

APPLYING THE LAW OF CHILD LABOR IN AGRICULTURAL SUPPLY CHAINS: A REALISTIC APPROACH

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I. INTRODUCTION

The King Canute legend tells the story of a king who placed his throne on the seashore and decreed that the tide shall not reach him. This arrogant

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act proved futile, as the waves still rose despite his command. Attempts at ending the use of child labor in agricultural supply chains can appear similarly futile.

A long list of federal and international laws have attempted to eliminate the use of child labor in global markets. The historical, cultural, and economic conditions that cause children to work in farming and other agricultural activities make it extraordinarily difficult to develop and enforce these laws. Eliminating the complex and pervasive problem of child labor requires a nuanced and practical approach.

This article summarizes some of the laws and regulations governing child labor in agricultural supply chains. The discussion focuses on the unique challenges within small-holder farm settings, contrasted with those in plantations or industrial workplaces. This article also discusses the difficulties of eliminating the worst forms of child labor (WFCL), when children are working on family farms. These family farms are often in areas that lack schools, basic infrastructure such as roads, and easy access to water and electricity. The need to work with sovereign governments, combined with these governments' limited resources to address their countries' child labor problems, is an important part of the complex mix; after all, these sovereign governments are the first responsible for applying the child labor laws.

The article will frequently refer to the efforts of the worldwide cocoa and chocolate industry, along with the efforts of governments and non-governmental organizations, to eliminate WFCL in picking cocoa beans in West Africa, an effort that started in 2001. The article will not chronicle all of the chapters of the ongoing cocoa industry efforts, but will highlight examples of the practical problems and creative solutions.

II. THE CHALLENGES OF REGULATING CHILD LABOR

A. The Root Problems of Child Labor

The participation of children in labor activities across the globe has a long history and complex causes.² Although some labor markets may have been influenced by the use of the worst forms of child labor, culturally-based household dynamics have had a greater influence in determining whether children work in revenue-generating activities. In many cases, this work has shaped industrial development. In all but one of the later-mentioned examples, the cocoa industry grew with extensive labor contributions from

² See, e.g., THE WORLD OF CHILD LABOR: AN HISTORICAL AND REGIONAL SURVEY (Hugh Hindman ed., 2009) (discussing the historical factors influencing the development of child labor across global regions).

spouses and children of farm owners.³

While some would prefer a simpler explanation such as exploitative corporations or corrupt bosses, the extent to which child labor or child work practices continue today depends on many other factors. These factors include the state of educational access,⁴ the wages earned by farmworkers and owners, the comparative cost and returns of investments between school and work, and food security.⁵ Poverty and market forces play an overwhelming role in determining the prevalence of child labor. Children are most likely to be engaged in labor in places with higher borrowing costs for loans, places located far from schools, and places where adults typically have negative returns on their education.⁶

Child labor exists all across the globe. The International Labour Organisation (ILO) estimated in 2012 that the Asia Pacific region has the highest number of children in employment (roughly 129 million), while sub-Saharan Africa has by far the greatest percentage of children that are engaged in work (30.3%). Between 2008 and 2012, the number of child laborers decreased from 215 to 168 million.⁷ The worldwide incidence of child labor is becoming more concentrated in the sub-Saharan Africa region, largely due to the relatively slower rate of development and slower rate of decline of child labor.⁸

The prevalence of child labor in sub-Saharan Africa cannot simply be attributed to lack of capital or foreign aid. In 2011, the Development Assistance Committee of the Organization for Economic Co-operation and Development (OECD) donated \$133.5 billion of net official development

³ Amanda Berlan, *Social Sustainability in Agriculture: An Anthropological Perspective on Child Labour in Cocoa Production in Ghana*, 49(8) J. DEV. STUDIES 1088, 1093 (2013).

⁴ Access to education is a complex issue. In many areas with a high prevalence of child labor, there are simply no schools for children to attend. Where schools do exist, poverty creates barriers to education; even if schooling is free, supplies, uniforms and school fees are unreachable for many families. Moreover, children may be needed at home to help with tasks that enable some family income and/or food. The quality of teaching and curricula, and the resulting potential for higher education or career growth, may also influence the perception of potential returns on investments in education. See, e.g., Faraaz Siddiqi and Harry Anthony Patrinos, *Child Labor: Issues, Causes, and Interventions* (Human Capital Dev. and Operations Policy, Working Paper No. 56, 1995), available at http://siteresources.worldbank.org/EDUCATION/Resources/278200-1099079877269/547664-1099079934475/547667-1135281552767/Child_Labor_issues.pdf.

⁵ Berlan, *supra* note 3, at 1095.

⁶ Kathleen Beegle et al., *Why Should We Care about Child Labor? The Education, Labor Market, and Health Consequences of Child Labor* (Nat'l Bureau of Econ. Research, Working Paper Series 10980, 2004).

⁷ INT'L LABOUR OFFICE, INT'L PROGRAMME ON THE ELIMINATION OF CHILD LABOUR (IPEC), MARKING PROGRESS AGAINST CHILD LABOUR - GLOBAL ESTIMATES AND TRENDS 2000-2012 4 (2013).

⁸ *Id.*

assistance, giving sub-Saharan Africa alone \$28 billion. 2011 also represented the first year that foreign aid declined slightly.⁹ Some sources estimate that sub-Saharan Africa has received nearly \$600 billion of aid since 1960.¹⁰

Yet, despite the large amount of foreign aid, many regions of the world lack basic infrastructure. In 2010, 61 million primary-aged children globally did not attend school, and that number has stagnated since 2008. In sub-Saharan Africa, 23 percent of children have either never attended school or dropped out before completing primary school.¹¹ Lack of access to education gives children no meaningful alternative to working. Additionally, this lack of access makes older generations less likely to value formal education for their children or to appreciate the risks associated with child labor. Furthermore, in 2010, 11 percent of the world's population lacked access to safe drinking water.¹² Many parts of Africa also lack access to adequate roads. Rural Africa's road coverage by land area is only roughly one quarter of the global average, with huge disparities in that coverage even within Africa.¹³ Other fundamental challenges that affect labor outcomes in the developing world include inability to access job sites, high prevalence of diseases, corruption, armed conflict, unstable political climates, lack of health care, gender inequities, and land tenure problems.¹⁴

The many challenges facing children in these regions and the complex root causes of child labor illustrate the difficulties involved with developing an appropriate regulatory strategy to end the practice and with determining the parties responsible for doing so.

⁹ *Development: Aid to Developing Countries Falls Because of Global Recession*, ORG. FOR ECON. CO-OPERATION AND DEV (OECD) (Apr. 4, 2012), available at <http://www.oecd.org/newsroom/developmentaidtodevelopingcountriesfallsbecauseofglobalrecession.htm>.

¹⁰ Kwame Akonor, *Foreign Aid to Africa: A Hollow Hope?*, 40 N.Y.U. J. INT'L L. & POL'Y 1071, 1074 (2008).

¹¹ UNESCO Institute for Statistics, *UNESCO Atlas of Out-of-School Children* (2014), available at <http://www.uis.unesco.org/data/atlas-out-of-school-children/en>.

¹² WHO/UNICEF JOINT MONITORING PROGRAMME FOR WATER SUPPLY AND SANITATION, *PROGRESS ON DRINKING WATER AND SANITATION* (2012).

¹³ AFRICAN DEVELOPMENT BANK, *AN INTEGRATED APPROACH TO INFRASTRUCTURE PROVISION IN AFRICA* 13 (2013).

¹⁴ See, e.g., Debra Satz, *Child Labor: A Normative Perspective*, 17:2 THE WORLD BANK ECON. REV. 297 (2003); Christiaan Grootaert and Ravi Kanbur, *Child Labor: A Review* (World Bank Policy Research, Working Paper No. 1454, 1995); Catherine Rodriguez and Fabio Sanchez, *Armed Conflict Exposure, Human Capital Investments and Child Labor: Evidence from Colombia*, Universidad de los Andes-CEDE, Documents Series ISSN 1657 (Feb. 2009), available at <http://core.ac.uk/download/pdf/6325276.pdf>; Erica Field, *Entitled to Work: Urban Property Rights and Labor Supply in Peru*, 122:4 QUARTERLY J. ECON. 1561(2007).

B. Categories of Child Labor

Establishing a universal definition of child labor is difficult because work has so many different aspects, ranging from work perceived as beneficial to a child's development (e.g., household chores) to indentured or bonded labor (e.g., slavery). The ILO recognizes this spectrum and distinguishes acceptable child "work" from unacceptable child "labor".¹⁵ As a result, child labor has many definitions in regulatory and academic contexts.¹⁶

Child labor targeted for elimination is defined by the ILO as one of the following:

- (1) [L]abor performed by a child under the minimum age specified for that type of work, as defined by national legislation;
- (2) hazardous labor that jeopardizes the physical, mental, or moral well-being of a child; or
- (3) the worst forms of child labor.¹⁷

The worst forms of child labor are defined by the ILO as:

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

¹⁵ "Not all work done by children should be classified as child labour that is to be targeted for elimination. Children's or adolescents' participation in work that does not affect their health and personal development or interfere with their schooling, is generally regarded as being something positive." *What Is Child Labor*, INT'L LABOUR ORG., (2014), <http://www.ilo.org/ipecc/facts/lang--en/index.htm>.

¹⁶ See Eric Edmonds, *Defining Child Labour: A Review of the Definitions of Child Labour in Policy Research*, (Statistical Info. and Monitoring Programme on Child Labour, Working Paper, 2008), available at http://ilo.org/ipecc/Informationresources/WCMS_IPEC_PUB_11247/lang--en/index.htm (discussing the full range of definitions of child labor).

¹⁷ *Child Labour Statistics*, INT'L LABOUR ORG. (2014), <http://www.ilo.org/dyn/clsurvey/lfsurvey.home>

children.”¹⁸

Each category of child labor requires unique approaches to its elimination.

C. *Child Labor in Agricultural Settings*

While regulating the use of child labor in supply chains can already be challenging, the uniqueness of the agricultural setting makes it even more difficult to regulate than the other modes of production. People think about exploitative labor practices in large-scale plantations, farms, or ranches, but actually, much of the world’s agricultural production occurs on small-scale farms or family plots that are not easily monitored. It has been pointed out that, “[c]ontrary to popular perception in high-income countries, most working children are employed by their parents rather than in manufacturing establishments or other forms of wage employment.”¹⁹ Family farms, however, often are of the more nuanced variety of work. So, painting with a broad brush in describing the problem of child labor obscures the complexity of the problem, particularly with respect to small, land-holder settings.

The United States provides a useful comparison for analyzing the status of children on farms in the developing world. In the United States, children’s contributions to farm work range from family members performing household chores on farms, to students working on farms owned by relatives or community members during school breaks, to migrant workers working with their children for pay. An estimated 1.03 million youth under 20 years of age resided on farms in 2009, with about 519,000 of those youths performing some type of farm work. An additional estimated 230,000 youth were hired to work on U.S. farms.²⁰ Opinions sharply differ on the extent to which children should be allowed to do this type of work, and the types of tasks that are reasonable at given ages.²¹ Much farm work abroad follows similar patterns in terms of child workers.²²

¹⁸ Int’l Labor Org., Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No. 182), art. 3, June 17, 1999.

¹⁹ See, e.g., Eric V. Edmonds & Nina Pavcnik, *Child Labor in the Global Economy*, 19 J. ECON. PERSPS. 199, 202 (2005).

²⁰ *Agricultural Safety*, CTR. FOR DISEASE CONTROL AND PREVENTION (Dec. 15, 2014), <http://www.cdc.gov/niosh/topics/aginjury/>.

²¹ See, e.g., Ana Campoy, *Farmers Contest Child-Labor Rules*, WALL ST. J., Dec. 5, 2011, <http://www.wsj.com/articles/SB10001424052970204083204577078491680523760>.

²² “Most children in commercial agriculture work on a seasonal basis, often full-time as part of a family unit during the harvest and seeding seasons, but irregularly or on a part-time basis during the remainder of the year. Many of these children attend school when they are not working.” U.S. DEPT. OF LABOR, *BY THE SWEAT AND TOIL OF CHILDREN*, VOLUME II 21-22 (1995).

The nature of agricultural work requires a different approach for regulation than from the factory or business setting. However, agricultural facilities also differ, as do their labor practices. For example, a plantation that hires contract workers and is run by a single corporation has more formalities and greater control in overseeing its employees. Plantations may also be more easily monitored than rural small-scale family or community-based farms. Because of this important distinction, the ILO's Minimum Age Convention only recommended a minimum age for employment on plantations and related facilities if it was not feasible to also do so for all agricultural work in rural areas.²³

III. LAWS THAT REGULATE CHILD LABOR

Child labor in agricultural supply chains is regulated through laws that impose varying levels of requirements on U.S. companies. These laws fall into two categories: those that address child labor generally and those that focus on preventing the worst forms of child labor. Several additional laws and regulations have been proposed but have not been enacted. In addition, many corporations that rely on agricultural supply chains have voluntarily adopted formal and informal efforts to combat child labor.

A. State, Federal, and International Laws Addressing Child Labor

1. Section 307 of the Tariff Act of 1930, As Amended

In the United States, the Tariff Act of 1930, also known as the Smoot-Hawley Tariff Act, is the earliest law applicable to the use of child labor.²⁴ The Act regulated the use of child labor in manufacturing goods. Section 307 of the Act prohibited the importation of goods produced, mined, or manufactured by convict and/or forced and/or indentured labor.²⁵ The legislation aimed to protect American jobs from the effects of the Great Depression. Preventing the import of goods made with indentured labor helped protect the American market from being flooded with goods from

²³ “Where it is not immediately feasible to fix a minimum age for all employment in agriculture and in related activities in rural areas, a minimum age should be fixed at least for employment on plantations and in the other agricultural undertakings [mainly producing for commercial purposes, but excluding family and small-scale holdings producing for local consumption and not regularly employing hired workers].” This convention was not ratified by the United States. Int’l Labor Org., Convention concerning Minimum Age for Admission to Employment (No. 138), June 19, 1976.

²⁴ Pub. L. No. 71-361, 46 Stat. 590 (1930).

²⁵ 19 U.S.C. § 1307 (2000).

more competitive markets.²⁶

In recent years, the focus has shifted from protecting companies to protecting workers, both adults and children. In 2000, an amendment by Senator Bernie Sanders (I-VT) specified that forced or indentured *child* labor is included in the definition of forced labor under Section 307.²⁷ This law is enforced by the Department of Homeland Security Immigration and Customs Enforcement (ICE). In practice, it has only been applied infrequently to child labor cases, presumably because it is difficult for ICE to prove that the goods were in fact made with indentured labor. Under Section 307, generalized knowledge that products of a particular kind from a country may have been produced using forced child labor is not enough; to stop shipments at the U.S. border, there must be evidence implicating that specific shipment, exporter, or foreign producer.²⁸

Section 307 of the Tariff Act also includes a “consumptive demand” exception, which stipulates that these restrictions do not apply to goods where domestic production cannot satisfy U.S. demand.²⁹ Congress has introduced legislation to repeal this provision, but those attempts to date have been unsuccessful.³⁰

2. ILO Convention 182

The U.S. Senate adopted the ILO’s Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor in 1999,³¹ of which article 3 defines practices that constitute WFCL. No substantive legal action was taken at the time of ratification because U.S. law was already compliant with the Convention. Instead, the Senate adopted an understanding of article 3(d) of the Convention³² that does not encompass situations in which children are

²⁶ McKinney v. U.S. Dept. of the Treasury, 799 F.2d 1544 (1986).

²⁷ Trade and Development Act of 2000, Pub. L. No. 106-200, 14 Stat. 251 (2000).

²⁸ 19 C.F.R. § 12.42(e) (2000).

²⁹ 19 U.S.C. § 1307 (“In no case shall such provisions be applicable to goods, wares, articles, or merchandise so mined, produced, or manufactured which are not mined, produced, or manufactured in such quantities in the United States as to meet the consumptive demands of the United States.”); *Cf.* Int’l Labor Rights Fund v. United States, 29 Ct. Int’l Trade 1050, 1055 (Ct. Int’l Trade 2005).

³⁰ *See, e.g.*, A bill to amend the Tariff Act of 1930 to eliminate the consumptive demand exception relating to the importation of goods made with forced labor, S. 1157, 110th Cong. (2007) (not enacted); The Customs Facilitation and Trade Enforcement Reauthorization Act of 2009, S. 1631, 111th Cong. (2009) (not enacted).

³¹ 145 Cong. Rec. S28, 858 (Nov. 5, 1999).

³² “For the purposes of this Convention, the term the worst forms of child labour comprises... 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.”

employed by a parent or guardian on a farm owned or operated by such a parent or guardian, and which did not conflict with the terms of the Fair Labor Standards Act³³ related to agricultural employment.³⁴ As discussed below, Congress has been reluctant to regulate child work or labor on family owned farms in the United States.

3. Executive Order 13126

In 1999, President Clinton issued Executive Order 13126 (EO 13126) preventing federal agencies from procuring goods made with forced or indentured child labor.³⁵ This Order implemented procurement regulations by the U.S. Department of Labor (DOL) under the Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor.³⁶ Under this law, the DOL, along with the Department of Homeland Security and the Department of State, maintains a list of goods identified by country of origin that the agency believes may be produced using forced or indentured child labor.³⁷ Federal contractors who supply the government with any of the listed goods must make a good faith effort at determining whether the items were produced with such labor. EO 13126 defines child labor as labor that is: “(1) exacted from any person under the age of 18 under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily; or (2) performed by any person under the age of 18 pursuant to a contract the enforcement of which can be accomplished by process or penalties.”³⁸ Notably, EO 13126 applies to forced or indentured child labor; however, it does not apply to WFCL or child work.³⁹

EO 13126 has been applied intermittently. George W. Bush’s administration took no action under EO 13126, while the Obama administration has issued Federal Register notices revising the products list four times.⁴⁰ Moreover, the standards used by the DOL and the other agencies, published in guidelines issued concurrently with the original EO 13126 list,⁴¹ are vague and discretionary. The agencies’ decision to list a given product rests on several factors, including: (1) the nature, source, and

³³ 29 U.S.C. § 201 et seq. (1994).

³⁴ S. Rep. No. 106-12, at 5 (1999).

³⁵ Exec. Order No. 13126, 64 Fed. Reg. 32383 (June 12, 1999).

³⁶ 48 C.F.R. § 22.15 (2001).

³⁷ The list was first published at 66 Fed. Reg. 5353 (Jan. 18, 2001).

³⁸ *Supra* note 35, at 6(c).

³⁹ *Id.*

⁴⁰ 75 Fed. Reg. 42164 (Jul. 20, 2010); 76 Fed. Reg. 31365 (May 31, 2011); 77 Fed. Reg. 20051 (April 3, 2012); 78 Fed. Reg. 44158 (Jul. 23, 2013).

⁴¹ 66 Fed. Reg. 5351 (Jan. 18, 2001).

extent of corroboration of information that the good is produced using forced child labor, (2) whether such information involved an isolated incident, and (3) whether recent and credible efforts are being made to address forced or indentured child labor in the relevant country or industry.⁴² Unfortunately, the agencies do not articulate how those factors are balanced.

There are no transparent standards for removing a listed good, avoiding the list altogether, or challenging a listing. Information used to determine whether to list a good is highly individualized, including the age of evidentiary support, the severity of the forced labor concerns in relation to the size of the industry, and differences in production environments.⁴³ The guidelines explicitly require weighing various factors in reaching a listing decision,⁴⁴ but do not provide additional information on what factors are assigned greatest importance. This opacity creates few incentives for countries and industries to improve conditions.

These agencies may view the opacity as unavoidable and not particularly troublesome. After all, it can be argued, listing a product “only” triggers federal contractors’ obligation to make a good faith effort to determine whether the product was produced using inappropriate child labor. This may arguably only place a small burden on the contractor. On the other hand, appearing on the EO 13126 list does stigmatize a product. If the evidentiary basis for a listing is faulty, or the efforts to address the identified problems are not recognized, the process could be unfair to both the foreign exporter and the contractor purchasing the product.⁴⁵

4. Trafficking Victims Protection Act

Shortly after EO 13126 was issued, Congress passed the Trafficking Victims Protection Act (TVPA), which helped broaden the understanding of child labor.⁴⁶ This legislation was initially primarily focused on combating sex trafficking of women and children,⁴⁷ but later reauthorizations also included revisions to the definition of child labor. The definition now encompasses all labor done by children under the age of fifteen and WFCL for children under the age of eighteen.⁴⁸ The TVPA aims to protect victims

⁴² *Id.* at 5352.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *See, e.g.*, Letter from Global Issues Group to U.S. Department of Labor (Apr. 9, 2010) (on file with DOL).

⁴⁶ Pub. L. No. 106-386, 114 Stat. 1464 (2000).

⁴⁷ *See* TVPA § 102(b), 22 U.S.C. § 7101(b) (2000).

⁴⁸ *See* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2005); William Wilberforce Trafficking Victims Protection

and to prosecute and prevent human trafficking. Like EO 13126, the reauthorizations of the law since 2005 (TVPA) require the DOL to maintain a list of goods produced with child labor that violate international standards.⁴⁹ This list is broader than the EO 13126 list since it contains any goods believed to be produced with child labor – not just forced child labor.⁵⁰ However, inclusion on the TVPA list does not preclude a good from being sold to the federal government or trigger any obligations for federal contractors. The primary purpose of the list is to raise public awareness and to encourage the producers and consumers of the listed product to change the producing industry practices.⁵¹ This “name and shame” approach creates public pressure for the relevant stakeholders to develop programs to address these labor practices. A product’s listing has no direct legal consequences and does not affect the product’s import or sales rights.⁵²

Like EO 13126, the criteria for listing a product are loose and subjective. The main considerations include the nature, date, and source of information, the extent of corroboration of such information, and the significant incidence of child labor or forced labor.⁵³ Additionally, the TVPA hopes “to promote collaboration and cooperation (1) between the United States Government and governments listed on the annual Trafficking in Persons Report; (2) between foreign governments and civil society actors; and (3) between the United States Government and private sector entities.”⁵⁴ While the Act’s goals and encouragement of public-private partnerships to address child labor problems are laudable, the process for compiling evidence supporting a listing and the standards for listing the product remain vague and unrigorous. In fact, the TVPA listing process appears even more informal and subjective than the EO 13126 process. The DOL appears to

Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008).

⁴⁹ 22 U.S.C. § 7107(b) (2013).

⁵⁰ 22 U.S.C. § 7106(b)(3) (2013).

⁵¹ U.S. DEPT. OF LABOR, FACT SHEET: REPORTS ON INTERNATIONAL CHILD LABOR AND FORCED LABOR (2013), available at <http://www.dol.gov/ilab/reports/child-labor/findings/2013TDA/ReportsFactSheet2013.pdf>.

⁵² Another “name and shame” practice that arose from the TVPA is the U.S. Department of State’s annual Trafficking in Persons (TIP) report. In that report, the State Department assigns each country to one of three tiers based on the extent of its government’s efforts to comply with the “minimum standards for the elimination of trafficking” found in Section 108 of the TVPA. As with the TVPA list, there are no direct legal consequences of a country’s ranking on the TIP report; rather, the purpose of the list is to encourage dialogue between states and assist with resource allocation. TIP reports include all forms of human trafficking, and are not exclusive to child labor or agriculture. See *Trafficking in Persons Report*, U.S. DEPT. OF STATE, <http://www.state.gov/j/tip/rls/tiprpt/>.

⁵³ 72 Fed. Reg. 73374, 73377 (Sec. and Exch. Comm’n Dec. 27, 2007).

⁵⁴ 22 U.S.C. § 7103a(a) (2000).

take a “zero tolerance” approach in compiling the list. If there is any credible evidence of WFCL, both the product and country responsible for the product will be put on the list. Issues such as what evidence is regarded as credible, how timely is the information, and how much evidence is required have not been publicly addressed by the DOL.⁵⁵ Agency decision makers may think that the listing causes no harm since there are no legal consequences. However, this rationale ignores the adverse effects of the “shaming” on origin governments. A foreign government who perceives it as being treated unfairly by the process may be less cooperative and have less incentive to partner with the U.S. government and others to address the alleged problem. Indeed, child labor is a fact of life for many undeveloped countries, yet if the standard for listing is “zero tolerance,” as it appears to be, these countries have little hope of ever getting off the list.

From a diplomatic or practical perspective, a zero tolerance approach makes little sense. In both urban and agricultural settings, the United States is also not free from trafficked children or children working in hazardous conditions. The U.S. press often reports stories about children working in hazardous conditions domestically.⁵⁶ For example, just recently the *New York Times* published a front-page report about children laboring in hazardous conditions in North Carolina tobacco farms.⁵⁷ Undoubtedly, neither the U.S. government nor U.S. companies would welcome other countries listing U.S. products as failing to comply with child labor laws.

One example that illustrates the questionable nature of the approach is the cocoa from the Cote d'Ivoire listing in 2009. When the cocoa was listed under the TVPRA in 2009,⁵⁸ the Harkin-Engel Protocol—the public-private partnership described below—had been in place for several years. If the purpose of listing a product/country is to encourage public-private partnerships, then that goal had already been achieved prior to the listing. Thus, it was unclear what purpose was served by that particular listing.

Perhaps the DOL believes it has no discretion in deciding to list a product based on the language of the law. If so, it should seek clarification from Congress. At the very least, the DOL should be more explicit, through regulation or through other written guidance, on both the criteria for adding

⁵⁵ See, e.g., U.S. Government Accountability Office, *Human Trafficking: Better Data, Strategy, and Reporting Needed to Enhance U.S. Antitrafficking Efforts Abroad* GAO-06-825 (July 2006).

⁵⁶ See, e.g., HUMAN RIGHTS WATCH, *FIELDS OF PERIL: CHILD LABOR IN U.S. AGRICULTURE* (May 2010); NATIONAL CONSUMERS LEAGUE, *5 MOST DANGEROUS JOBS FOR TEENS* (June 2012).

⁵⁷ Steven Greenhouse, *Just 13, and Working Risky 12-Hour Shifts in the Tobacco Fields*, N.Y. TIMES, Sept. 6, 2014, <http://www.nytimes.com/2014/09/07/business/just-13-and-working-risky-12-hour-shifts-in-the-tobacco-fields.html>.

⁵⁸ 74 Fed. Reg. 46620 (Sept. 10, 2009).

and for removing a product from the TVPRA list.

5. Dodd-Frank “Conflict Minerals” Provision

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) also imposes disclosure requirements on corporate supply chains.⁵⁹ The act requires U.S. companies that use “conflict minerals”, such as tin, tantalum, tungsten and gold, to publicly disclose their use and to register with the U.S. Securities and Exchange Commission (SEC).⁶⁰ Any company covered by the law must conduct a reasonable inquiry as to the country of origin of any minerals that the company uses in manufacturing its products.⁶¹ The law is intended to reduce violence in the Democratic Republic of Congo and surrounding countries by shrinking the market for minerals that originate from mines controlled by armed groups participating in the region’s internal conflicts.⁶²

Forced and/or child labor are considered to be inherent to these conflicts. The terms of the conflict minerals provision do not apply to agricultural products. Nonetheless, this legislative approach— requiring companies to inquire about the origin of articles in their supply chains and to report publicly on those inquiries – has been used as a model in state laws, as discussed below. In addition, other federal proposals have emulated the Dodd-Frank approach. One such example was a bill introduced by Rep. Maloney requiring companies with over \$100 million in gross revenues to publicly disclose in their annual reports the measures they take to identify and address forced labor, slavery, human trafficking, and WFCL in their supply chains.⁶³ The legislation would have also applied to agricultural supply chains, but it failed to be enacted by Congress.

Because the Dodd-Frank approach is closely tied to legislation related to child labor, the brief history of interpretation of the conflict minerals provision is worth mentioning here. The SEC promulgated complex regulations for the Act that imposed certain obligations on issuers who manufacture products for which conflict minerals are necessary to the

⁵⁹ Pub. L. No. 111–203, 124 Stat. 1376 (2010).

⁶⁰ 15 U.S.C. § 78m(p) (2012).

⁶¹ *Id.* at (p)(1)(A)(i).

⁶² *Supra* note 59, at § 1502(a) (“It is the sense of Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein, warranting the provisions of section 13(p) of the Securities Exchange Act of 1934, as added by subsection (b).”).

⁶³ Business Supply Chain Transparency on Trafficking and Slavery Act of 2014, H.R. 4842, 113th Cong. (2014) (not enacted).

functionality or production. The regulations impose the following obligations on the issuers: 1) filing a conflict minerals report that includes a description of the measures the issuer has taken to exercise due diligence; 2) including an independent private sector audit report; and 3) providing a description of the products that have not been found to be “DRC Conflict Free.”⁶⁴ In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the D.C. Circuit Court examined these regulations using a free speech test.⁶⁵ Under the *Central Hudson* test, a regulation violates the First Amendment unless it serves a substantial government interest, directly advances that interest, and is narrowly tailored. The Court struck down the disclosure requirement of products not found to be “DRC Conflict Free” because it was not narrowly tailored. The other regulations were upheld.⁶⁶ The SEC, along with Amnesty International as an intervenor, has petitioned for a rehearing,⁶⁷ arguing that the Court has recently reinterpreted the narrow tailoring prong⁶⁸ based on a different Supreme Court case.⁶⁹ Following the Court’s decision, the SEC issued a statement reaffirming that companies must comply with all provisions of Dodd-Frank. The statement also clarified that companies are not required to describe their products as “DRC Conflict Free,” having “not been found to be ‘DRC Conflict Free,’” or “DRC Conflict Undeterminable.” Companies may elect to do so if they have obtained an independent private sector audit; otherwise, no such audit is required.⁷⁰

6. California Transparency in Supply Chains Act

The California Transparency in Supply Chains Act (TSCA)⁷¹ is the most comprehensive law in the U.S. regulating child labor that is not limited in scope to WFCL. It requires California manufacturers and retailers with over \$100 million in gross receipts to post statements on their websites identifying efforts to eradicate slavery and human trafficking from their supply chains. Once again, the TSCA focuses on increasing the availability

⁶⁴ 77 Fed. Reg. 56274, 56283 (Sept. 12, 2012).

⁶⁵ 447 U.S. 557 (1980).

⁶⁶ Nat’l Ass’n of Mfrs. v. Sec. and Exch. Comm’n, No. 13-5252 (D.C. Cir. Apr. 14, 2014).

⁶⁷ Petition for Panel Rehearing and Rehearing En Banc, Nat’l Ass’n of Mfrs. v. Sec. and Exch. Comm’n, No. 13-5252 (D.C. Cir. Apr. 14, 2014).

⁶⁸ American Meat Inst. v. USDA, No. 13-5281, (D.C. Cir. July 29, 2014).

⁶⁹ *Zauderer v. Office of Disciplinary Co.*, 471 U.S. 626 (1985).

⁷⁰ Statement from Keith Higgins, Director, SEC Division of Corporation Finance, on the Effect of the Recent Court of Appeals Decision on the Conflict Minerals Rule (April 29, 2014), available at <http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/137054168199>.

⁷¹ Cal. Civ. Code § 1714.43 (2012).

of public information related to child labor in supply chains, and does not outright prohibit any activity. The TSCA does not require a reporting company to take any action if trafficking occurs in its supply chain; the company need only report on its ongoing activities. If the company takes no action and publicly reports no action, it complies with the law.

Despite not having a direct action requirement, the TSCA can still have meaningful effects on a company's reputation. The company is required to disclose the extent to which it verifies, audits, and certifies product supply chains for trafficking risks. It also must disclose its internal accountability standards, procedures, and employee training for reducing those risks.⁷² A company that discloses that it does not engage in any of these activities or that fails to take mitigating actions despite evidence of slavery or trafficking likely will receive pressure from consumers. On the other hand, if a company fails to post a TSCA report on its website, the Attorney General can bring an action for injunctive relief.⁷³

As previously noted, the TSCA shares similarities to the Dodd-Frank conflict mineral provisions, in that both laws require companies to publicly report on inquiries into their supply chains. While Dodd-Frank mandates a private sector audit and a reasonable inquiry into the country of origin of minerals used in its products, however, the TSCA only requires a company to report on whether or not it is engaging in that type of action. Dodd-Frank also provides extensive guidelines for auditing and SEC-regulated certification, while TSCA has no such provisions.

B. Failed Attempts at Legislation/Regulation

The United States has been a leading proponent of child and adult worker rights, as reflected by the legislation mentioned above and by the government's advocacy in institutions such as the ILO. However, the U.S. has not always adopted for itself mandates that it has urged upon other countries. The U.S. has not ratified two important ILO conventions related to child labor. First, the U.S. failed to ratify the Minimum Age Convention (No. 138). That Convention would have allowed signatories to set a minimum age for labor of at least fifteen, with exceptions for light work for children age 13-15 and a prohibition on hazardous labor before the age of eighteen.⁷⁴ Additionally, the United States failed to ratify the Convention on the Rights of the Child, which would require signatories to protect children "from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to

⁷² *Id.* § 1714.43(c).

⁷³ *Id.* § 1714.43(d).

⁷⁴ *Supra* note 23.

the child's health or physical, mental, spiritual, moral or social development."⁷⁵ This includes requiring measures to provide for a minimum age of employment, regulating appropriate hours and conditions of employment, and providing for penalties and sanctions to enforce the measures.⁷⁶ The conventions have not been enacted due to sovereignty concerns held by some U.S. senators.⁷⁷

Multiple bills were introduced in Congress in the 1990's and 2000's aimed at prohibiting or curtailing the use of child labor in products that entered the U.S. market. A series of acts entitled the Child Labor Deterrence Acts aimed to prohibit the importation of goods produced abroad with child labor.⁷⁸ The first of these bills was introduced by Senator Harkin of Iowa in 1992,⁷⁹ with four subsequent versions introduced through 1999.⁸⁰ Each of the bills failed to report out of committee. The Child Labor Free Consumer Information Act, a more narrowly tailored initiative, would have created a certification program for child labor free labels for sporting apparel.⁸¹ This bill did not survive committee, but can be seen as a sort of pre-cursor to the certification requirement later proposed for the chocolate industry, discussed below.

Another series of bills that Congress did not pass proposed to enact a Corporate Code of Conduct Act.⁸² This legislation would have required corporations with more than twenty employees abroad to implement codes of conduct, with strict labor mandates including the provision of a living wage, freedom of association, and enforcement requirements. Corporations in violation of the act would have incurred a loss of preferences for government contracts and civil liability to any aggrieved party. The law also would have covered partners, suppliers, and subcontractors of eligible corporations. It notably failed to provide an explicit definition of the prohibited child labor.

Other efforts to regulate working children in the U.S. have been extremely contentious, but persistent. One such example has been the

⁷⁵ Convention on the Rights of the Child, art. 32, Nov. 20, 1989, 1577 U.N.T.S. 3.

⁷⁶ *Id.*

⁷⁷ See, e.g., Karen Attiah, *Why won't the U.S. ratify the U.N.'s child rights treaty?*, THE WASHINGTON POST, Nov. 21, 2014, <http://www.washingtonpost.com/blogs/post-partisan/wp/2014/11/21/why-wont-the-u-s-ratify-the-u-n-s-child-rights-treaty/>.

⁷⁸ See, e.g., Child Labor Deterrence Act of 1992, S. 3133, 102nd Cong. (1992) (not enacted) at § 2(b).

⁷⁹ *Id.*

⁸⁰ Child Labor Deterrence Act of 1999, S. 1551, 106th Cong. (1999) (not enacted).

⁸¹ Child Labor Free Consumer Information Act, H.R. 1301, 105th Cong. (1997) (not enacted).

⁸² See, e.g., Corporate Code of Conduct Act, H.R. 2782, 107th Cong. (2001) (not enacted).

repeated attempts to remove agricultural exceptions to labor requirements. The Fair Labor Standards Act (FLSA) is the primary law regulating child labor and child work in the United States.⁸³ It generally restricts the hours that children under sixteen years of age may work and specifies certain hazardous occupations in which children may not engage. The FLSA includes broad exemptions for workers in agricultural professions, including child workers.⁸⁴ A series of failed bills, entitled the Children's Act for Responsible Employment,⁸⁵ would have brought agricultural laws to the same standard as other laws affecting working children in the United States. Opposition by farm/agriculture interests has prevented passage of these proposals.⁸⁶

In September 2011, the Obama administration proposed revisions to DOL regulations implementing the FLSA that set forth new criteria for the employment of minors in agriculture.⁸⁷ The proposed revisions related only to hired farm workers and did not modify rules for children working on farms owned by their parents. The DOL stated that its intent was for the regulations to provide greater parity between the agricultural and nonagricultural child labor provisions.⁸⁸ The proposed regulations would have almost entirely prohibited minors younger than 16 or 18 from: performing agricultural work involving animals, pesticide handling, timber operations, manure pits and storage bins; participating in the cultivation, harvesting and curing of tobacco; using electronics, including communication devices while operating power-driven equipment; being employed in the storing, marketing and transporting of farm product raw materials; and operating almost all power-driven equipment.

The DOL's proposed regulations prompted a fierce and immediate backlash. The agency received over 10,000 comments, of which the majority were negative, during the public comment period. Many respondents expressed particular concern over the potential effects of the rules on small family-owned farms.⁸⁹ Additionally, thirty senators submitted a letter to

⁸³ 29 U.S.C. § 201, et seq. (1938).

⁸⁴ 29 U.S.C. § 213(a)(6) (2014).

⁸⁵ Children's Act for Responsible Employment of 2009, H.R. 3564, 111th Cong. (2009) (not enacted); CARE Act of 2011, H.R. 2234, 112th Cong. (2011) (not enacted); CARE Act of 2013, H.R. 2342, 113th Cong. (2013) (not enacted).

⁸⁶ See, e.g., Michelle Chen, *States Attempt to Instill 'Work Ethic' by Rolling Back Child Labor Protections*, THE NATION, Jan. 10, 2012, <http://www.thenation.com/article/165561/states-attempt-instill-work-ethic-rolling-back-child-labor-protections>.

⁸⁷ 76 Fed. Reg. 54836 (Sept. 2, 2011).

⁸⁸ *Id.*

⁸⁹ See, e.g., Larry Dreiling, *DOL Nixes Proposed Child Farm Labor Rule*, HIGH PLAINS MIDWEST AG. J. (Apr. 30, 2012), <http://www.hpj.com/archives/dol-nixes-proposed-child->

Secretary of Labor Hilda Solis requesting that the DOL withdraw the proposed rule in its entirety.⁹⁰ Under the heavy criticism from Congress, the national media, and farm interests, the DOL withdrew the proposed regulations several months after their publication.⁹¹

C. Voluntary Efforts for Regulation

1. The Consultative Group to Eliminate the Use of Child Labor and Forced Labor in Imported Agricultural Products

While Congress and regulators have struggled with mandatory rules that would impose restrictions on young agricultural workers domestically, Congress enacted a provision in law that required the USDA to chair a working group of federal agencies to develop voluntary guidelines on child labor in foreign agriculture. This legislative provision was added to the 2008 farm bill (the Food, Conservation, and Energy Act of 2008) and created the Consultative Group to Eliminate the Use of Child Labor and Forced Labor in Imported Agricultural Products. In addition to participation by federal agencies, the consultative group included participants from non-governmental agencies, private companies and trade associations. The consultative group was tasked with strengthening the TVPRA mandate against importation of goods produced with child labor.⁹²

The group drafted guidelines with the stated purpose of reducing the likelihood that agricultural products imported into the United States are produced with child or forced labor. Its recommendations included setting stringent standards on child labor and forced labor, mapping supply chains to identify areas of child labor/forced labor risk, ensuring the availability of accessible complaint channels, and engaging in periodic auditing and internal reviews, public performance disclosures, and independent third-party implementation reviews.⁹³

The guidelines were both comprehensive and controversial.⁹⁴

farm-labor-rule/article_af4c1164-4a4d-5294-9a8f-ed0ef968748d.html.

⁹⁰ Letter from Senators Jerry Moran, et al. to Hilda Solis, Secretary, U.S. Department of Labor (Dec. 19, 2011), *available at* <http://www.moran.senate.gov/mwg-internal/de5fs23hu73ds/progress?id=T7ogQohaNI&dl>.

⁹¹ Press Release, U.S. Dept. of Labor, Labor Department Statement on Withdrawal of Proposed Rule Dealing with Children Who Work in Agricultural Vocations (Apr. 26, 2012) *available at* <http://www.dol.gov/whd/media/press/whdpressvB3.asp?Pressdoc=national/20120426.xml>.

⁹² Pub. L. No. 110-234, 122 Stat. 923 (2008).

⁹³ REPORT FROM CONSULTATIVE GROUP TO ELIMINATE THE USE OF CHILD LABOR AND FORCED LABOR IN IMPORTED AGRICULTURAL PRODUCTS, (December 15, 2010) *available at* <http://www.dol.gov/ilab/reports/pdf/20120314CGDraftRPTRECS.pdf>.

⁹⁴ *Consultative Group to Eliminate the Use of Child Labor and Forced Labor in*

Interestingly, although the USDA solicited public comments,⁹⁵ it did not revise the proposed guidelines in response to the comments actually received. On the one hand, the guidelines were a useful compilation of recommendations that had been made by the consultative group participants and other interested stakeholders, and as such, were a helpful summary of what might be considered best practices. On the other hand, some of the guidelines were viewed as unrealistic, and unlikely to be applied in real-world settings.⁹⁶ As has been pointed out, the guidelines were not meant to be adopted *in toto* by particular companies or industries, but could be viewed as a checklist or menu of options to be selected.⁹⁷

The results of the Consultative Group were not published in a vacuum; the voluntary guidelines were developed during a period when several companies and industries were attempting to address the problems of abusive child labor in supply chains. In fact, some of the guidelines were modeled after certain company activities described below.

2. Company-Specific Efforts

While many companies have attempted to address the child labor problem, many obstacles stand in their paths. Because of the widespread attention on child labor, individual companies and industry-wide coalitions have developed programs to try to eradicate child labor problems in their supply chains. Some of the challenges have arisen in the factory context. The electronics industry, for one, has faced widespread negative publicity concerning labor abuses in factories from which the companies source components. After a New York-based labor watchdog reported “severe labor abuses” at six factories in China, Samsung committed to site inspections and volunteered to allow oversight by the industry group Electronic Industry

Imported Agricultural Products: Public Comments, U.S. Dep’t of Labor (2011), available at <http://www.dol.gov/ilab/issues/child-labor/fcea.htm>.

⁹⁵ 76 Fed. Reg. 20305 (April 12, 2011).

⁹⁶ See, e.g., Global Issues Group, *Comments on USDA’s Proposed Guidelines on Child Labor for Imported Agricultural Commodities* (2011), available at <http://www.dol.gov/ilab/issues/child-labor/consultativegroup/comment4.pdf>. (“It is unclear how a company would arrange for farm level monitoring and auditing including the announced and unannounced site visits which the guidelines suggest in a market where the government prohibits direct contact with the farmers. Even absent such a provision, it is unclear how origin governments would respond to the small army of independent third party monitors necessary to accurately and realistically audit even a portion of the millions of small holder family farms that make up a national cocoa sector.”)

⁹⁷ See, *supra* note 93, at 2-3 (“[T]he Group recommends a set of *program elements* for inclusion in the voluntary company guidelines to be issued by the Secretary of Agriculture.”) (emphasis added).

Citizenship Coalition.⁹⁸ Apple has similarly come under fire for allegations of hazardous working conditions for adult workers in its Chinese plants, and has responded through the application of a supplier code of conduct and vigorous auditing.⁹⁹

Individual companies in the textile industry have also initiated efforts to improve labor practices in their production factories. Nike is one of the most prominent examples. Throughout the 1990s, the company suffered many high-profile attacks over working conditions in its plants, culminating in boycotts and widespread protests on college campuses. In response, the company played a key role in creating the Fair Labor Association, a nonprofit that develops independent monitoring protocols with publicly posted audits and a code of conduct. This code includes minimum wage and hour restrictions, which its members volunteer to enforce.¹⁰⁰

3. The Roundtable on Sustainable Palm Oil

In 2002, the World Wildlife Fund joined with corporations including Migros, the Malaysian Palm Oil Association, and Unilever to address sustainability issues with the palm oil industry's supply chain, including children working in agricultural production. The partnership was subsequently formally established in Switzerland as the Roundtable on Sustainable Palm Oil (RSPO). The RSPO has over 2000 members, and 47 organizations have signed its Statement of Intent. The RSPO seeks, among other goals, to adopt global standards for the palm oil industry, including through annual meetings, agreement on industry-wide guidelines, and a certification and labeling scheme.¹⁰¹

The RSPO has certified approximately fifteen percent of the world's palm oil as sustainable.¹⁰² To become certified, individual oil mills and their supply base are audited for their compliance with the RSPO Principles and Criteria. One of those criteria is: "Children are not employed or exploited. Work by children is acceptable on family farms, under adult supervision,

⁹⁸ Jun Yang, *Samsung Abuses Workers at Its China Plants, Labor Group Says*, BLOOMBERG, Sept. 5, 2012, <http://www.bloomberg.com/news/articles/2012-09-05/samsung-china-workers-physically-verbally-abused-group-says>.

⁹⁹ Charles Duhigg and David Barboza, *In China, Human Costs Are Built Into an iPad*, N.Y. TIMES, Jan. 25, 2012, <http://www.nytimes.com/2012/01/26/business/ieconomy-apples-ipad-and-the-human-costs-for-workers-in-china.html>.

¹⁰⁰ Max Nisen, *How Nike Solved Its Sweatshop Problem*, BUS. INSIDER, May 9, 2013, <http://www.businessinsider.com/how-nike-solved-its-sweatshop-problem-2013-5>.

¹⁰¹ *About Us*, ROUNDTABLE ON SUSTAINABLE PALM OIL (2015), <http://www.rspo.org/about>.

¹⁰² *Roundtable on Sustainable Palm Oil*, World Wildlife Fund (2014), available at http://wwf.panda.org/what_we_do/footprint/agriculture/palm_oil/solutions/roundtable_on_sustainable_palm_oil/.

and when not interfering with education programmes.”¹⁰³ The RSPO also maintains a supply chain database that enables the tracing of volumes of certified palm oil.

4. The Harkin-Engel Protocol

Perhaps the best-known industry collaboration involved the cocoa industry and allegations of child trafficking and slavery in the harvesting of cocoa pods in West Africa. In early 2001, newspapers and television shows in the United Kingdom reported that children were being “enslaved” to work in cocoa bean production.¹⁰⁴ In the U.S., a *Philadelphia Inquirer* article headlined “A Slave-Labor Force of Youths” wrote about children being sold by traffickers to farmers, and of “lucky” child slaves living on corn paste and bananas, while “unlucky” ones are whipped and beaten.¹⁰⁵

The news reports about alleged child slavery used in the picking of cocoa beans prompted Congressman Eliot Engel (D-NY) to introduce an appropriations amendment that would require the Food and Drug Administration to develop a mandatory label for chocolate products indicating that child slave labor was not used in their production.¹⁰⁶ Later, Senator Tom Harkin (D-IA) announced that he planned to offer an amendment identical to the one offered by Congressman Engel. The amendment passed in the House, but stalled in the Senate. The cocoa and chocolate industry objected to the legislation on at least two grounds: (1) the proposed label would likely lead to decreased sales, hurting the farmers and families that the legislation was presumably trying to help, and (2) the nature of cocoa bean production would make it impossible for any company to certify the source of its cocoa beans.

Certain aspects of cocoa bean production make it extremely difficult to regulate. Cocoa beans are produced in West Africa on small, family owned farms that are usually no larger than 7-10 acres.¹⁰⁷ Thus, the companies that make chocolate products or supply cocoa usually do not own the actual cocoa farms. In the small, cocoa-oriented villages or communities, farmers harvest their beans and bring them to an area to dry. It is common for middle

¹⁰³ Roundtable on Sustainable Palm Oil, RSPO Principles and Criteria for Sustainable Palm Oil Production (Oct. 2007).

¹⁰⁴ See, e.g. *Slavery: A Global Investigation* (BBC television broadcast Sept. 28, 2000).

¹⁰⁵ Sudarsan Raghavan & Sumana Chatterjee, *A Slave-Labor Force of Youths Keeps Chocolate Flowing West*, PHILA. INQUIRER (June 24, 2001) http://articles.philly.com/2001-06-24/news/25324986_1_cocoa-farms-cocoa-processors-beans.

¹⁰⁶ H. Amdt. 142 to Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act 2002, H.R. 2330, 107th Cong. (2001).

¹⁰⁷ *The Challenge*, RESPONSIBLE COCOA (2014), <http://responsiblecocoa.com/the-challenge>.

men, known as “traitants” and “pisteurs” in the Cote d’Ivoire (the largest cocoa producing country), to go from place to place to collect the beans and combine them into larger loads. These middle men then bring the beans to distributors. The distributors in turn will sell to cocoa processing companies. Historically, the companies that process cocoa did not buy directly from the farmers. In fact, in some countries, companies that purchase cocoa beans are actually prohibited by law from buying cocoa beans directly from farmers.¹⁰⁸ In West Africa, much of the cocoa is purchased from farmers by a national cocoa organization. In any case, the path of cocoa from farm to the port involves a complex system of intermediaries.¹⁰⁹ There are an estimated 2 million cocoa farms in West Africa, with over 1.5 million of them in Cote d’Ivoire and Ghana alone. Many of these farms are in remote parts of the country, far from major towns or cities, reachable by unpaved roads, and located in rugged terrain.

Given the basic reality of the attenuated and uncontrolled cocoa supply chain, the U.S. producers trying to respond to Congress’ concerns faced a dilemma. No company was in a position to make a claim that all of the cocoa beans that went into its chocolate bars were derived from farms in which no trafficked children had labored. A company could argue that because it had no control over the supply chain, it had no legal responsibility for activities that may have taken place on family farms. However, as a commercial matter, the companies could not simply accept allegations that their products were made with child slave labor. Furthermore, from a moral perspective, the industry executives expressed the view that, “[w]e knew the goal – a cocoa supply chain we could all be proud of, where responsible, safe labor practices are the norm.”¹¹⁰

After extensive negotiations over the summer of 2001, the cocoa/chocolate industry reached agreement with Senator Harkin and Congressman Engel. The Harkin-Engel Protocol¹¹¹ was an agreement among the cocoa industry, governments, non-governmental organizations, and cocoa workers that created a strategy for addressing the use of child labor in global cocoa production. The cocoa industry committed to eliminating WFCL¹¹² in the supply chain through a series of six steps. These steps

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Testimony of Larry Graham, President, National Confectioners Association at the U.S. Department of Labor (May 28, 2008) (*available at* http://www.candyusa.com/files/Graham_DOL_oral.pdf).

¹¹¹ Chocolate Mfrs. 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 Labour (2001) [hereinafter Harkin-Engel Protocol].

¹¹² While the text of the protocol refers only to forced child labor and the worst forms of

include issuing a public statement of need, forming multi-sectoral advisory groups, signing a joint statement witnessed by the ILO, creating a memorandum of cooperation, establishing a joint foundation, and developing “credible, mutually-acceptable, voluntary, industry-wide standards of public certification, consistent with applicable federal law, that cocoa beans and their derivative products have been grown and/or processed without any of the worst forms of child labor.”¹¹³ The Protocol stipulated that those standards would be developed taking into account the results of the then-ongoing baseline-investigative industry surveys. The Protocol is groundbreaking in its scope and purpose. It is regarded as one of the first instances of a U.S. industry agreeing to self-regulation on an international human rights issue.¹¹⁴

5. The Harkin-Engel Approach to Certification

One of the first obligations undertaken by industry under the Protocol was to commission a study to determine the nature and extent of the problems involving child labor in the Cote d’Ivoire and Ghana. The study, conducted by the International Institute of Tropical Agriculture (IITA),¹¹⁵ made several key findings. Relying largely on survey data, the study found that over 98 percent of children working in cocoa in the Cote d’Ivoire worked on farms to which they had a family tie.¹¹⁶ Nearly one percent of the remaining children were salaried for their work.¹¹⁷ Twenty-nine percent reported that they could not leave their place of employment, and those that could stated that they would require permission from their parents or an intermediary, or lacked funds for personal transportation.¹¹⁸ Most importantly, the study found scant evidence of forced or indentured child labor or trafficking.¹¹⁹ The study did, however, find widespread evidence of children working in hazardous conditions such as spraying pesticides, using

child labor, later statements by members have expanded its scope to include forced adult labor. *See, e.g.*, Joint Statement from U.S. Senator Tom Harkin, Representative Eliot Engel and the Chocolate and Cocoa Industry on the Implementation of the Harkin-Engel Protocol (June 16, 2008).

¹¹³ *Supra* note 111.

¹¹⁴ PAYSON CTR. FOR INT’L DEV. AND TECH. TRANSFER, TULANE UNIV., OVERSIGHT OF PUBLIC AND PRIVATE INITIATIVES TO ELIMINATE THE WORST FORMS OF CHILD LABOR IN THE COCOA SECTOR IN COTE D’IVOIRE AND GHANA (Mar. 31, 2011).

¹¹⁵ IITA, CHILD LABOR IN THE COCOA SECTOR OF WEST AFRICA: A SYNTHESIS OF FINDINGS IN CAMEROON, CÔTE D’IVOIRE, GHANA, AND NIGERIA (Aug. 2002).

¹¹⁶ *Id.* at 15.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 13.

¹¹⁹ *Id.*

machetes, and carrying inappropriately heavy loads.¹²⁰

Although some criticized the study's methodology, the fundamental findings forced those involved in the Protocol to reassess the approach to the problem, because the problems were not the same as those decried by the original headlines that prompted creation of the Protocol. To be sure, trafficking remained a great concern, particularly as Cote d'Ivoire was embroiled in a civil war that caused economic and physical dislocation in some of the cocoa growing portions of the country. As a law enforcement problem, there was still an important need to address the awareness of trafficking and the resources needed by the local, sovereign authorities. After all, national, regional, and local governments are responsible for arresting and punishing people involved in trafficking.

At the same time, Protocol participants also understood that the police might not necessarily be the best party to address the problems of children working in hazardous conditions on family farms. Arresting parents whose children are using machetes is neither the best approach to the problems nor the best use of resources. Instead, the industry focused its efforts under the Protocol on making families and communities aware of the hazards and the need for children to attend school. Pilot projects undertaken by the industry, in conjunction with non-governmental organizations, highlighted the need for child labor monitoring systems within communities to educate and to identify and remediate hazardous situations. If necessary, this would include removing children from a hazardous environment.

Along with reassessing the nature of the problem, industry struggled to develop the "standards of certification" it had committed to under the Protocol. To this day, ensuring that beans that have made their way into the cocoa supply chain have not come from a farm where children worked is still impossible. As the industry recognized from the outset, certifying that none of the cocoa beans came from a farm in which children worked in WFCL—much less one in which children have been trafficked—is even more difficult. Getting farmers to change their behavior was not going to be easy, and was unlikely to be accomplished by law enforcement efforts or in a short period of time. If the U.S. government, with its plentiful resources, cannot ensure that children are not trafficked across the border from Mexico or working in inappropriate ways on U.S. farms, then impoverished West African countries are even less likely to have the ability to police and alter ingrained behavior on family farms. Lack of education, low incomes, lack of schools, school transportation difficulties, inflexible gender roles, and lack of fundamental infrastructure such as drinking water and electricity, all contribute to the problem of WFCL, as described above.

Recognizing both the extent and the long time needed to address the

¹²⁰ *Id.* at 14-15.

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problem of eradicating WFCL, the cocoa and chocolate industry developed a “standard of certification” that was, in essence, a continuous improvement model.¹²¹ The “standard of certification” included the following key elements:

- extensive surveys to assess the nature and extent of the problems;
- verification of the surveys by independent third parties;
- public reporting of the data; and
- corrective actions by origin governments, industry and other stakeholders (remediation).



This system of certification assumed that these actions would be part of a cycle. After programs designed to remediate the problems were implemented, the effects of the programs would be measured. Then the data would be verified and reported publicly. If the data showed the need for a change in approach, adjustments to the on-the-ground programs would be made.

The novel approach proposed by the industry required extensive resources. In the early years of the Protocol, the industry spent millions of dollars on surveys in Cote d’Ivoire and Ghana, the sources for about 70 percent of the world’s cocoa exports and the main focus of the Protocol. The early surveys conducted under the “system of certification” confirmed the essence of the IITA survey’s findings: the vast majority of children working on cocoa farms were working with their families and trafficking was hard to

¹²¹ *Public Certification*, RESPONSIBLE COCOA (2015), <http://responsiblecocoa.com/our-solutions/another-child-page/>.

find, but WFCL – children exposed to hazardous conditions and not going to school – were rampant.¹²² Later surveys and analysis by Tulane University confirmed the Protocol reports' conclusions: WFCL were widespread, but trafficking was “rare” and “elusive.”¹²³

When the Harkin-Engel Protocol was signed in September of 2001, the parties agreed to work toward the elimination of WFCL in West African cocoa bean production by 2005. While industry had completed the six steps outlined in the Protocol, including announcing the industry-wide “standard of certification,” by 2005 only mixed progress had been made on actually reducing the incidence of WFCL.¹²⁴ Senator Harkin and Congressman Engel negotiated an extension of the Protocol to 2008 with the cocoa/chocolate industry, but the goal – working toward the elimination of WFCL – remained unchanged.¹²⁵ The industry estimates that, by 2008, it had spent over \$75 million on Protocol activities.¹²⁶ Those expenditures included individual company programs as well as industry-wide programs. Unfortunately, despite widespread efforts, the Tulane University reports suggest that the efforts had little success until that point.¹²⁷

One of the problems with the efforts that had been undertaken was a lack of coordination. For example, company programs were not necessarily focused in areas which the governments of Cote d'Ivoire and Ghana had identified as priorities or where resources were available to take advantage of the company efforts. Most experts thought the establishment of child labor monitoring systems (CLMS) in villages in the countries' cocoa producing areas would be helpful. CLMS involves organizing communities to know who is producing cocoa in the area, the names of the children and whether the children are going to school, and education about WFCL. The

¹²² Int'l Labour Org., *Rooting Out Child Labour from Cocoa Farms: A Synthesis Report of Five Rapid Assessments* (2007).

¹²³ PAYSON CTR. FOR INT'L DEV. AND TECH. TRANSFER, TULANE UNIV., SECOND ANNUAL REPORT: OVERSIGHT OF PUBLIC AND PRIVATE INITIATIVES TO ELIMINATE THE WORST FORMS OF CHILD LABOR IN THE COCOA SECTOR IN COTE D'IVOIRE AND GHANA (Sept. 30, 2008).

¹²⁴ PAYSON CTR. FOR INT'L DEV. AND TECH. TRANSFER, TULANE UNIV., FIRST ANNUAL REPORT: OVERSIGHT OF PUBLIC AND PRIVATE INITIATIVES TO ELIMINATE THE WORST FORMS OF CHILD LABOR IN THE COCOA SECTOR IN COTE D'IVOIRE AND GHANA 59 (Oct. 31, 2007).

¹²⁵ Joint Statement from U.S. Senator Tom Harkin, Representative Eliot Engel and the Chocolate and Cocoa Industry on the Implementation of the Harkin-Engel Protocol (June 16, 2008).

¹²⁶ Responsible Cocoa, *The Harkin-Engel Protocol* (2014), <http://responsiblecocoa.com/about-us/the-harkin-engel-protocol/>.

¹²⁷ PAYSON CTR. FOR INT'L DEV. AND TECH. TRANSFER, TULANE UNIV., OVERSIGHT OF PUBLIC AND PRIVATE INITIATIVES TO ELIMINATE THE WORST FORMS OF CHILD LABOR IN THE COCOA SECTOR IN COTE D'IVOIRE AND GHANA (Mar. 31, 2011).

monitoring allows local citizens and officials the ability to identify when a child might be subjected to WFCL. While child labor monitoring systems can be very effective, if a child is found to be in need of help, such as removal from his household for his protection, there need to be resources in the community to provide help for the child. If the local community does not have the resources, the CLMS will be ineffective.

In 2010, the Protocol was modified by a new “Framework of Action to Support Implementation of the Harkin-Engel Protocol” to improve coordination and to increase and maximize government and private sector resources.¹²⁸ In the new Framework, the major stakeholders in the Protocol would, for the first time, work together with shared responsibilities. The new Framework announced a goal of 70 percent reduction in WFCL practices by 2020.¹²⁹ The new goal and date were extremely significant. For the first time, all Protocol stakeholders publicly acknowledged that making major progress on WFCL would take many years. Second, the participants recognized that completely eliminating WFCL practices in the cocoa sector was unlikely in even the next decade. Instead, they saw a 70 percent reduction in WFCL as a more realistic goal, given all of the difficulties that by then were well understood.

A key element of the new Framework was for stakeholders to focus their efforts on remediation programs that would reduce WFCL practices. As part of the Framework, in conjunction with the ILO, the U.S. DOL announced a \$10 million program focused on child labor monitoring systems and capacity building in the Cote d’Ivoire and Ghana.¹³⁰ The industry initially pledged over \$7 million in “qualifying” programs with best efforts to reach \$10 million, which it has far exceeded.¹³¹

The Framework established the Child Labor Cocoa Coordinating Group (CLCCG), which was the initial coordination and steering group responsible for implementing the Framework. The CLCCG was composed of representatives of Senator Harkin, Congressman Engel, the U.S. DOL, the governments of Cote d’Ivoire and Ghana, and the cocoa/chocolate

¹²⁸ Sen. Harkin, Rep. Engel, Dep’t of Labor, Government of Cote d’Ivoire, Government of Ghana, International Cocoa and Chocolate Industry, *Framework of Action to Support Implementation of the Harkin-Engel Protocol* (September 13, 2010), available at <http://www.dol.gov/ilab/projects/summaries/CocoaFrameworkAction.pdf>.

¹²⁹ *Id.* at 1.

¹³⁰ *Id.* at 5.

¹³¹ Of the original industry funding, \$2 million was earmarked to support an ILO-IPEC Public-Private Partnership and \$5 million to expand industry work on cocoa. The industry also offered to explore committing an additional \$3 million for remediation activities. The \$10 million from DOL and ILO was dedicated to implementing a new program to support the Framework. *Id.* at 4-5.

industry.¹³² In its first year of operation, the CLCCG developed the following areas of activity and responsibility: 1) Assessing areas of need for additional action; 2) Assessing and prioritizing new investments to address the areas of need; 3) Determining how to assess funding changes, including funding for new programs and increases to existing activities or programs in Côte d'Ivoire and Ghana; 4) Encouraging and contributing to coordination among projects both within and external to the Framework and national plans; 5) Establishing credible milestones for measuring commitment and progress toward the achievement of the overarching goal of the Protocol and Framework; 6) Establishing a common set of indicators; 7) Monitoring progress toward milestones; 8) Monitoring and assessing the effectiveness and impact of Framework-implemented programs at combating WFCL; and 9) Convening an annual briefing to update representatives of civil society and other key stakeholders about Framework efforts.¹³³

One of the most innovative aspects of the CLCCG was that key stakeholders could share information about progress and needs on the ground. Furthermore, the CLCCG structure made it difficult for the stakeholders to avoid their obligations under the Framework, and also created a sense of shared responsibility for progress. One of the most interesting aspects of the CLCCG responsibilities was reviewing industry programs for eliminating WFCL. Among the numerous questions that have arisen include: will CLMS be effective without resources for “rescuing” children found at risk? What does “rescuing” mean when the children are working with their parents and carrying heavy loads? If children have no school to attend, who is responsible for building the schools? If the industry proposes to build a school in a cocoa community, then whose responsibility is it to build housing for teachers who come from places other than the community? How should the industry address the particular educational needs of girls, whose education has traditionally been a low priority in society? Assuming schools are nearby, how can girls attend school if there are no nearby wells since girls are expected to fetch water for the household before going to school? Is it the industry or the government’s responsibility to build wells? These are just a few of the questions that have arisen when designing and implementing programs.

One of the most fundamental and persistent questions concerning the effectiveness of the programs has been whether programs that focus specifically and solely on identifying and preventing WFCL can be effective without also addressing the underlying conditions of poverty. If a farmer’s income increases, will his children be less likely to continue to work? Will

¹³² *Id.* at 6.

¹³³ CHILD LABOR COCOA COORDINATING GROUP, 2011 ANNUAL REPORT 17-19 (Jan. 23, 2012).

his children be more likely to attend school? If cocoa communities become more prosperous, will they be better able to build schools and wells? While there is no consensus on how to successfully eradicate WFCL in cocoa growing in West Africa, more stakeholders seem to think a “holistic” approach has the greatest chance for long term success.¹³⁴

6. Challenges Associated With Certification Regimes

The Harkin-Engel Protocol adopted a “system of certification” that was not a certificate of a particular product attribute (“slave labor free”), but more akin to a continuous improvement model. More traditional certification programs have been urged in the cocoa sector and other sectors.

Studies of certification programs in other agricultural markets have largely shown that impacts on local communities are not as positive as initially hoped. The Fair Trade label for coffee, as one of the certification systems with the greatest longevity and with direct emphasis on social and economic improvement, illustrates the effects of such efforts. While Fair Trade labeling has grown to include products other than coffee, its coffee labeling initiative is among the oldest and most well-studied of certification endeavors.

Fair Trade U.S.A.’s mission is to “enable sustainable development and community empowerment by cultivating a more equitable global trade model that benefits farmers, workers, consumers, industry and the earth.”¹³⁵ It has several types of certification standards, which are reviewed every few years. Notably, there are different standards for independent smallholders and farm workers, due to the unique considerations for each discussed above. The Independent Smallholder Standard (ISS) is for farmers that own small parcels of land, but are not organized into cooperatives or associations, while the Farm Workers Standard (FWS) is directed to farm workers that do not own land and work on larger farms. The ISS has requirements for collective commercialization, community needs assessments and action plans, democracy, transparency, farmer training, stable business partnerships, equitable employment conditions, and environmental

¹³⁴ See, e.g., *supra* note 128 at 1 (WFCL will be reduced by “joint efforts by key stakeholders to provide and support remediation services for children removed from the worst forms of child labor, including education and vocational training, protective measures to address issues of occupational safety and health related to cocoa production, and livelihood services for the households of children in cocoa growing communities; the establishment and implementation of a credible and transparent sector-wide monitoring system across cocoa growing regions in the two countries; and the promotion of respect for core labor standards.”).

¹³⁵ *Mission/Values*, FAIR TRADE USA (2014) <http://fairtradeusa.org/about-fair-trade-usa/mission>.

stewardship, among others.¹³⁶ Meanwhile, the FWS has requirements relating to empowerment, economic development, social responsibility, and environmental stewardship.¹³⁷ Certification checklists for both standards include, but are not limited to, predetermined community development premiums for every sale, compliance with national and local laws for wages and safety rules (including payment of industry averages at a minimum), guaranteed worker access to healthcare, unionization rights, movement away from subcontracting, elimination of the most toxic chemicals, safe waste disposal, and efficient use of water resources.¹³⁸

Recent studies have concluded that the impact of Fair Trade certification have been at best, widely uneven, although some small, early studies found improvements in incomes,¹³⁹ household consumption and infant mortality,¹⁴⁰ and average prices.¹⁴¹ In an unpublished Harvard study, researchers found that Fair Trade certification provided no benefits to the majority of workers. Certification increased export prices, but was not associated with greater sales. It led to an increase in average income for all households in a coffee-growing area but that increase was only concentrated among the most skilled coffee growers and farm owners. The certification has had no impact on elementary school attendance, and is actually correlated with lower school attendance among children of unskilled coffee workers.¹⁴² Another recent study of coffee farmers in Peru showed no relationship between certification and household income or prices received, although certification did provide better access to credit and value of agricultural assets after several years.¹⁴³ Other studies have generally shown

¹³⁶ Fair Trade USA, *Independent Smallholders Standard Vision, Objectives and Summary* (Aug. 2012)) http://www.fairtradeusa.org/sites/all/files/wysiwyg/filemanager/ISS_Vision_and_Objective_081412.pdf.

¹³⁷ Fair Trade USA, *Farm Workers Standard Vision, Objectives and Summary*, (Aug. 2012) http://fairtradeusa.org/sites/all/files/wysiwyg/filemanager/FWS_Vision_and_Objectives_August_2012v2.pdf.

¹³⁸ *Id.*; *supra* note 128.

¹³⁹ See generally Eric Arnould, Alejandro Plastina, & Dwayne Ball, *Does Fair Trade Deliver on its Core Value Proposition? Effects on Income, Educational Attainment, and Health in Three Countries*, 28(2) J. PUB. POL'Y & MKTG. 186 (2009).

¹⁴⁰ See generally Leonardo Bechetti & Marco Constantino, *The Effects of Fair Trade on Marginalized Producers: An Impact Analysis on Kenyan Farmers*, 36(5) WORLD DEV. 823 (2008).

¹⁴¹ See generally Christopher Bacon, *Confronting the Coffee Crisis: Can Fair Trade, Organic, and Specialty Coffees Reduce Small-Scale Farmer Vulnerability in Northern Nicaragua?*, 33(3) WORLD DEV. 497 (2005).

¹⁴² See generally Raluca Dragusanu & Nathan Nunn, *The Impacts of Fair Trade Certification: Evidence from Coffee Producers in Costa Rica (Preliminary and Incomplete)* (Feb. 28, 2014).

¹⁴³ Ruerd Ruben and Ricardo Fort, *The Impact of Fair Trade Certification for Coffee*

highly uneven impacts on income, education, credit access, and other variables depending on the survey method, length of time since implementation of certification system, geographic region, and industry.¹⁴⁴ A comprehensive review of the economic and social impacts of certification schemes concluded that, while little information is available on total effects, impacts to the social welfare of small producers are highly system- and place-specific.¹⁴⁵ Importantly, even if the certification systems' standards did raise grower incomes relative to conventional systems, they are unlikely to produce a sufficient volume of goods to allow the growers to escape poverty.¹⁴⁶

IV. DISCUSSION

Each law targeting child labor was enacted with the best intentions. Given the complexity of addressing child labor, and particularly WFCL, however, it is extraordinarily difficult to draft laws that effectively address the specific problems that lawmakers and the public wish to solve. Simply decreeing an end to WFCL practices will not cause the problem to go away. Indeed, the blunt instruments of certain laws and regulations may create unintended consequences. For example, if import or sales of cocoa had been restricted based on allegations of forced child labor, an approach proposed by one NGO,¹⁴⁷ the 98 percent of children who work on family farms would have suffered. Similarly, if the result of the Dodd-Frank disclosure provisions had discouraged companies from purchasing minerals from the Congo – even if produced through legitimate means – families in the war-

Farmers in Peru, 40(3) WORLD DEV. 570, 578 (2012).

¹⁴⁴ See, e.g., Ernesto Mendez et al., *Effects of Fair Trade and organic certifications on small-scale coffee farmer households in Central America and Mexico*, 25(3) RENEWABLE AGRIC. & FOOD SYS. 236 (2010) (explaining that certification systems had a positive influence on savings and credit, but no impact to education and incidence of migration at the household level); Brian Chiputwa et al., *Food Standards, Certification, and Poverty among Coffee Farmers in Uganda* (GlobalFood Discussion Papers, No. 27, 2014) (noting that Fair Trade certification increased household living standards by 30% among rural coffee farmers in Uganda, but Utz and Organic labeling had no effect); Mercy Kamau et al., *The Impact of Certification on Smallholder Coffee Farmers in Kenya: The case of 'UTZ' Certification Program*, Joint 3rd African Association of Agricultural Economists and 48th Agricultural Economists Association of South Africa (Sept. 19-23, 2010) (examining the difference in impact of the certification between two regions in Uganda).

¹⁴⁵ Report from RESOLVE Steering Committee of the State-of-Knowledge Assessment of Standards and Certification, *Toward Sustainability: The Roles and Limitations of Certification* 71 (2012).

¹⁴⁶ See generally Joni Valkila, *Fair Trade Organic Coffee Production in Nicaragua: Sustainable Development Or a Poverty Trap?*, 68(12) ECOLOGICAL ECON. 3018 (2009).

¹⁴⁷ Steven Thomma, *U.S. Ban Sought on Cocoa Produced by Child Slaves*, SAN JOSE MERCURY NEWS, May 31, 2002.

tor region who need the mining income will be adversely affected. That said, recognizing the complexity of the problem of child labor is not an excuse to do nothing. The prevalence of child labor is decreasing, and its rate of decrease is accelerating. Between 2000 and 2013, child labor decreased almost one-third globally, and WFCL decreased by more than 50 percent.¹⁴⁸ While it is impossible to know how much of these decreases are due to enforcement of laws on abusive child labor, at least some credit must be given to the enactment and enforcement of new laws and regulations. Not all company officials will be as thoughtful as the chocolate company representative who declared the desire for “a supply chain we can be proud of. . .”¹⁴⁹ Similarly, not every industry will realize that its economic success is dependent on the sustainability and vibrancy of its supply chain. So, there is a moral and legal imperative to enact “Thou shalt not” pronouncements when it comes to WFCL practices in agricultural supply chains.

That said, it is obvious that simple declarations and prohibitions are not enough to deal with the complexities of child labor, particularly in agricultural supply chains. The approach with the greatest chance of success requires companies to investigate and disclose their efforts to address supply chain issues. Nonetheless, the disclosure approach has limitations. First and most obvious, the company subject to the disclosure requirement is not required to take direct action to remediate any problems found. Second, only companies large enough to trigger disclosure requirements are covered. Third, the companies most likely to respond to the public scrutiny catalyzed by the disclosure requirements are “consumer facing” large companies. If the company doesn’t have a recognizable brand or does not produce a product directly purchased by consumers, public pressure might not be particularly effective.

All of these criticisms have merit, but the disclosure-centered approach still has value. While the disclosures do not require action, the investigation and reporting requirements still do not allow a company to turn a blind eye to its supply chain; a company must be aware of what its suppliers are doing to ensure compliance with applicable laws. Moreover, even if they are not consumer facing, in the social media-driven society, public scrutiny of disclosures can still create pressure on companies to correct bad practices. More importantly, any company that must comply with public reporting will have new incentives to scrutinize its suppliers’ practices. Focusing attention on the largest companies makes sense since those companies often have large supply chains, so many smaller companies will also be forced to be compliant as their customers demand good practices.

The focus on companies working with their supply chains is consistent

¹⁴⁸ Int’l Labour Office, *supra* note 7, at 3-4.

¹⁴⁹ *See supra* note 110.

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with what companies are now being required to do for other purposes. For example, since the World Trade Center attack of September 11, 2001, companies have been required for security reasons to know more about and secure their supply chains.¹⁵⁰ Requiring companies to add an expectation of compliance with child labor laws is consistent with the expectation that corporations take ownership of their supply chains.

Of course, to make this approach work, the disclosure requirements must not be unduly burdensome. The regulations need to be flexible enough to encourage compliance, and not spur the impetus for circumvention. The problems of child labor can only be addressed by taking a realistic approach to supply chain management.

V. CONCLUSION

King Canute is famous for what most people think was his imperious command to stop the tides from encroaching on his position at the seashore. Contrary to popular lore, however, King Canute was not the megalomaniac people have come to believe. The King was, in fact, a wise ruler. He knew he could not control everything within his kingdom, let alone the tides. His purpose was to demonstrate to his minions the limitations of his power, and the need for humility in exercising power. Making decrees has a place, and proscribing the worst forms of child labor is quite appropriate, but realism and humility in addressing the problems of child labor are necessary to achieve long term success in tackling this complex problem.

¹⁵⁰ See, e.g., 6 U.S.C. § 961 (2006) (establishing the Customs-Trade Partnership Against Terrorism, a public-private partnership to strengthen the security of the international supply chain).