firms that only do business in other countries.[164] Additionally, importing countries often have difficulty fostering the political force necessary to compel firms operating within their jurisdictions to change their suppliers' behavior in exporting countries.[165] Citizens of importing countries also confront challenges when using traditional avenues to address

---

[155] *Id.*

[156] Verified Complaint, *supra* note 8, § 23.

[157] *See* ILO Convention, *supra* note 61, arts. 3(a), 3(d); *supra* notes 155–157 and accompanying text.

[158] *See* Baradaran & Barclay, *supra* note 50, at 19; Stevens, *supra* note 78.

[159] *See* Elizabeth B. Chilcoat, *Pinkie Promises or Blood Oaths? Using Social Clauses in U.S. Free Trade Agreements to Eradicate Child Labor,* 7 Wash. U. Global Stud. L. Rev. 307, 311–12 (2008); Kornikova, *supra* note 35, at 220.

[160] Chilcoat, *supra* note 159, at 313.

[161] *Id.*

[162] *See id.*

[163] Michael P. Vanderbergh, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA L. Rev. 913, 919–20 (2007).

[164] *Id.* at 920.

[165] *Id.*

qualms about firms' practices in other countries.[166] Concerned consumers must first compel their own government to act, which in turn must then influence the government of the exporting country, which then must find the correct strategy to change the behavior of companies operating in the exporting country.[167] Additionally, exporting governments may be hesitant to change or enforce existing labor laws, due to the risk that foreign firms may entirely remove capital from that country and invest in a jurisdiction with more relaxed labor laws and cheaper labor.[168]

Multinational corporations, on the other hand, are often in advantageous positions to control their own supply chains.[169] Manufacturers already have monitoring systems in place for their supply chains in order to ensure economic efficiency.[170] These systems are better equipped to prevent human abuses from occurring because firms can take precautionary measures while governments and consumers cannot take action until after abuses have occurred.[171] Additionally, the private sector has access to monetary resources that often dwarf the resources available to governments and nongovernmental organizations (NGOs).[172] Scholars observe that manufacturing regulation in exporting countries has largely shifted from public governance to private contracting through large, multinational firms.[173] Multinational firms impose certain standards due to pressure from consumers, investors, and other stakeholders, the motivation to evade any potential litigation, and the desire to preempt any future government regulation.[174]

The importance of this private regulation is also reflected in NGOs' behavior.[175] Rather than concentrating efforts on national and international governmental bodies, NGOs often apply pressure to private companies in order to encourage this type of private regulation.[176] For example, the "Raise the Bar,

---

[166] *See id*. (discussing the concerns of consumers regarding environmental issues in exporting countries, which parallels concerns about labor conditions).

[167] *Id.*

[168] *See* Bellamy, *supra* note 104, at 69.

[169] *See* Todres, *supra* note 82, at 86; Vanderbergh, *supra* note 163, at 917 (explaining the power of multinational corporations to effect environmental change in their supply chains).

[170] *See* Todres, *supra* note 82, at 86.

[171] *See id.* at 87.

[172] *See id.* at 89.

[173] Vanderbergh, *supra* note 163, at 918 ("The new Wal-Mart effect occurs where a mix of social, economic, and legal factors induces a firm to impose on its suppliers private environmental or other requirements that are traditionally the subject of government regulation."); Whelan, *supra* note 13, at 4 ("Requirements that are 'traditionally the subject of government regulation,' including environmental standards, workers' rights and the like are replacing public governance through private contracting with corporations' chain of suppliers.").

[174] Vanderbergh, *supra* note 163, at 917.

[175] *See id*. at 915.

[176] *Id.*

Hershey!" campaign is a joint effort by multiple organizations, including Green America, International Labor Rights Forum, and the Global Exchange, to educate consumers on Hershey's stalled efforts to reduce child labor in its supply chain.[177] The Raise the Bar campaign highlights how NGOs pressure companies to become more socially responsible.[178] Hershey agreed to work with the Rainforest Alliance[179] to certify its line of Bliss chocolates and invest $10 million in West Africa to reduce child labor by the end of 2012 after the International Labor Rights Forum scheduled a Super Bowl ad casting light on Hershey's use of child labor.[180]

Therefore, corporations have an incentive to clean up their supply chains in order to avoid bad publicity and to promote positive brand recognition.[181] Importing countries, such as the United States, should concentrate resources on facilitating this process for multinational companies because these firms are usually in the best position to promote change along their supply chains.[182]

A. Multinational Corporations Should Certify Their Products and Implement Sponsorship Programs in Order to Sustain an Ethical Company Image and Reform Supply Chains

It is often in multinational corporations' best interest to proactively combat child labor in order to prevent damaging publicity.[183] Media exposure of sweatshop conditions in New Delhi and Indonesia, for example, soiled The

---

[177] *Hershey: Raise the Bar on Chocolate!*, GLOBAL EXCHANGE, http://www.globalexchange.org/fairtrade/cocoa/raisethebar (last visited Mar. 14, 2014).

[178] Zarah Patriana, *Hershey's and Fair Trade: Is It a Victory?* GLOBAL EXCHANGE (May 7, 2013) http://www.globalexchange.org/blogs/fairtrade/2013/05/07/hersheys-and-fair-trade-is-it-a-victory/ (last visited Mar. 14, 2014).

[179] STILL TIME TO RAISE THE BAR, *supra* note 20, at 36. Rainforest Alliance (RA) is an American non-profit organization that certifies cocoa farms in Brazil, Colombia, Costa Rica, Cote d'Ivoire, the Dominican Republic, Ecuador, Ghana, and Peru. *Id.* RA standards prohibit the use of forced labor, child labor, and discrimination, but living wages are not a guaranteed part of certification and buyers do not have to pay a specific minimum floor price for RA-certified cocoa beans. *Id.* Furthermore, only 30 percent of the cocoa beans need to be certified in order to earn a RA label, which means that some products with the RA label could still be made by forced or child labor. *Id.*

[180] Carey Polis, *Hershey's Child Labor: Chocolate Company to Certify Independently Certified Cocoa by End of 2012*, HUFFINGTON POST (Jan. 1, 2012), http://www.huffingtonpost.com/2012/02/01/hersheys-child-labor_n_1247111.html (last visited Mar. 14, 2014).

[181] *See* Todres, *supra* note 82, at 96; HOXIE ET AL., *supra* note 106; Lehr, *supra* note 106; *see also* Dan McDougall, *Child Sweatshop Shame Threatens Gap's Ethical Image*, GUARDIAN (Oct. 27, 2007) http://www.guardian.co.uk/business/2007/oct/28/ethicalbusiness.india (last visited Mar. 14, 2014). In October 2007, the U.K. newspaper the Observer reported that the Gap Inc. received merchandise from a factory in India where children younger than ten worked sixteen hours a day without pay. *Id.* The title of the article demonstrates the damage these types of disclosures can have on companies' reputation: "Child Sweatshop Shame Threatens Gap's Ethical Image." *Id.*

[182] *See* Vanderbergh, *supra* note 163, at 917–18; *supra* text accompanying notes 163–174.

[183] Kornikova, *supra* note 35, at 208; Bellamy, *supra* note 104, at 71.

Gap, Inc. and Nike, Inc.'s socially responsible images.[184] It is also important, however, for corporations to avoid acting rashly and to keep the complex issues that induce child labor in mind when deciding how to solve problems along the supply chain.[185] Child labor stems from both workers' decisions, conditioned by poverty, and employers' hiring decisions, conditioned by the demands of a globalized economy.[186] To pull operations from a country or to immediately fire all underage employees could be devastating for children because they may need to resort to even more dangerous occupations.[187] As the UNCRC noted, those seeking to eliminate child labor must balance a child's right to be free from exploitation and his or her right to survival.[188]

Another issue facing Hershey and other chocolate manufacturers is the difficulty tracing the supply chain for chocolate products.[189] A large ensemble contributes to finalized chocolate bars, including farmers, manufacturers, exporters, and traders.[190] Furthermore, manufacturers combine cocoa beans from various parts of West Africa together before exporting them—further complicating companies' ability to distinguish cocoa beans harvested by children's hands from cocoa beans harvested by adults working in humane working conditions.[191] After the shareholders filed the complaint against Hershey, the company highlighted this problem, arguing that the "overwhelmingly vast majority of the cocoa materials purchased by Hershey . . . are processed cocoa products . . . purchased from large multi-national companies."[192] In order to guarantee that cocoa products are child labor free, chocolate manufacturers need a system that guarantees that no children were used in each intermediary step of the process.[193]

---

[184] *See* McDougall, *supra* note 181; Jim Keady, *When Will Nike "Just Do It" on the Sweatshop Issue?*, HUFFINGTON POST (Oct. 2, 2009), http://www.huffingtonpost.com/jim-keady/when-will-nike-just-do-it_b_308448.html (last visited Mar. 14, 2014).

[185] Baradaran & Barclay, *supra* note 50, at 32–33.

[186] *Id.*

[187] *See* Bellamy, *supra* note 104, at 60 (illustrating how children forced out of Bangladeshi factories resorted to stone-crushing, street hustling, and prostitution to make up for the lost income).

[188] *See* Kornikova, *supra* note 35, at 224.

[189] *See* Mustapha, *supra* note 82, at 1166.

[190] *See id.*

[191] *See id.*

[192] *Hershey Shareholders Allege Company Uses Cocoa Produced Through Unlawful Child Labor in Africa*, PR NEWSWIRE (Nov. 1, 2012), http://www.prnewswire.com/news-releases/hershey-shareholders-allege-company-uses-cocoa-produced-through-unlawful-child-labor-in-africa-176786601.html (last visited Mar. 14, 2014).

[193] *See* Mustapha, *supra* note 82, at 1166 (explaining the complexities inherent in cocoa production).

1. Fair Trade Certification

Fair trade certification addresses both the poverty that creates conditions for child labor and the complicated supply chain for chocolate products.[194] The Payson Center for International Development at Tulane University issued a report in 2011 suggesting that product certified cocoa would be one of the most effective ways to eliminate child labor in cocoa production.[195] Fair trade allows farmers in developing countries to "receive special trading conditions and increased profits in exchange for meeting various human rights and labor standards."[196] Fair trade organizations carry out random supply chain inspections and provide fair trade-certified labels, which assure consumers that the creation of the labeled product satisfied rigorous economic, social, and environmental standards.[197]

Fair trade certification addresses poverty, the root cause of child labor, by factoring the costs that accompany production into farmers' salaries, rather than just global market prices.[198] Cocoa farmers often "sell their harvests to middlemen who rig scales or misrepresent prices," a practice that drives down farmers' profits and increases the appeal of child labor.[199] Fair trade, on the other hand, provides stable payment terms that guarantee not only a living wage, but also the capital needed to fuel lasting economic development.[200] Fair trade certification thus alters the economic incentives for labor practices.[201] Rather than attempting to use children as a source of cheap labor, farmers have an incentive to provide work for adults because they are guaranteed a certain price and given access to previously out of reach markets for doing so.[202]

Fair trade can also be an effective way to reduce child labor because it involves a constant monitoring system to ensure compliance.[203] Currently, Hershey's supplier audits are scheduled beforehand, which increases the risk that any labor violations will be masked before the inspection.[204] With fair trade,

---

[194] *See* Baradaran & Barclay, *supra* note 50, at 5, 62–63; Mustapha, *supra* note 82, at 1166; STILL TIME TO RAISE THE BAR, *supra* note 20, at 38 (explaining how 100 percent of the produce must obtain certification in order to carry the fair trade label which ensures that all chocolate is child labor-free despite the complicated supply chain for cocoa).

[195] STILL TIME TO RAISE THE BAR, *supra* note 20, at 7.

[196] Baradaran & Barclay, *supra* note 50, at 5.

[197] *See id*. at 40, 42.

[198] *See id*. at 40, 62–63.

[199] *See id*. at 16; *Products: Cocoa*, FAIR TRADE USA, *available at* http://www.fairtradeusa.org/products-partners/cocoa.

[200] *See* Baradaran & Barclay, *supra* note 50, at 40.

[201] *See supra* text accompanying notes 200–202.

[202] Baradaran & Barclay, *supra* note 50, at 58.

[203] *See id.* at 42.

[204] *California Transparency in Supply Chains Act of 2010 Compliance*, HERSHEY CO., (Dec. 2011), http://www.thehersheycompany.com/assets/pdfs/hersheycompany/Hershey_CA-Disclosure.pdf; *see The*

producers self-assess their progress against fair trade standards, are evaluated by fellow free trade partners, and host random third party inspections to ensure that fair trade criteria are being followed.[205]

This monitoring is coupled with real sanctions for violating free trade standards, such as loss of access to fair trade markets and price premiums.[206] This regulatory system creates compelling profit-motivated incentives for producers to reduce, rather than increase, child labor.[207] Furthermore, constant monitoring and enforcement of labor standards could also reduce child labor because gender equality in employment can ensure that women receive the same wages as men, and thus reduce the need for children to work as well.[208]

Independent monitoring systems also ensure that the complex supply chain for chocolate products remains child labor free.[209] Careful auditing provides accountability along the cocoa supply chain despite the many intermediate buyers involved.[210] Unlike uncertified products, fair trade cocoa can always be charted back to the source, and labor violations are met with real repercussions.[211]

2. Sponsorship Programs

Converting to fair trade certification, however, does not solve the problem of children already working on farms that supply Hershey with cocoa beans.[212] Child labor violations are difficult to resolve because the alternative occupations for child workers could be even more dangerous.[213] "The more that corporations look at their supply chains the more likely it is that they'll find inappropriate practices that can't easily be resolved," wrote a CSR blogger for *Forbes* magazine.[214] "What would you do if you found 12-year-olds working in your factory and you also learned that their families depended on their children's wages to buy food?"[215]

Value of Third Party Audits, AIB INT'L, https://www.aibonline.org/press/ValueofThirdPartyAudits.html (last visited Mar. 14, 2014).

[205] Baradaran & Barclay, *supra* note 50, at 42.

[206] *Id.*

[207] *Id.*

[208] *See* Bellamy, *supra* note 104, at 62.

[209] *See* Baradaran & Barclay, *supra* note 50, at 57 (explaining how Kuapa Kokoo, a fair trade organization in Ghana, eliminated illicit child labor in their operations).

[210] *Id.* at 58.

[211] *Id.*

[212] *See* SCHOENBERGER, *supra* note 13, at 139–40 (detailing how Levi Strauss & Company dealt with children suppliers found working in their factories).

[213] *See* Kornikova, *supra* note 35, at 223–24.

[214] Klein, *supra* note 21.

[215] *Id.*

A multinational corporation could implement a sponsorship program for children already ingrained in a company's supply chain.[216] The Gap, Inc., for example, now provides children previously employed by The Gap, Inc.'s contractors, with access to education, a continued wage, and guaranteed employment back at the factory after becoming old enough to work legally.[217] Similarly, Levi Strauss & Company discovered that contractors used child labor in two Bangladeshi factories.[218] Levi decided not to terminate the contractual arrangement due to the detrimental effects on the children's families and the high possibility that the children would turn to begging and prostitution once they lost their jobs.[219] Levi managers and consultants met with the contractors to develop an innovative plan: the factories would continue to pay salary and benefits to already employed children while they attended school and then "offer them full-time jobs once they reached the legal working age."[220] Additionally, Levi agreed to pay for the students' tuition and books and would rent space and hire a teacher if nearby public schools did not have any room for new students.[221]

Sponsorship programs address the root cause of child labor—poverty—by holding financial safety nets in place for children and their families.[222] A sponsorship program allows families to continue receiving much-needed income while keeping children in school and away from harmful employment.[223] Children's education also increases their marketable skills, thus insulating themselves and their families from future economic vulnerabilities.[224] Firms are often reluctant to invest capital in markets without skilled labor, and parents are often hesitant to send their children to school if there are no opportunities

[216] *See* SCHOENBERGER, *supra* note 13, at 139; *Case Study: Child Labor in Bangladesh*, LEVI STRAUSS & CO. (2010), *available at* http://www.levistrauss.com/wp-content/uploads/2014/01/Case-Study_Child-Labor-in-Bangladesh.pdf

[217] McDougall, *supra* note 181.

[218] SCHOENBERGER, *supra* note 13, at 139.

[219] MICHAEL HOPKINS, THE PLANETARY BARGAIN: CORPORATE SOCIAL RESPONSIBILITY MATTERS 98 (2003).

[220] *Case Study: Child Labor in Bangladesh*, *supra* note 216.

[221] *Id.*

[222] *See* Baradaran & Barclay, *supra* note 50, at 62–63; LATIN AMERICA AND THE CARIBBEAN REG'L OFFICE OF THE WORLD BANK, REPORT NO. 20208-BR BRAZIL: AN ASSESSMENT OF THE BOLSA ESCOLA PROGRAMS iv (2001), *available at* https://openknowledge.worldbank.org/bitstream/handle/10986/15705/multi0page.pdf?sequence=1 [hereinafter REPORT NO. 20208-BR] (explaining how a federal sponsorship program in Brazil provides families with guaranteed income and protects families from future income loss through education).

[223] REPORT NO. 20208-BR, *supra* note 222, at i (explaining how Brazil's federal sponsorship program reduces poverty by providing families with a grant and reduces child labor by making the grant conditional on the child's school attendance).

[224] *Id.* at iv.

that stem from education.[225] Sponsorship programs can make these communities more lucrative by increasing school attendance, skilled labor, and incentives for other firms to invest more capital in the community.[226] Finally, charity initiatives, like a sponsorship program, generate positive publicity for a company, while also addressing the company's specific problems along its supply chain.[227]

B. U.S. Legislators Should Concentrate on Ways to Encourage Companies to Address Human Rights Violations Within Their Supply Chains

In 1992, Senator Harkin introduced the Child Labor Deterrence Act.[228] This legislation would have made it illegal to import products made by children.[229] Unlike the ILO Convention, this act would have imposed civil and criminal penalties on companies that violated it.[230] Congress followed a similar policy when it amended the Tariff Act to prohibit the import of goods produced by indentured child labor in 2000.[231] Policy makers justify these bans on imports by both the detrimental impact of child labor on children in exporting countries and the potential unfairness to adult workers in developed countries who are forced to compete with cheap imports created by children.[232] Regulators have rarely enforced this provision of the Tariff Act, however, as the current import of chocolate into the United States demonstrates.[233] Furthermore, these bans on imports fail to address the fundamental cause of child labor—poverty.[234]

Given the fragile circumstances surrounding child labor, Congress should not continue to pursue policies like the Child Labor Deterrence Act because it could potentially make conditions worse for children.[235] Prohibiting goods

---

[225] Brown, *supra* note 99, at 69.

[226] *Id.* (discussing how education, which is typically incorporated into sponsorship programs, makes communities a more desirable place for firms to invest capital).

[227] *See* SCHOENBERGER, *supra* note 13, at 140 (explaining how the publicity surrounding Levi Straus & Co.'s decision to sponsor child workers' education fueled the company's socially responsible image).

[228] Bellamy, *supra* note 104, at 60.

[229] Baradaran, *supra* note 50, at 33–34.

[230] *Id.*; Chilcoat, *supra* note 160, at 313 (discussing the lack of sanctions in the ILO Convention on the Worst Forms of Child Labor); Mustapha, *supra* note 82, at 1172.

[231] 19 U.S.C. § 1307 (2006); *see* Mustapha, *supra* note 82, at 1172–73.

[232] Brown, *supra* note 99, at 69.

[233] Mustapha, *supra* note 82, at 1173.

[234] *See* Brown, *supra* note 99, at 69.

[235] *See id.* (arguing how trade restrictions on goods artificially reduce demand on goods, leading to unemployment and declined wages); Bellamy, *supra* note 104, at 60 (illustrating how children in Bangladesh faced even more extreme poverty and hazardous occupations after the Deterrence Against Child Labor Act was introduced in Congress).

produced by children reduces the price by artificially decreasing the demand.[236] This in turn lowers wages for children who continue to work or forces children to find less suitable, and potentially more dangerous, employment.[237] For example, when Senator Harkin introduced the Child Labor Deterrence Act, Bangladeshi manufacturers fired 55,000 children in an effort to keep American business.[238] 40,000 of these children disappeared, while others were forced into brick carrying and prostitution.[239]

Therefore, when governments consider how to curb the use of child labor in imports, they also need to consider the child's right to survive.[240] Policies that reduce income for working children's families, by artificially decreasing demand in the market, will most likely increase the time children spend working to make up for the lost income.[241]

1. Due Diligence

Legislators should concentrate on increasing CSR due diligence and transparency.[242] The quick progression of the Dodd-Frank Act, the CTSCA, and H.R. 2759 Business Transparency on Trafficking and Slavery Act demonstrates that policymakers are becoming increasingly open to the idea of using disclosure for public policy objectives.[243] Public disclosure applies pressure to multinational firms to understand what occurs in their supply chains and to implement policies that remedy discovered abuses.[244] It also encourages more supply audits and training about labor issues at the "farm or factory level" of the supply chain.[245]

Although due diligence for a multinational firm's supply chain is a new concept, evidence already demonstrates that the policy can induce positive

236 Brown, *supra* note 99, at 69.

237 *Id.*; *see* Bellamy, *supra* note 104, at 60.

238 Bellamy, *supra* note 104, at 60.

239 Kornikova, *supra* note 35, at 224.

240 *See id.* at 223; *see also* Brown, *supra* note 99, at 69 (explaining how policies banning child labor imports has an adverse affect on child laborers' lives).

241 Brown, *supra* note 99, at 69.

242 *See* COMPLIANCE IS NOT ENOUGH: BEST PRACTICES IN RESPONDING TO THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT, VERITÉ 3 (2011), *available at* http://www.verite.org/sites/default/files/VTE_WhitePaper_California_Bill657FINAL5.pdf (illustrating recommendations for how companies should comply with due diligence legislation); *supra* text accompanying notes 234–240.

243 *See* Altschuller, *supra* note 105.

244 *See* Lynn, *supra* note 109, at 336; Todres, *supra* note 82, at 96; HOXIE ET AL., *supra* note 106, at 1; Lehr, *supra* note 106.

245 VERITÉ, *supra* note 242, at 3–4.

change.[246] On October 21, 2011, the U.N. Security Council Committee on the DRC sent a letter to Mary Schapiro, the SEC Chairman, on the effects of the Dodd-Frank Act in the DRC.[247] The letter stated that requiring companies to perform due diligence on their supply chain contacts in the DRC was effective.[248] Production of minerals shifted to largely non-conflict areas of the country in order to comply with the Dodd-Frank Act, reducing the overall profit armed groups could garner from penetrating mineral supply chains.[249] "[P]rivate sector purchasing power and due diligence implementation is reducing conflict financing," the letter read, "promoting good governance in the DRC mining sector, and preserving access to international markets for impoverished artisanal miners."[250]

Of course, conducting proper due diligence and subsequently implementing the necessary changes will require a large commitment of time, resources, and finances.[251] Firms will need to examine all steps of workers' employment across the whole supply chain and then both prevent human rights infractions and take corrective action when such infractions do occur.[252] Due to the expense of conducting due diligence and acting on its findings, policymakers should strive to make human rights due diligence obligations the same for all companies.[253] Companies such as Wal-Mart have expressed willingness to compete on a more socially conscious playing field once all firms can compete on the same basis.[254]

Therefore, policymakers should seriously consider passing the H.R. 2759 Business Transparency on Trafficking and Slavery Act.[255] Although some critics are reluctant to put constraints on U.S. companies while they compete on an international stage, passing H.R. 2759 could actually guarantee a more even playing field for U.S. companies.[256] If this bill became law, a uniform federal

---

[246] *See* Lynn, *supra* note 109, at 327; Letter from David Biggs, Secretary, United Nations Sec. Council Comm., to Mary Schapiro, Chairman, Sec. and Exch. Comm'n, at 1 (Oct. 21, 2011), *available at* http://www.sec.gov/comments/s7-40-10/s74010-346.pdf [hereinafter David Biggs Letter].

[247] *See* David Biggs Letter, *supra* note 246, at 1.

[248] *See id.*

[249] *Id.* at 2.

[250] *Id.* at 1.

[251] *See* VERITÉ, *supra* note 242, at 3–4 (detailing the steps corporations need to take in order to eradicate human trafficking and forced labor from supply chains, which lead to greater expenses).

[252] *Id.*

[253] *See* Todres, *supra* note 82, at 98 (arguing that adopting H.R. 2759 would prevent firms not operating in California from enjoying an economic advantage in the marketplace through use of cheap illicit labor abroad).

[254] Paul Klein, *Why Has Corporate Social Responsibility Stalled?*, FORBES (Oct. 22, 2012), http://www.forbes.com/sites/csr/2012/10/22/why-has-corporate-social-responsibility-stalled (last visited Mar. 14, 2014).

[255] *See* Todres, *supra* note 82, at 98.

[256] *Id.* at 90, 98.

requirement could ensure that companies not subject to the CTSCA do not enjoy a "competitive advantage" from using cheap, illicit labor sources.[257] Furthermore, a federal standard would also send a message to companies incorporated abroad that the United States, a market of 310 million consumers, takes human rights violations in the work force seriously.[258]

2. Provide Incentives for Multinational Firms to Become Fair Trade Certified

Due to the costs involved with supply chain reforms, the United States should also follow the European Union's example and provide financial incentives for multinational companies to become more socially responsible.[259] The European Union's investment in fair trade seems to have encouraged greater receptivity to fair trade activity in Europe than in the United States.[260] In 2007, Europe had "254 fair trade importing organizations . . . 3,191 specialty fair trade stores . . . and 67,619 supermarkets that carried fair trade products."[261] Alternatively, the United States had barely "200 fair trade importing organizations . . . 280 fair trade stores . . . and 40,000 supermarkets that carry fair trade products."[262] In 2011, the United States' per capita consumption of fair trade products was less than a fifth of per capita fair trade consumption in the United Kingdom.[263] When the Fair Labor Organization recorded fair trade consumption by country in the northern hemisphere, the United States only fared better in terms of per capita consumption than the Czech Republic, Estonia, Spain, and Italy.[264]

The European Union's policy on fair trade also seems to have made an impression on the chocolate industry.[265] Barry Callebaut, a Belgian chocolate company based in Switzerland, launched four fair trade certified cocoa recipes in January 2011.[266] Nestle UK, a British subsidiary of a Swiss company,

---

[257] *Id.* at 98.

[258] *Id.*; *Why Select USA?* SELECT USA, http://selectusa.commerce.gov/why-select-usa (last visited Mar. 14, 2014).

[259] *See* Baradaran & Barclay, *supra* note 50, at 6; Todres, *supra* note 82, at 86 (acknowledging that monitoring and reforming supply chains carries monetary consequences).

[260] *See* Baradaran & Barclay, *supra* note 50, at 58–60 (comparing fair trade activity in the European Union, where the government has educated consumers and provided governmental support to companies, to the United States, where the government has not).

[261] *Id.* at 60.

[262] *Id.*

[263] John Bowes, *The Toughest Fair Trade Nut to Crack*, ZESTER DAILY (May 16, 2011), http://zesterdaily.com/world/fair-trade-revolution-john-bowes/ (last visited Mar. 14, 2014).

[264] *Id.*

[265] *See infra* text accompanying notes 266–269.

[266] *Barry Callebaut Restates Prior Half-Year Results*, RTT NEWS (Mar. 19, 2013), http://www.rttnews.com/2079395/barry-callebaut-restates-prior-half-year-results.aspx (last visited

achieved Fairtrade certification for its four-finger Kit Kat bars in the United Kingdom and Ireland in January 2010, and committed to certifying its two-finger Kit Kat bars in these countries in January 2013.[267] Cadbury Company, a British company, certified Cadbury Dairy Milk Bar in the United Kingdom and Ireland in 2009 and certified Cadbury Dairy Milk Fairtrade in Canada, Australia and New Zealand a year later.[268] Although Cadbury currently sells certified chocolates in seven countries, Cadbury chocolate products in the United States are not certified because Hershey bought Cadbury's U.S. chocolate business in 1988.[269] So far, Hershey has refused to meet the social standards set by Cadbury's overseas operations.[270]

Of course, some U.S. companies have also taken the initiative to become fair trade certified without any incentives from the U.S. government.[271] Ben & Jerry's, an American ice cream company, announced a new flavor, "Late Night Snack," in 2011, which included fair trade-certified cocoa.[272] The company also transitioned all ingredients to fair trade in 2013.[273] Additionally, Mars, Inc.'s Dove Dark chocolates are Rainforest Alliance Certified in the United States.[274] Even so, the current climate in America's chocolate sector lags behind other countries in terms of fair trade certification and social awareness.[275]

In order to encourage American companies to use fair trade certification, and thus reduce child labor, the U.S. government should make fair trade more

---

Mar. 14, 2014); *Callebaut's Finest Belgian Chocolate—the Four Classic Recipes Now also Fairtrade Certified*, BARRY-CALLEBAUT (Nov. 9, 2010), http://www.barry-callebaut.com/news?release=6292 (last visited Mar. 14, 2014).

[267] STILL TIME TO RAISE THE BAR, *supra* note 20, at 44; *Nestle UK and Ireland Doubles Its Commitment to Fairtrade*, NESTLE (Oct. 25, 2012), http://www.nestle.co.uk/media/pressreleases/kitkat2fingergoesfairtrade#.USUkz82hrlc (last visited Mar. 14, 2014); *Nestle UK & Ireland Sister Companies,* NESTLE, http://www.nestle.co.uk/aboutus/nestléuksistercompanies (last visited Mar. 14, 2014).

[268] STILL TIME TO RAISE THE BAR, *supra* note 20, at 44; *The Story*, CADBURY, http://www.cadbury.co.uk/the-story (last visited Feb. 21, 2014).

[269] *Tell Cadbury and Hershey to Offer Free Trade Chocolates for Easter in the US,* GLOBAL EXCHANGE, http://org.salsalabs.com/o/703/p/dia/action/public/index.sjs?action_KEY=10039 (last visited Mar. 14, 2014).

[270] *Id.*

[271] *See* STILL TIME TO RAISE THE BAR, *supra* note 20, at 43; *Our Green Frog Seal on TV—Mars Galaxy Chocolate (UK)*, RAINFOREST ALLIANCE; http://www.rainforest-alliance.org/multimedia/mars-galaxy-chocolate (last visited Feb. 21, 2014) (mentioning that Dove chocolates are certified in the United States).

[272] *See* STILL TIME TO RAISE THE BAR, *supra* note 20, at 43; *Our History,* BEN & JERRY'S, http://www.benjerry.com/company/history (last visited Feb. 21, 2014).

[273] *Ben & Jerry's Commits to Fairtrade Program for 2013*, QSR (Jan. 17, 2013), http://www.qsrweb.com/article/206815/Ben-Jerry-s-commits-to-fairtrade-program-for-2013 (last visited Mar. 14, 2014).

[274] *Our Green Frog Seal on TV—Mars Galaxy Chocolate (UK)*, *supra* note 271.

[275] *See supra* text accompanying notes 265–274.

enticing through tax breaks, subsidies, and consumer education.[276] Fair trade chocolate is usually more expensive than non-certified chocolate.[277] Even so, Harvard College, the Massachusetts Institute of Technology, and the London School of Economics released a study in 2011 indicating that fair trade labels actually increase sales, suggesting that consumers are willing to pay more for products free from illicit labor practices.[278] After being educated on the products they commonly purchased, consumers in a Belgian study showed willingness to pay up to 10 percent, and sometimes as high as 27 percent, more than the normal price in order to support products made without child labor.[279] Therefore, governments can encourage companies to go fair trade by ensuring that consumers are aware of the benefits of certification through governmental promotions and education, which in turn can encourage higher sales.[280]

CONCLUSION

Child labor is a deep-seated and complicated issue. The efforts of multiple parties, including exporting and importing governments, multinational corporations, NGOs, and consumers, are needed to ensure that all children are free from debilitating labor and enjoy safe and stimulating childhoods. If companies like Hershey and legislators in the United States are serious about contributing to a solution, all parties need to recognize the forces that make child labor prevalent—especially poverty. Any new policies need to encourage investment in these exporting communities, rather than removing business or jobs, since this could be even more detrimental for children. Fair trade certification, sponsorship programs, mandatory due diligence, and public disclosure could begin to ensure that when American children receive Hershey kisses on Halloween, no children from Ghana or the Ivory Coast were exploited in its production.

---

[276] *See supra* text accompanying notes 265–274.

[277] Matt Sena, *Chocolate Industry Analysis 2013—Cost & Trends,* FRANCHISE HELP, www.franchisehelp.com/industry-reports/chocolate-industry-report (last visited Mar. 14, 2014).

[278] STILL TIME TO RAISE THE BAR, *supra* note 20, at 19.

[279] Baradaran & Barclay, *supra* note 50, at 46.

[280] *See id.* at 46, 58, 62.