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TASTE OF CHILD LABOR NOT SO SWEET: A CRITIQUE OF REGULATORY APPROACHES TO COMBATING CHILD LABOR ABUSES BY THE U.S. CHOCOLATE INDUSTRY

I. INTRODUCTION

United States chocolate manufacturers,¹ including Hershey's² and Mars,³ received unwelcomed media attention in 2001 as reports of the use of child labor on West African cocoa farms surfaced.⁴ Investigations revealed that children harvest cocoa beans⁵ under conditions that qualify as the "worst forms of child labor"⁶ as defined in International Labour

1. United States chocolate manufacturers were represented by the Chocolate Manufacturers Association (CMA), *see infra* notes 32 and 37 and accompanying text, until the CMA merged with the National Confectioners Association (NCA) in 2008 and became the Chocolate Council of NCA. *See* NAT'L CONFECTIONERS ASS'N, NCA YEAR IN REVIEW: 2008, *available at* http://nca.files.cms-plus.com/Year_In_Review_2008.pdf. For a list of members of the NCA, including chocolate manufacturers, *see* National Confectioners Association, NCA Members—Manufacturers, <http://www.candyusa.com/About/content.cfm?ItemNumber=1611> (last visited May 10, 2010). Retail sales of chocolate products totaled \$16.9 billion in 2009. NAT'L CONFECTIONERS ASS'N, UNITED STATES CONFECTIONERY MARKET 10 (2010), *available at* <http://www.candyusa.com/Industry/content.cfm?ItemNumber=1440&navItemNumber=1708> (follow "2009 Industry Review" hyperlink).

2. The Hershey Company's brands include Reese's, Hershey's Kisses, and Kit Kat. Hershey's, Products: Chocolate Candy, <http://www.hersheys.com/products/chocolate.asp> (last visited Mar. 10, 2008).

3. Mars, Incorporated markets Snickers, M&M's, Dove, and Mars. Mars, Global Brands, <http://www.mars.com/global/global-Brands.aspx> (last visited Mar. 10, 2008). Together, Hershey's and Mars account for more than two-thirds of the U.S. chocolate market. *See* Marc Levy, *Aggressive Mars Breathes down Hershey's Neck in US*, USA TODAY, Oct. 10, 2008, *available at* http://www.usatoday.com/money/economy/2008-10-11-3684973405_x.htm.

4. Media reports included a series of investigations published by the Knight Ridder publishing company. *See, e.g.,* Sudarsan Raghavan & Sumana Chatterjee, *Much of America's Sweets Made Possible Through Slave Labor on Ivory Coast*, KNIGHT RIDDER WASH. BUREAU, June 25, 2001; Sudarsan Raghavan, *Ivory Coast Slave Traders Prey on Children's Desire to Help Their Families*, KNIGHT RIDDER WASH. BUREAU, June 25, 2001; Sumana Chatterjee & Sudarsan Raghavan, *Nearly Hidden, Slavery on Ivory Coast Cocoa Farms Is Easy to Miss*, KNIGHT RIDDER WASH. BUREAU, June 25, 2001.

5. Harvesting cocoa beans involves cutting down cocoa pods from trees either by hand or with hooked blades, cutting open the thick shells of the cocoa pods with machetes, scooping out and fermenting the cocoa beans taken from the pods, drying the beans, and packing the beans into sacks weighing between 132 and 198 pounds. INT'L PROGRAMME ON THE ELIMINATION OF CHILD LABOUR, INT'L LABOUR ORG., SAFETY AND HEALTH FACT SHEET, HAZARDOUS CHILD LABOUR IN AGRICULTURE: COCOA 1 (2004), *available at* http://www.ilo.org/public/english/standards/ipecc/publ/download/factsheets/fs_cocoa_0304.pdf.

6. The term "worst forms of child labour" is defined as:

(a) 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, including forced or compulsory recruitment of children for use in armed conflict;

Organization (ILO)⁷ Convention 182. Under ILO Convention 182,⁸ ratifying countries commit themselves to eliminating the worst forms of child labor.⁹

The child labor abuses on West African cocoa farms have far-reaching consequences as Côte d'Ivoire (also known as the Ivory Coast), Ghana, Cameroon, and Nigeria produce 70% of the world's cocoa, with Côte d'Ivoire alone accounting for almost 40% of that supply.¹⁰ With the United States importing 20% of Côte d'Ivoire's exports of cocoa products,¹¹ and

(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 children.

Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour art. 3, June 17, 1999, S. Treaty Doc. No. 106-5, 1999 U.S.T. LEXIS 170 [hereinafter ILO Convention 182].

7. The International Labour Organization (ILO), founded in 1919 by the United Nations, is a "tripartite" agency of the United Nations composed of governments, employers, and workers to develop policies and programs. The ILO is "devoted to advancing opportunities for women and men to obtain decent and productive work in conditions of freedom, equity, security and human dignity" and promotes "social justice and internationally recognized human and labour rights." International Labour Organization, About the ILO, http://www.ilo.org/global/About_the_ILO/lang--en/index.htm (last visited May 10, 2010).

8. ILO Convention 182.

9. *Id.* Countries that have ratified ILO conventions are required to submit biennial reports to the ILO on their efforts to implement them. ILO, Committee of Experts on the Application of Conventions and Recommendations, http://www.ilo.org/global/What_we_do/InternationalLabourStandards/Apply_ingandpromotingInternationalLabourStandards/CommitteeofExperts/lang--en/index.htm (last visited May 10, 2010). As of January 2010, 171 countries have ratified Convention 182, including the United States (ratified in 1999), Côte d'Ivoire (ratified in 2003), Cameroon (ratified in 2002), Ghana (ratified in 2000), and Nigeria (ratified in 2002). ILOLEX: Database of International Labour Standards, C182: Worst Forms of Child Labour Convention, 1999 (2010), <http://www.ilo.org/ilolex/english/convdsp1.htm> (follow "C182" hyperlink; then follow "See the ratifications for this Convention" hyperlink).

10. Calculations are based on data provided by the International Cocoa Organization (ICCO), an organization composed of various cocoa-producing and cocoa-consuming nations charged by the United Nations to administer the provisions of the International Cocoa Agreement. International Cocoa Organization, About ICCO, <http://www.icco.org/about/about.aspx> (last visited May 10, 2010); EXECUTIVE COMM., INT'L COCOA ORG., ANNUAL FORECASTS OF PRODUCTION AND CONSUMPTION AND ESTIMATES OF PRODUCTION LEVELS TO ACHIEVE EQUILIBRIUM IN THE WORLD COCOA MARKET 6 tbl.2 (2008). The International Cocoa Agreement promotes a "sustainable cocoa economy," defined as "a system in which all stakeholders maintain productivity at levels that are economically viable, ecologically sound and culturally acceptable through the efficient management of resources." United Nations Conference on Trade and Development, United Nations Cocoa Conference, Geneva, Switz., Feb. 2–Mar. 2, 2001, *International Cocoa Agreement*, arts. 1.1, 2.19, U.N. Doc. TD/COCOA.9/7 (Mar. 13, 2001).

11. TIAJI SALAAM-BLYTHER ET AL., CONGRESSIONAL RESEARCH SERVICE, CHILD LABOR IN WEST AFRICAN COCOA PRODUCTION: ISSUES AND U.S. POLICY 4 (2005).

that number representing almost half of the United States' supply,¹² child labor likely produced much of the chocolate products that United States' consumers enjoy.¹³

The United States Department of State estimates that approximately 109,000 children in Côte d'Ivoire's cocoa industry work under "the worst forms of child labor."¹⁴ Among other hazards, children carry heavy loads of cocoa beans,¹⁵ apply pesticide and fertilizer without protective gear,¹⁶ and use machetes to clear underbrush and cut open cocoa beans.¹⁷ Many child workers are underfed and beaten on a regular basis,¹⁸ and most do not attend school.¹⁹ One study estimates that up to 10,000 of these children are victims of trafficking.²⁰

12. *Id.* at 7 tbl.3.

13. Cocoa beans from West Africa, and other regions, are processed in manufacturing plants into chocolate liquor, cocoa butter, cocoa powder, and, of course, chocolate. A few brands of chocolate do not use West African cocoa beans and are believed to be child-labor free; these include Cloud Nine/Tropical Source, Dagoba Organic Chocolate, and Equal Exchange. *See* Slave-Free Chocolate, Slave-Free Chocolate Table, <http://vision.ucsd.edu/~kbranson/stopchocolateslavery/main.html#Table> (last visited May 10, 2010).

14. BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, 2006 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CÔTE D'IVOIRE (2007), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2006/78730.htm>. The State Department cites with approval a 2002 study by the International Institute of Tropical Agriculture. *See infra* note 17.

15. INT'L INST. OF TROPICAL AGRIC., CHILD LABOR IN THE COCOA SECTOR OF WEST AFRICA: A SYNTHESIS OF FINDINGS IN CAMEROON, CÔTE D'IVOIRE, GHANA, AND NIGERIA 16 (2002), *available at* <http://www.globalexchange.org/campaigns/fairtrade/cocoa/IITACocoaResearch.pdf> [hereinafter IITA STUDY]. For further discussion on the findings of the study, see *infra* notes 128–35 and accompanying text. *See also* INT'L INST. OF TROPICAL AGRIC., SUMMARY OF FINDINGS FROM THE CHILD LABOR SURVEYS IN THE COCOA SECTOR OF WEST AFRICA: CAMEROON, CÔTE D'IVOIRE, GHANA, AND NIGERIA 4–5 (2002), *available at* http://www.dol.gov/ilab/media/reports/iclp/cocoa_findings.pdf [hereinafter IITA SUMMARY OF FINDINGS].

16. United States Department of Labor, Child Labor in Commercial Agriculture, *available at* <http://www.dol.gov/ilab/media/reports/iclp/sweat2/commercial.htm> (last visited May 10, 2010).

17. IITA STUDY, *supra* note 15.

18. Raghavan & Chatterjee, *Much of America's Sweets*, *supra* note 4.

19. *Id.*

20. BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, *supra* note 14. These children are trafficked into Côte d'Ivoire from neighboring countries, Mali, Burkina Faso, Benin and Togo. *Id.* "Trafficking in persons" is defined by the United Nations as

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/22, art. 3(a), U.N. GAOR, 55th Sess., Annex 2, Supp. No. 49, U.N. Doc. A/45/49U.N. (Nov. 15, 2000).

Media reports accused United States chocolate manufacturers of complicity in child labor practices on West African cocoa farms, but chocolate manufacturers denied responsibility, stating that they neither owned the cocoa farms nor controlled the labor practices of local farmers.²¹ Initially, industry representatives even denied that child labor existed on the cocoa farms.²² The chain of production for chocolate products is long and complex, with chocolate products reaching consumers only through several intermediaries,²³ which include local farmers,²⁴ local middlemen, exporters, and international traders and manufacturers.²⁵ To complicate matters further, cocoa beans from various farms are combined together before being exported, making it impossible to discern their source; cocoa beans originating from farms that use child labor are indistinguishable from the cocoa beans originating from farms that do not.²⁶

Lawmakers struggled to reach solutions that would require chocolate manufacturers to ensure that their cocoa products do not contain cocoa beans harvested by child labor.²⁷ Most notably, Representative Eliot Engel²⁸ proposed an amendment to the 2002 Agriculture Appropriations

21. See Sumana Chatterjee & Sudarsan Raghavan, *Chain of Labor Blame Shifts, Practice Persists*, DETROIT FREE PRESS, June 25, 2001, at 6A (“Cocoa suppliers say they don’t control farms. Chocolate companies say they rely on suppliers to provide cocoa untainted by slave labor.”); see also Chatterjee & Raghavan, *Nearly Hidden*, *supra* note 4 (Willy Geeraerts, the Director of Quality Assurance for Barry Callebaut, stated, “What we don’t control we cannot guarantee. When the cocoa comes to us, it is such a long chain, and before it gets to us, controlled by middlemen along the way.”).

22. President of the CMA and, now, the NCA, Larry Graham, stated, “Everyone we have talked to in the country who has worked there years and years has never seen this practice.” Chatterjee & Raghavan, *Nearly Hidden*, *supra* note 4.

23. See ASS’N OF THE CHOCOLATE, BISCUIT & CONFECTIONERY INDUS. OF THE EU (CAOBISCO) ET AL., CERTIFICATION FOR COCOA FARMING: SUBMISSION TO TULANE UNIVERSITY 5 (2007) [hereinafter TULANE SUBMISSION], available at <http://www.confectioncanada.com/Controls/ViewAttachment.aspx?No=301> (Cocoa beans travel “from farm gate to local collection points to warehouses to port.”); Elliot J. Schrage & Anthony P. Ewing, *The Cocoa Industry and Child Labour*, 18 J. CORP. CITIZENSHIP 99, 101 (2005) (“The cocoa supply chain includes many intermediaries between the farmer and consumer. Small farmers typically sell their cocoa harvest to local middlemen for cash. The middlemen work under contract for local exporters, who, in turn, sell cocoa to international traders and the major international cocoa brands.”).

24. Farmers in West Africa typically grow and harvest cocoa beans in remote areas on small, family-run farms that number between 1.5 to 2 million. TULANE SUBMISSION, *supra* note 23, at 4. These farms are usually no more than 3 hectares, or 7 acres. *Id.*

25. Schrage & Ewing, *supra* note 23, at 101.

26. Chatterjee & Raghavan, *Nearly Hidden*, *supra* note 4.

27. See SALAAM-BLYTHER ET AL., *supra* note 11, at 13; Sumana Chatterjee, *Chocolate Firms Launch Fight Against ‘Slave Free’ Labels*, PHILA. INQUIRER, Aug. 1, 2001, at A01.

28. Representative Engel (D-NY) has served in the United States House of Representatives since 1989. Biographical Directory of the United States Congress, Engel, Eliot Lance, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=E000179> (last visited May 10, 2010).

Bill that would have earmarked \$250,000 for the Food and Drug Administration to develop a “slave free” label for chocolate products.²⁹ The Chocolate Manufacturers Association (CMA) hired former Senators Bob Dole³⁰ and George Mitchell³¹ to lobby against the provision, knowing that their products would not qualify for the “slave free” label.³² Although the provision passed in the House of Representatives,³³ a companion provision was never introduced in the Senate.³⁴

Amid threats of boycotts and calls for other punitive measures by the general public, the chocolate industry met with various stakeholders, including NGOs, labor organizations, government officials and politicians, to propose alternative solutions to the child labor problem, eventually leading to a compromise in September 2001.³⁵ In exchange for Congress withdrawing the provision for a mandatory “slave free” label, the CMA reached an agreement with the stakeholders to voluntarily remedy the child labor problem.³⁶ The agreement is commonly referred to as the Harkin-Engel Protocol,³⁷ named after Senator Tom Harkin³⁸ and

29. Sumana Chatterjee, *Chocolate Companies Fight ‘Slave Free’ Labels on Products*, KNIGHT RIDDER WASH. BUREAU, Aug. 1, 2001; see H. Amend. 142 to Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act 2002, H.R. 2330, 107th Cong. (2001).

30. Dole served as the Republican Senator from Kansas from 1969 until 1996, when he resigned in order to pursue his presidential bid. He was the U.S. Senate Majority Leader from 1985–1987 and 1995–1996. Biographical Directory of the United States Congress, Dole, Robert Joseph <http://bioguide.congress.gov/scripts/biodisplay.pl?index=D000401> (last visited May 10, 2010).

31. Mitchell was the Democratic Senator from Maine from 1980 until 1995. He served as U.S. Senate Majority Leader from 1989 to 1995. Biographical Directory of the United States Congress, Mitchell, George John <http://bioguide.congress.gov/scripts/biodisplay.pl?index=m000811> (last visited May 10, 2010).

32. Chatterjee, *Chocolate Companies Fight*, *supra* note 29; Chatterjee, *Chocolate Firms Launch Fight*, *supra* note 27.

33. The bill passed by a vote of 291–115 in the House in June 2001. See Sumana Chatterjee & James Kuhnenn, *Labels OK’D for Chocolate Child Slavery Furor Spurs House Action*, DETROIT FREE PRESS, June 29, 2001, at 4A.

34. SALAAM-BLYTHER ET AL., *supra* note 11, at 13.

35. *Id.* at 6, 13.

36. *Id.*

37. 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 LABOR (2001) [hereinafter HARKIN-ENGEL PROTOCOL]. Signatories to the agreement are Larry Graham (President, CMA) and William Guyton (President, World Cocoa Foundation). The witnesses are: Tom Harkin (U.S. Senate-Iowa), Herbert Kohl (U.S. Senate-Wisconsin), Eliot Engel (U.S. Congress-New York), Youssoufou Bamba (Ambassador, Embassy of the Ivory Coast), Frans Roselaers (Director, International Programme on the Elimination of Child Labour, International Labor Organization), Ron Oswald (General Secretary, International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers’ Associations), Kevin Balcs (Executive Director,

Representative Eliot Engel,³⁹ both of whom played major roles during the negotiations.

The Harkin-Engel Protocol (Protocol), signed September 19, 2001, is a voluntary, nonbinding, and nonlegislative document that outlines six steps for the chocolate industry to take in order to eliminate the worst forms of child labor in its supply chain in compliance with international labor standards.⁴⁰ However, because of the Protocol's voluntariness, it has been largely unsuccessful in eliminating child labor practices on West African cocoa farms.⁴¹ This Note argues that proposed solutions must be removed from the hands of industry leaders and situated within state regulatory frameworks to be effective.

This Note examines how the United States government can effectively prevent the importation of cocoa products produced by child labor on West African cocoa farms into the United States. Part II addresses the application of internationally recognized labor standards to transnational corporations (TNCs) through both international law and national legislation and why these efforts have been inadequate. Part III provides an overview of the debate regarding the use of voluntary initiatives in place of legally binding state regulation to curb labor violations by transnational corporations. Part IV details the six steps of the Protocol and comments on the Protocol's effectiveness. Part V highlights recently enacted legislation addressing child labor in the agricultural industry and distinguishes it from the Protocol. Finally, Part VI argues that this new legislation should be applied to the child labor problem on West African farms and proposes provisions that would make its implementation more effective.

Free the Slaves), Linda Golodner (President, National Consumers League), and Darlene Adkins (National Coordinator, The Child Labor Coalition).

38. Senator Harkin has proposed and supported various measures and efforts to abolish child labor in the United States and abroad. He pushed for the Senate to ratify ILO Convention 182, which it did in 1999. Tom Harkin, *Fighting for Equal Rights and Opportunity at Home and Abroad*, <http://harkin.senate.gov/issue/equalrights.cfm> (last visited May 10, 2010); *see supra* note 9. Senator Harkin also introduced an amendment to the Trade and Development Act of 2000, which requires that countries take steps to implement ILO Convention 182 in order to continue to receive US trade preferences under the Generalized System of Preferences. *See* Trade and Development Act of 2000, Pub. L. No. 106-200, 114 Stat. 251 (2000); Tom Harkin, *Fighting for Equal Rights and Opportunity at Home and Abroad*, <http://harkin.senate.gov/issue/equalrights.cfm> (last visited May 10, 2010). Senator Harkin also introduced The Child Labor Deterrence Act in 1992, 1993, 1995, 1997, and 1999. *See infra* notes 65–69 and accompanying text.

39. *See supra* note 28.

40. HARKIN-ENGEL PROTOCOL, *supra* note 37. For discussion on these six steps, *see infra* Part IV.A.

41. *See infra* Part IV.B.

II. IMPOSING INTERNATIONALLY RECOGNIZED LABOR STANDARDS ON TRANSNATIONAL CORPORATIONS (TNCs)⁴²

The view credited to economist Milton Friedman that the only social responsibility of business is to increase profits has largely been abandoned.⁴³ Current society no longer seriously questions the notion that corporations have duties beyond profit making;⁴⁴ corporations must also act ethically and responsibly.⁴⁵ However, with the advance of globalization, the concern is that corporations will take advantage of lenient regulations in foreign countries⁴⁶ and commit violations of international human rights and labor standards in pursuit of profit making.⁴⁷ While commentators now accept that TNCs should be held directly accountable for human rights violations,⁴⁸ most international standards are binding on states, and not on corporations or individuals.⁴⁹

42. A transnational corporation, or TNC, is defined by the U.N. as: “an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries—whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.” U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on the Promotion & Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, para. 20, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter *Norms on the Responsibilities of Transnational Corporations*].

43. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 133 (1962) (“[T]here is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud.”).

44. For a survey on social corporate responsibility when the idea first emerged in the 1970s, see generally *SOCIAL RESPONSIBILITY AND ACCOUNTABILITY* (Jules Backman ed., 1975).

45. “Society now expects corporations to behave responsibly with regard to a wide range of stakeholders, including shareholders, consumers, workers, persons living in the vicinity of its operations, and even the wider community and the environment.” Jan Wouters & Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 *NW. J. INT’L HUM. RTS.* 262, 264 (2008).

46. Many foreign countries provide attractive incentives for corporations to do business within their borders; these include creating export processing zones (where normal trade barriers are lowered or eliminated), providing tax-free status for investors, and providing freedom from domestic regulation for corporations. Neil Kearney, *Corporate Codes of Conduct: The Privatized Application of Labour Standards*, in *REGULATING INTERNATIONAL BUSINESS: BEYOND LIBERALIZATION* 205, 207 (Sol Picciotto & Ruth Mayne eds., 1999).

47. Bob Hepple, *Labour Regulation in Internationalized Markets*, in *REGULATING INTERNATIONAL BUSINESS: BEYOND LIBERALIZATION* 183, 186 (Sol Picciotto & Ruth Mayne eds., 1999) (“[C]ompanies will be tempted to relocate to countries where social protection and the costs of labour are lower, and regulations are thought to be more ‘flexible.’ This leads to downward pressures on wage costs and labour standards in other countries.”); Kearney, *supra* note 46, at 207.

48. Wouters & Chanet, *supra* note 45, at 264.

49. Sol Picciotto, *Introduction: What Rules for the World Economy?*, in *REGULATING INTERNATIONAL BUSINESS: BEYOND LIBERALIZATION* 1, 12 (Sol Picciotto & Ruth Mayne eds., 1999)

Generally, international law is ill suited to hold TNCs responsible for human rights compliance,⁵⁰ and past attempts to impose international human rights obligations directly on corporations have failed.⁵¹ Similarly, national legislation has been repeatedly inadequate.⁵²

A. Failed Attempts at Creating International Law Binding on TNCs

The United Nation's efforts to set standards for TNCs have proven ineffective. For example, the U.N. Code of Conduct on Transnational Corporations (Code of Conduct)⁵³ would have regulated for the first time on the international level various corporate practices, including those implicating child labor.⁵⁴ Arguments as to whether the Code of Conduct should be legally binding or voluntary hindered negotiations, with developing nations advocating for the former and developed nations advocating the latter.⁵⁵ Under pressure from developed countries, including the United States, the U.N. abandoned its efforts after almost fifteen years,⁵⁶ and the Code of Conduct was never adopted.⁵⁷ The U.N. later adopted the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human

("Formally, treaties and other international agreements are part of public international law, which binds only states.").

50. [I]nternational human rights law is not well adapted to hold TNCs accountable for the human rights abuses that they perpetrate. In international human rights law, only the State is generally charged with duties to secure human rights for individuals within jurisdiction. This is symptomatic of the State-centric focus of public international law.

SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION 9 (2004). Nonstate actors, including corporations, are only indirectly regulated under international law. *Id.*

51. *See infra* Part II.A.

52. *See infra* Part II.B.

53. United Nations Draft Code of Conduct on Transnational Corporations, 23 I.L.M. 626 (1984).

54. *See id.* at 628 ("Transnational corporations should/shall respect human rights and fundamental freedoms in the countries in which they operate.").

55. "[T]he Draft Code failed to secure general agreement as a result of . . . irreconcilable differences . . . over the role of international law in the draft Code." Peter Muchlinski, *A Brief History of Business Regulation*, in REGULATING INTERNATIONAL BUSINESS: BEYOND LIBERALIZATION 47, 54 (Sol Picciotto & Ruth Mayne eds., 1999); *see also* Isabella D. Bunn, *Global Advocacy for Corporate Accountability: Transatlantic Perspectives from the NGO Community*, 19 AM. U. INT'L L. REV. 1265, 1280–81 (2004).

56. 1977–1992. *See* Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 166–67 (1997).

57. *See* SIDNEY DELL, THE UNITED NATIONS AND INTERNATIONAL BUSINESS 73–74, 77 (1990). The debates over the Corporate Code of Conduct Act did lead to other relevant initiatives that were adopted, including the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. *See* Picciotto, *supra* note 49, at 16; *infra* notes 60–63 and accompanying text.

Rights (Norms).⁵⁸ However, the Norms merely contain recommendations that can be used as bases for treaties and other sources of binding international law.⁵⁹ Like the Norms, the U.N. Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (Tripartite Declaration)⁶⁰ addresses the labor activities of TNCs, but again only provides recommendations for TNCs to adopt on a voluntary basis.⁶¹ Although the Tripartite Declaration references ILO labor standards,⁶² again, these obligations bind only states and not corporations directly.⁶³

58. *Norms on the Responsibilities of Transnational Corporations*, *supra* note 42. For a comparison of the Norms to the Code of Conduct, see University of Minnesota, At a Glance: Comparing the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, with the Draft United Nations Code of Conduct on Transnational Corporations, available at <http://www1.umn.edu/humanrts/ataglance/compdftun.html> (last visited May 10, 2010).

59. Three essential aims of the draft principles were: (i) to help Governments identify what types of legislation they should enact and what types of enforcement mechanisms they should implement to ensure the principles had a positive influence; (ii) to encourage companies to implement the draft principles; (iii) and to lay the groundwork for the binding international standard setting process.

U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on the Promotion & Prot. of Human Rights, Working Group on the Working Methods and Activities of Transnational Corporations, *The Realization of Economic, Social and Cultural Rights: The Question of Transnational Corporations*, para. 33, E/CN.4/Sub.2/2000/12 (Aug. 28 2000) (prepared by El-Hadji Guissé).

60. Adopted by the ILO during the 204th Session, in Geneva, November 1977 and amended during the 279th Session in November 2000, the Tripartite Declaration is the "primary document embodying the ILO's labour principles for [transnational corporations]." IVANKA MAMIC, IMPLEMENTING CODES OF CONDUCT: HOW BUSINESSES MANAGE SOCIAL PERFORMANCE IN GLOBAL SUPPLY CHAINS 29 (2004).

61. One commentator has argued that the fact the Tripartite Declaration is voluntary should not "detract from the normative value of those parts of it that reflect binding obligations." ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 213 (2006).

62. Specifically, the Tripartite Declaration urges TNCs to "respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations as well as the Constitution of the International Labour Organization and its principles" ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, para. 8 (3d ed. 2001) [hereinafter *Tripartite Declaration*]. The Universal Declaration of Human Rights, adopted by the United Nations in 1948, enumerates the fundamental human rights to be universally protected. G.A. Res. 217A, U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc. A/Res/217A (Dec. 10, 1948). The Tripartite Declaration also incorporates by reference the Declaration on Fundamental Principles and Rights at Work, which commits member nations to respect and promote principles and rights in four categories, including the abolition of child labor, whether or not they have ratified the relevant Conventions. See *Tripartite Declaration*, para. 8; ILO, Programme for the Promotion of the ILO Declaration on Fundamental Principles and Rights at Work, *ILO Declaration on Fundamental Principles and Rights at Work—86th Session, Geneva, June 1998*, available at <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm> (last visited May 10, 2010).

63. The Tripartite Declaration explicitly states that its incorporation of the ILO Declaration on Fundamental Principles and Rights at Work does not affect the voluntary character of the Tripartite Declaration's provisions. *Tripartite Declaration*, *supra* note 62, at add. II.

B. National Legislation and Its Limitations

Aside from the U.N.'s attempts, efforts to directly require TNCs to comply with internationally recognized labor standards through national legislation have also been unsuccessful. Two well-known examples of these failures are the Child Labor Deterrence Act (CLDA)⁶⁴ and the Corporate Code of Conduct Act (CCCA).⁶⁵ The CLDA of 1999,⁶⁶ introduced by Senator Harkin, would have prohibited the importation of manufactured goods that are found to be produced by abusive child labor into the United States.⁶⁷ Importantly, the Act would have imposed civil and criminal penalties directly on companies that violated the prohibition against the importation of these products.⁶⁸ The Act also explicitly referenced ILO Convention 182.⁶⁹ However, the CLDA stalled in Congress and was never enacted.⁷⁰ Similarly, the CCCA attempted to directly impose internationally recognized labor standards on corporations and was never enacted. The CCCA would have required U.S. corporations that employ more than twenty persons in a foreign country to adopt and implement a Corporate Code of Conduct in compliance with "internationally recognized worker rights and core labor standards."⁷¹ However, like the CLDA, the CCCA was never enacted.⁷²

Even those acts that have been passed by Congress have been inadequate in dealing with child labor abuses due to their lack of enforcement. The Tariff Act of 1930 states that "[a]ll goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any

64. Child Labor Deterrence Act of 1999, S. 1551, 106th Cong. (1999).

65. Corporate Code of Conduct Act, H.R. 2782, 107th Cong. (2001).

66. Similar versions of this bill have been introduced by Senator Harkin in 1992, 1993, 1995, and 1997, but each bill has stalled. *See* S. 1551: Child Labor Deterrence Act of 1999, Other Legislation with the Same Title, <http://www.govtrack.us/congress/bill.xpd?bill=s106-1551&tab=related> (last visited May 10, 2010).

67. S. 1551 § 6.

68. *Id.* § 7.

69. *Id.* § 2(a)(3).

70. The last action taken on the 1999 bill was on August 5, 1999 when it was referred to the Committee on Finance. *See* S. 1551: Child Labor Deterrence Act of 1999, Overview, <http://www.govtrack.us/congress/bill.xpd?bill=s106-1551> (last visited May 10, 2010).

71. Corporate Code of Conduct Act, H.R. 2782, 107th Cong. § (b)(4)(B) (2001).

72. The last action taken on the bill was on August 24, 2001 when it was referred to the Subcommittee on International Monetary Policy and Trade. *See* H.R. 2782: Corporate Code of Conduct Act, Overview, <http://www.govtrack.us/congress/bill.xpd?bill=h107-2782> (last visited May 10, 2010).

of the ports of the United States.”⁷³ Despite the Tariff Act being amended in 2000 to specify that the prohibition includes goods produced by forced or indentured *child* labor,⁷⁴ chocolate products from West Africa likely produced by child labor are not currently banned.⁷⁵ Under the Tariff Act, only eight classes of products have been found to be produced by convict, forced, or indentured labor, and have been subsequently banned from the United States.⁷⁶ The small number of enforcement actions may be due to “a low number of allegations, the insufficiency of evidence gathered in investigations, or merely the reluctance of the Customs Service to enforce certain violations of the Tariff Act due to political or economic concerns.”⁷⁷ The Trafficking Victims Protection Reauthorization Act (TVPRA) similarly bans the importation of goods produced by forced or child labor,⁷⁸ yet remains ineffective in keeping cocoa produced by child labor from entering the United States.⁷⁹

Although U.N. mandates are not binding on TNCs, the legal imperatives to hold the cocoa industry accountable for the child labor practices in its supply chain do exist in national legislation, specifically in the form of the Tariff Act and the Trafficking Victims Protection

73. 19 U.S.C. § 1307 (2006). The primary purpose of the Tariff Act was to protect American businesses and manufacturers from competition with slave labor abroad; however, the attendant human rights consequences were not overlooked. One Senator stated, “I propose the amendment to the end that America shall not give aid or comfort to those employers and planters in foreign countries whose forced and indentured labor is brought to poverty and degeneration, with the attendant inhuman treatment of the native workers.” 71 CONG. REC. 4488 (1929), *reprinted in* McKinney v. U.S. Dep’t of Treasury, 9 Ct. Int’l Trade 315, 320 n.22 (Ct. Int’l Trade 1985).

74. Trade and Development Act of 2000, Pub. L. No. 106-200, 114 Stat. 251 (2000).

75. In May 2002, the International Labor Rights Fund filed a complaint against the CMA, seeking an investigation under the Tariff Act of the importation of cocoa produced in the Côte d’Ivoire. The United States Court of International Trade dismissed the case based on the “consumptive demand” exception to Section 307 of the Tariff Act, which specifically exempts from the ban goods that cannot be produced domestically in the United States, such as cocoa. Int’l Labor Rights Fund v. United States, 29 Ct. Int’l Trade 1050, 1055 (Ct. Int’l Trade 2005). Senator Harkin introduced a bill in 2007 to eliminate the consumptive demand exemption, but no action has been taken on the bill. *See* S. 1157, 110th Cong. (2007).

76. These classes of products are furniture from Mexico; clothes hampers and palm leaf bags from Mexico; diesel engines from China; socks from China; galvanized pipe from China; machine presses from China; sheepskin and leather from China; and malleable iron pipe fittings from China. U.S. Customs and Border Protection, Convict, Forced, or Indentured Labor Product Importations (2009), http://www.cbp.gov/xp/cgov/trade/trade_outreach/convict_importations.xml.

77. Marc Ellenbogen, Note, *Can the Tariff Act Combat Endemic Child Labor Abuses? The Case of Cote d’Ivoire*, 82 TEX. L. REV. 1315, 1334 (2004).

78. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006) (codified as amended in scattered sections of 18, 22 and 42 U.S.C.).

79. *See infra* Part V.A for a discussion of renewed efforts to enforce the TVPRA mandate against the importation of goods produced by child labor under a consultative group established by the 2008 Farm Bill and chaired by the Department of Labor. Cocoa from Côte d’Ivoire was added to the TVPRA list on September 10, 2009. *See infra* note 187.

Reauthorization Act.⁸⁰ However, increased enforcement is needed to make these laws effective.

III. THE ROLE OF VOLUNTARY INITIATIVES IN REGULATING TNCs IN THE UNITED STATES

A. *The Rise of Voluntary Initiatives*

Increasing recognition of the inadequacy of traditional regulation led to reliance on “alternative regulatory programs,”⁸¹ specifically voluntary initiatives, to remedy, among other ills, child labor abuses in the supply chains of transnational corporations.⁸² U.S. government leaders, corporations, and NGOs espoused the benefits of voluntary initiatives, which are characterized by their self-regulatory nature and primarily take the form of corporate codes of conduct.⁸³

U.S. government and NGO leaders saw voluntary initiatives as a solution for the failure of both international and national law to adequately address the consequences of globalization and the resulting child labor abuses.⁸⁴ NGOs played an important role in bringing labor rights violations in the global supply chains of corporations to the public’s

80. In addition, the Executive Branch has addressed the child-labor problem. President Bill Clinton’s Executive Order No. 13,126 prohibits federal agencies from buying products made by child labor. Exec. Order No. 13,126, 3 C.F.R. 195 (2000). The original list of products does not include cocoa, but the Department of Labor has since announced that it is considering whether to include cocoa from Côte d’Ivoire on a future list of banned items under the Executive Order. See Notice of Initial Determination Updating the List of Products Requiring Federal Contractor Certification as to Forced/Indentured Child Labor Pursuant to Executive Order 13126, 74 Fed. Reg. 46,794, 46,796 (Sept. 11, 2009). The Department of Labor is receiving public comments before publishing the final determination updating the list of banned goods. *Id.*

81. Thomas McInerney, *Putting Regulation Before Responsibility: Towards Binding Norms of Corporate Social Responsibility*, 40 CORNELL INT’L L.J. 171, 182 (2007).

82. “Rather than legislate to eliminate exploitation at home and abroad, many administrations, including that of the United States, preferred to encourage multinational companies to adopt voluntary undertakings on responsibility for the labour standards of their suppliers and business partners.” Kearney, *supra* note 46, at 208. These voluntary initiatives followed naturally from the popularization of the deregulation and free market ideas of the 1980s. *Id.*; see also Ruth Mayne, *Regulating TNCs: the Role of Voluntary and Governmental Approaches*, in REGULATING INTERNATIONAL BUSINESS: BEYOND LIBERALIZATION 235, 239–40 (Sol Picciotto & Ruth Mayne eds., 1999).

83. Corporate codes of conduct are public statements made by a corporation that they will respect national labor legislation and international labor standards with respect to both their own activities and the activities of their suppliers. Kearney, *supra* note 46, at 208. Corporate codes of conduct are “written statements of principles a corporation will follow regarding working conditions.” *Id.* at 209.

84. *Id.* at 209 (“[P]roliferation [of corporate codes of conduct] is a reflection of the failure of governments to implement effective labour legislation and of intergovernmental institutions, such as the [ILO], to enforce internationally agreed basic minimum labour standards around the world.”).

attention, which led many corporations to adopt corporate codes of conduct.⁸⁵ Because many corporate codes of conduct explicitly reference international law and standards,⁸⁶ government and NGOs viewed voluntary initiatives as a means “to apply sometimes-latent international legal prescriptions directly to corporations.”⁸⁷ They also believed that voluntary initiatives would fill regulatory gaps by encouraging compliance with the “spirit” of traditional regulatory laws.⁸⁸

Corporate leaders appreciated the potential public benefits of adopting corporate codes of conduct and other voluntary initiatives—the so-called “business case” for corporate social responsibility.⁸⁹ According to the reasoning under the “business case,” corporations should adopt codes of conduct to project a good image to the public, which, in turn, will translate into improved sales and profitability.⁹⁰ Because a bad reputation will have the opposite effect on profits, corporations should voluntarily assume obligations to correct violations when scandals surface.⁹¹

Corporations also embraced voluntary initiatives because they saw traditional regulatory schemes as too rigid since they are applied uniformly without regard to conditions specific to different corporations.⁹² Other benefits of voluntary initiatives advanced by proponents from both the public (government and NGOs) and the private sectors include: promotion of dialogue among various stakeholders,⁹³ better information on

85. Mayne, *supra* note 82, at 240 (“The unwillingness or inability of governments to develop binding international rules setting standards for TNCs also enhanced the role of NGOs in calling attention to commercial abuse or injustice.”).

86. For example, the Protocol explicitly incorporates ILO Convention 182 standards regarding “the worst forms of child labor.” HARKIN-ENGEL PROTOCOL, *supra* note 37; *see infra* note 116 and accompanying text.

87. McNerney, *supra* note 81, at 172. “[V]oluntary . . . initiatives seek to create an international-regulatory framework that applies directly to [corporations], bypassing the state.” *Id.* at 189; *see also* Kearney, *supra* note 46, at 208 (“Corporate codes of conduct, in effect, have privatized the implementation of national labour legislation and the application of international labour standards.”).

88. *See* Wouters & Chanet, *supra* note 45, at 272. “In some cases, corporations may be expected to do more than the law literally requires and, at the very least, not take advantage of its loopholes.” *Id.* at 266.

89. DAVID VOGEL, *THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY* 16–17, 19 (2005); Kearney, *supra* note 46, at 208.

90. *See* MAMIC, *supra* note 60, at 26; McNerney, *supra* note 81, at 184.

91. *See* McNerney, *supra* note 81, at 184. According to the business case, bad publicity can undo the benefits of advertising and negatively affect stock prices. Kearney, *supra* note 46, at 208.

92. *See* Editorial, *Voluntary Initiatives: Improving Environmental Performance and Helping Achieve Sustainability*, 21 *INDUSTRY & ENVIRONMENT* (1998), <http://www.unep.fr/media/review/vol21no1-2/vol21no1-2.htm#editorial>.

93. *See id.*

best practices,⁹⁴ flexibility,⁹⁵ promotion of creative solutions,⁹⁶ and faster implementation than traditional regulation.⁹⁷

Although codes of conduct predominated in the beginning stages of corporate social responsibility, multi-stakeholder initiatives have emerged in recent years,⁹⁸ with the Protocol as a prime example. These multi-stakeholder initiatives “involve[] a range of actors . . . other than the [corporations] themselves,” including NGOs, labor organizations, investors, and other interested stakeholders who encourage corporations to set and comply with core labor standards, for example.⁹⁹ The premise of most multi-stakeholder initiatives is that, though ultimately adopted by the corporations voluntarily, all actors play a part in decision making, including the proposal, implementation, and enforcement of standards.¹⁰⁰

B. Pitfalls of the Voluntary Approach to Regulating TNCs

For voluntary initiatives to be effective, one assumes that economic incentives will encourage corporations to comply with their provisions.¹⁰¹ The “business case” for corporate social responsibility necessarily relies on consumer behavior and on consumers being informed of the practices of corporations.¹⁰² While some studies establish a link between a corporation’s socially responsible behavior and its profits,¹⁰³ there is no

94. *See id.*

95. *See* Kearney, *supra* note 46, at 209 (“[C]orporate codes of conduct . . . may be the catalyst that will force governments to examine new mechanisms for the enforcement of workers’ rights.”); *see also* James A. Paul & Jason Garred, *Making Corporations Accountable: A Background Paper for the United Nations Financing for Development Process* 6 (working paper, Dec. 2000), available at <http://www.worldsummit2002.org/publications/corporationaccount.pdf> (“[V]oluntary codes can be adopted more swiftly and are more ‘flexible’ than regulatory rules in a rapidly evolving global marketplace.”).

96. *Voluntary Initiatives*, *supra* note 92.

97. *Id.*; Paul & Garred, *supra* note 95, at 6.

98. “[M]ultistakeholder initiatives have emerged as one of the dominant regulatory approaches in recent years.” Peter Utting, *Regulating Business via Multistakeholder Initiatives: A Preliminary Assessment*, in *VOLUNTARY APPROACHES TO CORPORATE RESPONSIBILITY: READINGS AND A RESOURCE GUIDE* 61, 61 (2002), available at [http://www.un-ngls.org/orf/documents/publications.en/develop.dossier/dd.07%20\(csr\)/Section%20II.pdf](http://www.un-ngls.org/orf/documents/publications.en/develop.dossier/dd.07%20(csr)/Section%20II.pdf).

99. MAMIC, *supra* note 60, at 27.

100. Utting, *supra* note 98, at 62, 65.

101. *See* McInerney, *supra* note 81, at 184; Wouters & Chanet, *supra* note 45, at 274.

102. *See* Wouters & Chanet, *supra* note 45, at 274.

103. *See* Vogel, *supra* note 89, at 29. *But see* VOGEL, *supra* note 89, at 30–33 (stating criticisms of these studies). Vogel writes, “[T]he connection between [corporate socially responsible behavior] and financial performance has not been established and . . . neither academics nor practitioners should rely on the research results [finding such a connection] because [the studies] are noncomparable.” *Id.* at 32.

decisive conclusion that consumers in fact act differently based on particular knowledge of a corporation's business practices.¹⁰⁴

Even accepting that consumer behavior predictably affects stock prices and corporate profitability, corporations will only minimally perform if motivated purely by economic rationality.¹⁰⁵ Real compliance requires effective enforcement tools, yet many codes of conduct have “weak[] . . . mechanisms for monitoring and inducing compliance.”¹⁰⁶ Voluntary initiatives have often been criticized as “window dressing” public relations¹⁰⁷ since companies can fail to achieve substantial results even while outwardly committing themselves to the aims of their corporate codes of conduct.¹⁰⁸ Many do not incorporate even the minimum obligations required by national and international labor standards.¹⁰⁹ Further, corporations can write voluntary codes with such vague and general terms as to make them practically ineffective.¹¹⁰ All of the above features lead to a general lack of effectiveness of many voluntary initiatives.

C. Moving Beyond the Voluntary Initiative/Traditional Regulation Debate

Although voluntary initiatives and traditional regulation appear mutually exclusive, recent commentators have moved beyond arguing for one over the other. Instead, these commentators argue that voluntary initiatives and traditional regulation should complement each other.¹¹¹

104. “While many studies report a positive relationship between ethics and profits, some find a negative relationship, and still others find the relationship to be either neutral or mixed.” *Id.* at 29.

105. McInerney, *supra* note 81, at 184 (“Even conceding that certain [companies] might be responsive to improved stock price or customer pressures, these factors are unlikely to generate a high level of compliance. . . . [I]t is unlikely that companies will be driven to achieve more than a minimum of social responsibility.”).

106. Picciotto, *supra* note 49, at 16. “Usually [nonbinding codes] envisage only some kind of general review procedure, and they normally exclude the possibility of complaints about the behaviour of specific [corporations].” *Id.* at 16–17. “Few [voluntary initiatives] include meaningful monitoring mechanisms or disclosure requirements designed to enhance compliance.” Bunn, *supra* note 55, at 1291. “[Voluntary codes] do not generally include complaint procedures, nor any basis for legal claims or redress, and thus provide little scope for individuals to be compensated for corporate violations that cause harm.” Paul & Garred, *supra* note 95, at 6.

107. Utting, *supra* note 98, at 69.

108. McInerney, *supra* note 81, at 183 (“[C]ompanies can have the correct process in place while failing to achieve substantive performance criteria.”).

109. Kearney, *supra* note 46, at 209.

110. Paul & Garred, *supra* note 95, at 6 (“[C]odes are often vague statements of principle that cannot provide reliable guidelines for behavior in concrete situations.”).

111. See, e.g., IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 3 (1992); DEBORAH DOANE & ALISON HOLDER, WHY CORPORATE SOCIAL RESPONSIBILITY IS FAILING CHILDREN 1 (2007), available at <http://corporate-responsibility.org/why->

Voluntary initiatives are not sufficient on their own to regulate corporate labor activities and must be bolstered by state regulation and enforcement.¹¹²

IV. EFFECTIVENESS OF THE PROTOCOL

The Protocol, a voluntary, nonbinding, and nonlegislative document, commits the chocolate industry to end the abusive child labor practices found in its West African cocoa production chain through six steps, culminating in a certification system.¹¹³ The chocolate industry completed its obligations under the first five steps of the Protocol; yet, the final deadlines elapsed without a viable certification system in place.¹¹⁴ To those who hoped that a certification system would guarantee that chocolate products imported into the United States from West Africa were not produced with child labor, the Harkin-Engel Protocol has proved to be a failure.¹¹⁵

A. *The Six Steps of the Protocol*

The ultimate objective of the Protocol is to ensure that “[c]ocoa beans and their derivative products . . . [are] grown and processed in a manner that complies with . . . [ILO] Convention 182.”¹¹⁶ The Protocol outlines an action plan with six steps to eliminate the “worst forms of child labor”¹¹⁷ on West African cocoa farms: (1) publicly commit to end child labor in the supply chains of chocolate manufacturers;¹¹⁸ (2) create by October 2001 an advisory group to investigate labor practices on West African farms and

corporate-social-responsibility-is-failing-children-2007 (“[V]oluntary CSR initiatives are not ends in themselves: specific regulatory actions can, and should, *strengthen* voluntary CSR commitments, reinforcing ethical values in a competitive market.”); McInerney, *supra* note 81, at 172 (“Voluntary CSR measures should supplement not supplant state regulation.”); Wouters & Chanet, *supra* note 45, at 266 (“Voluntary and regulatory approaches should therefore not be seen as mutually exclusive, but rather as complementary.”).

112. See sources cited *supra* note 111.

113. HARKIN-ENGEL PROTOCOL, *supra* note 37.

114. See *infra* notes 147, 149 and accompanying text.

115. See *infra* Part IV.B.

116. HARKIN-ENGEL PROTOCOL, *supra* note 37, at 1 (“Objective”). Like many voluntary initiatives, the Protocol incorporates international labor standards—in this case, ILO Convention 182.

117. See *supra* note 6 for the definition of the “worst forms of child labor” under ILO Convention 182.

118. HARKIN-ENGEL PROTOCOL, *supra* note 37, at 2 (“Public Statement of Need for and Terms of an Action Plan”). Further, the industry promises to contribute “significant resources” to tackle the problem. *Id.*

create by December 2001 a consultative group to propose remedies;¹¹⁹ (3) sign a joint statement on child labor by December 2001;¹²⁰ (4) establish a joint action program to research, enforce standards, and establish independent monitoring by May 1, 2002;¹²¹ (5) form a joint international foundation by July 2002 to oversee efforts;¹²² and (6) develop a certification system by July 1, 2005 that assures U.S. consumers that cocoa beans and cocoa products are not produced with child labor.¹²³ The Protocol extends an explicit invitation to the ILO to “assess[], monitor[], report[] on, and remedy[]” the problem of child labor on West African cocoa farms because of its expertise in dealing with labor issues.¹²⁴ The Protocol also stipulates that the chocolate industry will partner with local and international governments, NGOs, and consumers in implementing the Protocol.¹²⁵

The chocolate industry announced on October 1, 2001 that it acknowledged responsibility for the child labor practices in its supply chains, in fulfillment of the first step of the Protocol.¹²⁶ The public widely welcomed the Protocol as an unprecedented effort to accept responsibility for child labor abuses across an entire industry.¹²⁷

119. *Id.* (“Formation of Multi-Sectoral Advisory Groups”).

120. *Id.* (“Signed Joint Statement on Child Labor to be Witnessed at the ILO”). In addition to committing signatories to end the worst forms of child labor on West African cocoa farms, the joint statement will also “identify positive developmental alternatives for the children removed from the worst forms of child labor.” *Id.*

121. *Id.* (“Memorandum of Cooperation”). The Protocol states that the memorandum of cooperation, which will establish the joint action program of research, shall be “binding” on stakeholders. *Id.*

122. *Id.* (“Establishment of Joint Foundation”). These efforts include organizing field projects and establishing a clearinghouse of best practices. *Id.*

123. *Id.* at 3 (“Building Toward Credible Standards”). “[T]he industry in partnership with other major stakeholders will develop and implement credible, mutually-acceptable, voluntary, industry-wide standards of public certification . . . that cocoa beans and their derivative products have been grown and/or processed without any of the worst forms of child labor.” *Id.*

124. *Id.* at 1 (“ILO Expertise”). Therefore, the Protocol exemplifies a true multi-stakeholder initiative. *See supra* note 99 and accompanying text.

125. HARKIN-ENGEL PROTOCOL, *supra* note 37, at 1 (“Responsibility”).

126. *See* Sumana Chatterjee, *Chocolate Industry Accepts Responsibility for Child Labor Practices*, KNIGHT RIDDER WASH. BUREAU, Sept. 30, 2001.

127. *See, e.g., id.* (“Experts say it will be the first time an agricultural industry has taken responsibility for its product from harvesting to market.”); *see also* *Hearing to Collect Information to Assist in the Development of the List of Goods from Countries Produced by Child Labor or Forced Labor*, Department of Labor (May 28, 2008) (statement of Larry Graham, President, Nat’l Confectioners Ass’n), <http://www.dol.gov/ilab/programs/octf/pdf/20080423f.pdf> [hereinafter Graham testimony] (“It is fair to say that no other industry had ever attempted to report on or address labor conditions across an entire agricultural sector in the developing world.”). The Department of Labor conducted a public hearing May 28, 2008 “for the purpose of gathering factual information regarding the use of child labor and forced labor worldwide in the production of goods” and “pursuant to section 105(b)(1) of the Trafficking Victims Protection Reauthorization Act” Notice of Public Hearing

Under the second step of the Protocol, the United States Department of Labor (DOL) commissioned the International Institute of Tropical Agriculture (IITA)¹²⁸ to determine the extent of child labor practices on West African cocoa farms.¹²⁹ The results of the 2002 IITA study concluded that: (1) about 12,000 children working on the farms in Côte d'Ivoire had no family ties;¹³⁰ (2) 2,100 children in Côte d'Ivoire were recruited to work through intermediaries;¹³¹ (3) children were involved in the hazardous tasks of applying pesticides, transporting heavy loads, and using machetes;¹³² (4) about 64% of the working children were below the age of 14;¹³³ and (5) only about 34% of children working on the cocoa farms in Côte d'Ivoire attended schools.¹³⁴ The study's findings also demonstrate that the child labor problem is a complex one related to poverty and government instability.¹³⁵

In furtherance of the third step of the Protocol, the chocolate industry and several NGOs signed a joint statement before the ILO on November 30, 2001 reaffirming their support of the Protocol.¹³⁶ More than a restatement of obligations under the Protocol, the joint statement also acknowledges certain factors contributing to the child labor problem,

To Collect Information To Assist in the Development of the List of Goods From Countries Produced by Child Labor or Forced Labor, 73 Fed. Reg. 21,985–87 (Apr. 23, 2008).

128. The International Institute of Tropical Agriculture is an NGO whose mission is to “enhance food security and improve livelihoods in Africa” through research and development. IITA, <http://www.iita.org> (follow “Research for Development” hyperlink) (last visited May 10, 2010).

129. See IITA STUDY, *supra* note 21, at 4–5. The chocolate industry, the Department of Labor, and United States Agency for International Development (USAID) paid for the study and released results in August 2002. IITA STUDY, *supra* note 17, at 1, 5. Researchers visited 203 villages in Nigeria, Cameroon, and Ghana and administered surveys. *Id.* at 9 tbl.1a. In Côte d'Ivoire, researchers visited 250 localities and conducted 114 interviews. *Id.* at 10 tbl.1b.

130. IITA STUDY, *supra* note 17, at 15 tbl.3 (suggesting that the children were trafficked as slaves).

131. *Id.* (again, suggesting that the children were trafficked).

132. *Id.* at 16.

133. IITA SUMMARY OF FINDINGS, *supra* note 15, at 4. Additionally, about 59% of the children working on cocoa farms are boys. *Id.*

134. *Id.* at 22.

135. *Id.*

136. Signatories to the joint statement are: Association of European Union Chocolate, Biscuit and Confectionery Industries of the European Union (CAOBISCO); Chocolate Manufacturers Association; Chocolate Manufacturers Association of Canada; Cocoa Association of London; Cocoa Merchants Association of America; European Cocoa Association; International Cocoa Organization; International Office of Cocoa, Chocolate and Sugar Confectionery Industries; World Cocoa Foundation; Child Labor Coalition; Free The Slaves; International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers Associations; and National Consumers League. Press Release, Global Exchange, Organizations Recognize Urgent Need to Eliminate Child Labour in Violation of ILO Convention (Nov. 30, 2001), available at <http://www.globalexchange.org/campaigns/fairtrade/cocoa/statement113001.html> [hereinafter Global Exchange Press Release].

namely, the poverty facing local farmers and the lack of access to education for children.¹³⁷ The joint statement further commits the signatories to eliminate practices in violation of ILO Convention 29, concerning forced labor,¹³⁸ and expands on the ILO's role in implementing the Protocol.¹³⁹

As required by step four of the Protocol, the chocolate industry joined with trade unions and NGOs to sign a binding Memorandum of Cooperation (Memorandum) on May 1, 2002.¹⁴⁰ The Memorandum outlines the structure of the joint international foundation created under step five of the Protocol.¹⁴¹ The joint international foundation, which was created in July 2002 and called the International Cocoa Initiative—Working Towards Responsible Labour Standards for Cocoa Growing (ICI),¹⁴² devises monitoring and verification standards in collaboration

137. *Id.* (“We also share the view that practices in violation of ILO Conventions 182 . . . and 29 . . . result from poverty and a complex set of social and economic conditions often faced by small family farmers and agricultural workers, and that effective solutions to address these violations must include action by appropriate parties to improve overall labour standards and access to education.”).

138. Convention Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55 (entered into force May 1, 1932). This is in addition to ILO Convention 182 already incorporated into the Protocol. *See supra* note 116 and accompanying text.

139. “ILO will play an important role in identifying positive strategies, including developmental alternatives for children engaged in the worst forms of child labour and adults engaged in forced labour in the growing and processing of cocoa beans and their derivative products.” Global Exchange Press Release, *supra* note 136.

140. Press Release, CAOBISCO, Global Chocolate, Cocoa Industry Provides Update on Efforts to Address Abusive Child Labour in West African Cocoa Sector: Completes Key Protocol Milestone; Working with Stakeholders to Develop Pilot Programmes to Launch During Next Harvest (May 3, 2002), *available at* http://www.caobisco.com/doc_uploads/moc_press_release.pdf. Signatories to the binding Memorandum of Cooperation are: CAOBISCO; Chocolate Manufacturers Association; National Confectioners Association; Confectionery Manufacturers Association of Canada; International Confectionery Association; Cocoa Merchants Association of America; The Federation of Cocoa Commerce, Ltd.; European Cocoa Association; World Cocoa Foundation; International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers Associations; Free The Slaves; Child Labour Coalition; and the National Consumers League.

141. BUSINESS AND HUMAN RIGHTS: A COMPILATION OF DOCUMENTS 622–24 (Radu Mares ed., 2004). The purpose of the Joint International Foundation is to “support[] field practices and creat[e] a clearinghouse of best practices.” *Id.* at 624.

142. The joint international foundation is headquartered in Switzerland. Press Release, ILO, ILO Welcomes New Foundation to Eliminate Abusive Child and Forced Labour Practices in Cocoa Farming (July 1, 2002), *available at* http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang—en/wcms_007801/index.htm. The Board of the ICI consists of 18 industry and nonindustry members, with one copresident from each class. Current members of the ICI Board are: Barry Callebaut; Cadbury Schweppes; Dignité (a trade union based in Côte d’Ivoire); Education International; European Cocoa Association; Ferrero; Free the Slaves; Global March Against Child Labour; Hershey Foods; International Confectionery Association; International Trade Union Confederation; International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers Associations; Kraft Foods; Mars Incorporated; Nestlé; US National Consumers League; WAO Afrique; and Toms. International Cocoa Initiative, Structure, Membership and

with local governments in West Africa to end child labor practices on cocoa farms.¹⁴³

B. Failures in Implementing the Protocol

Despite these developments in fulfilling the first five steps, the chocolate industry failed to accomplish the sixth step and ultimate objective of the Protocol in developing a reliable and credible certification system for imported cocoa beans and cocoa products.¹⁴⁴ Industry leaders claim that they have made significant progress in establishing a certification system, yet consumers are still no more assured that their chocolate products are not produced by child labor than they were in 2001.¹⁴⁵ The failures of the Protocol exemplify the ineffectiveness of voluntary initiatives in general.

1. Missed Deadlines

First, the failure of the chocolate industry to even meet the Protocol's stated deadlines is an indication of its general ineffectiveness. The CMA assured the public that it would meet its July 1, 2005 deadline.¹⁴⁶ Despite

Financing, <http://www.cocoainitiative.org/structure-membership-and-financing.html> (last visited May 10, 2010).

143. In 2003, the ICI launched its first field programs in several communities in Ghana and Côte d'Ivoire, working with local farmers to create and implement several initiatives; these include training programs to sensitize community members to the concept of exploitative child labor, construction of schools, and student enrollment projects. INT'L LABOR RIGHTS FUND, REPORT ON COCOA AND FORCED CHILD LABOR 2 (2006) [hereinafter ILRF REPORT], available at <http://www.laborrights.org/files/COCOA06Critique.pdf>. By 2008, the ICI had ongoing programs in 104 communities in Côte d'Ivoire and 119 communities in Ghana. Press Release, 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: Protocol Drives Number of Achievements; Industry Outlines Next Steps (June 16, 2008), available at <http://harkin.senate.gov/pr/p.cfm?i=299399> [hereinafter Harkin, Engel Joint Statement 2008]. The ICI considers the pilot programs to be more successful in Ghana than in Côte d'Ivoire, largely due to the destabilization caused by the recent Ivorian civil war. ILRF REPORT, *supra*. For an account of the complex causes of the Ivorian civil war from various perspectives, see PERSPECTIVES ON CÔTE D'IVOIRE: BETWEEN POLITICAL BREAKDOWN AND POST-CONFLICT PEACE (Cyril I. Obi ed., 2007).

144. See *infra* Part IV.B.1.

145. See *infra* Part IV.B.2.

146. Specifically, the CMA stated, "The industry will complete development of effective, credible standards of certification for cocoa farming by July 1, 2005—as required by the Protocol." Press Release, CAOBISCO, Industry Firmly Committed to "Protocol": Will Meet Deadlines (Feb. 14, 2005), available at <http://www.caobisco.com/article.asp?artID=24>. The CMA pointed to monitoring programs underway in Ghana and Côte d'Ivoire and stated that development of the certification process would be completed by the deadline with the first certification report released in early 2006. *Id.*

these firm statements from the chocolate industry, it failed to meet the deadline.¹⁴⁷ The industry renegotiated an extended deadline for July 1, 2008 with the inclusion of new terms: it promised to monitor and certify only 50% of cocoa producing farms in Côte d'Ivoire and Ghana, rather than 100% of cocoa farms.¹⁴⁸ The July 1, 2008 deadline came and went the way of the original deadline, with the few media reports on the matter announcing another failure by the chocolate industry.¹⁴⁹ Again, the industry negotiated an extended deadline for a completed certification process—this time for the end of 2010.¹⁵⁰

2. *Lack of Substantive Progress*

Second, in 2008, a new report detailed the lack of progress that the chocolate industry has achieved in the seven years since the Protocol was signed.¹⁵¹ The study's major findings include: (1) children continue to do

147. See Press Release, Joint Statement from U.S. Senator Tom Harkin, Representative Eliot Engel, and the Chocolate/Cocoa Industry on Efforts to Address the Worst Forms of Child Labor in Cocoa Growing Protocol Work Continues (July 1, 2005), available at <http://harkin.senate.gov/pr/p.cfm?i=240245> [hereinafter Harkin, Engel Joint Statement 2005].

148. *Id.* (“While the July 1, 2005 deadline will not be fully met, industry has assured Sen. Harkin and Rep. Engel that it is fully committed to achieving a certification system, which can be expanded across the cocoa-growing areas of West Africa and will cover 50% of the cocoa growing areas of Côte d'Ivoire and Ghana within three years.”). Later, Senator Harkin and Representative Engel urged the industry to meet the July 1, 2008 deadline and reminded them that the ultimate goal is to ensure 100% of the cocoa growing sector—the original commitment under the Protocol. Letter from Tom Harkin, U.S. Senator, & Eliot Engel, U.S. Representative, to John Claringbould, Chairman, Global Issues Group, Mars, Inc. (Mar. 19, 2008), available at <http://www.caobisco.com/article.asp?artID=48>.

149. See, e.g., Olaolu Olusina, *West Africa: Child Labour in Cocoa Industry*, THIS DAY, Aug. 19, 2008, available at <http://allafrica.com/stories/200808200567.html>.

150. Harkin, Engel Joint Statement 2008, *supra* note 143.

151. PAYSON CTR. FOR INT'L DEV. & TECH., 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 I (2008), available at <http://childlabor-payson.org/FINAL%20Second%20Annual%20Report.pdf> [hereinafter PAYSON CTR. SECOND REPORT]. After the missed July 1, 2005 deadline, the Department of Labor hired the Payson Center for International Development and Technology at Tulane University (Payson Center) to monitor progress toward a certification system. *Id.* at 13. The Payson Center released the Second Annual Report in September, shortly after the July 1, 2008 deadline passed. The first report was released in October 2007. See PAYSON CTR. FOR INT'L DEV. & TECH., TULANE UNIV., FIRST ANNUAL REPORT: OVERSIGHT OF PUBLIC AND PRIVATE INITIATIVES TO ELIMINATE THE WORST FORMS OF CHILD LABOR IN THE COCOA SECTOR IN CÔTE D'IVOIRE AND GHANA I (2007), available at <http://childlabor-payson.org/FirstAnnualReport.pdf>. A third report was released in September 2009. PAYSON CTR. FOR INT'L DEV. & TECH., TULANE UNIV., THIRD 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 I (2009) [hereinafter PAYSON CTR. THIRD REPORT]. Although reporting that some progress has been made toward a certification system, the report confirms the continued prevalence of child labor on West African cocoa farms. See *id.* at 11–12.

hazardous work on cocoa farms in Ghana and Cote d'Ivoire;¹⁵² (2) children are still trafficked into Côte d'Ivoire from neighboring countries;¹⁵³ and (3) the majority of children living in cocoa farm communities have not had direct exposure to community development projects.¹⁵⁴ The report does acknowledge some limited progress, especially the pressure that the media attention put on governments in Ghana and Côte d'Ivoire to address the worst forms of child labor in their nations,¹⁵⁵ including the adoption of ILO Convention 182.¹⁵⁶

3. *Industry Redefining Its Obligations Under the Protocol*

Third, a major concern for NGOs and trade unions has been the industry's definition of "certification" that will satisfy the objective of the Protocol. Certification has always been the essential component of the Protocol because it will encourage long-term change in labor practices on cocoa farms as well as inform consumers whether their chocolate products are child-labor free.¹⁵⁷ But industry representatives began making statements qualifying the chocolate industry's commitment to create a certification system under the Protocol.¹⁵⁸ Rather than certifying that chocolate products are child-labor free, the industry is simply gathering data "to determine the prevalence of abusive child labor" practices on the cocoa farms.¹⁵⁹

According to the International Cocoa Verification Board (ICVB), which was established in 2007 to verify the certification process, the

152. These tasks include "the use of tools and equipment, carrying heavy loads, and exposure to environmental hazards" such as applying pesticides and other chemicals. "Some of these activities . . . [classify] as worst forms of child labor." PAYSON CTR. SECOND REPORT, *supra* note 151, at 10.

153. *Id.*

154. However, the report clarifies that these children, 95% in Ghana and 98% in Côte d'Ivoire, may have benefitted "indirectly" from these programs "and without their knowledge." *Id.*

155. *Id.*

156. *See supra* note 9 and accompanying text.

157. "The development of a system of public certification is a key part of the Harkin-Engel Protocol." Harkin, Engel Joint Statement 2008, *supra* note 143.

158. Adrienne Fitch-Frankel, the Fair Trade Director of Global Exchange, states that a Department of Labor report calls the chocolate industry's reworked definition of "certification" under the Protocol a "misnomer": "What industry is currently pursuing under its own definition of certification is not truly certification that there is no abusive child labour. It is a survey to determine the prevalence of abusive child labour." Olusina, *supra* note 149.

159. Adrienne Fitch-Frankel, *Tainted Love? Chocolate-Lovers: Cocoa Industry Set to Be a Heartbreaker on July 1, 2008*, June 27, 2008, <http://www.commondreams.org/archive/2008/06/27/9926>. Adrienne Fitch-Frankel of Global Exchange states, "It is simply sad that the chocolate manufacturers have redefined the word 'certification' to mean 'data collection.'" Olusina, *supra* note 149.

“certification system” to be established will consist of “monitoring, data analysis, reporting, and activities to address the worst forms of child labor,” and “is not a certification label attesting to specific product attributes.”¹⁶⁰ Instead, the certification reports will present compilations from studies.¹⁶¹ Critics have argued that this is not what the Protocol contemplated, and the industry is redefining “certification” to mean “data collection.”¹⁶² The Payson Center for International Development and Technology at Tulane University (Payson Center), hired by the Department of Labor after the missed July 1, 2005 deadline to monitor progress toward a certification system,¹⁶³ criticized the industry’s definition of certification in its Third Annual Report.¹⁶⁴

Furthermore, these certification surveys apply only to a limited area. Pilot programs and data collection are only currently implemented in Côte d’Ivoire and Ghana—not in all of West Africa’s cocoa-growing regions.¹⁶⁵ Therefore, efforts under the Protocol do not exhaustively investigate the presence of child labor in cocoa supply chains.

4. *No Penalties for Industry’s Lack of Compliance and Transparency*

Fourth, the very voluntariness of the agreement contributes to the substantive shortcomings of the Protocol. Although voluntary initiatives can be useful to a certain extent,¹⁶⁶ the Protocol exemplifies their limitations. For instance, reliance on voluntary initiatives diverts attention away from effective state regulation.¹⁶⁷ Most voluntary initiatives provide no penalties for noncompliance, and corporations cannot be compelled to be completely transparent about their labor practices.¹⁶⁸ For example, in 2008, the chocolate industry prevented a representative from the International Labor Rights Fund from attending a multi-stakeholder

160. INT’L COCOA VERIFICATION BD., VERIFICATION OF CERTIFICATION ACTIVITIES IN WEST AFRICAN COCOA SECTOR 4 (2008), available at <http://www.cocoaverification.net/Docs/ICVB%20RFP%20for%20Verifiers.pdf> (quoting Harkin, Engel Joint Statement 2005, *supra* note 147).

161. *Id.*

162. See, e.g., Fitch-Frankel, *Tainted Love?*, *supra* note 159; see also *supra* note 159.

163. See *supra* note 151.

164. PAYSON CTR. THIRD REPORT, *supra* note 151, at 13 (“This approach to ‘certification’ avoids establishing measurable targets with clearly defined indicators against which one could empirically demonstrate improvement.”).

165. See INT’L COCOA VERIFICATION BD., *supra* note 160, at 3.

166. See *supra* Part III.A.

167. The diversion is demonstrated by the fact that the chocolate industry avoided pending legislation that would have required a slave-free label on their products by agreeing to voluntarily remedy the child labor problem. See *supra* Part I; see also *infra* note 214.

168. See *supra* note 106 and accompanying text.

meeting about its global supply chains.¹⁶⁹ The lack of transparency on the part of chocolate manufacturers is further exemplified by Hershey's refusal to disclose a list of its cocoa suppliers, as proposed through a shareholder resolution.¹⁷⁰

5. *Underinclusiveness of Protocol's Provisions*

Fifth, notably absent from the Protocol is a mandate to implement ILO Convention 138, which addresses the minimum age of laborers.¹⁷¹ Even if the worst forms of child labor under ILO Convention 182 are eliminated from global supply chains, other labor violations should prevent a child-labor-free certification for cocoa from West Africa.

The Protocol also fails to address in a meaningful way the underlying causes of child labor in the global supply chain of chocolate manufacturers—namely, the poverty of local farmers.¹⁷² Rather than pay a living wage to local farmers, and perhaps pass on the additional costs to consumers, chocolate manufacturers have shifted the responsibility to local farmers, subjecting them to sporadic survey and ICI programs.¹⁷³

V. NEW EFFORTS TO COMBAT CHILD LABOR: CONSULTATIVE GROUP ESTABLISHED BY FOOD, CONSERVATION, AND ENERGY ACT OF 2008

A. *Section 3205 of Food, Conservation, and Energy Act: "Consultative Group to Eliminate the Use of Child Labor and Forced Labor in Imported Agricultural Products"*

In 2008, Congress revisited the problem of child labor practices within the supply chains of TNCs when it included Section 3205¹⁷⁴ in the Food, Conservation, and Energy Act, commonly referred to as the 2008 Farm

169. The chocolate industry claimed an on-going lawsuit against certain chocolate manufacturing companies as the reason for exclusion, although that case had been dismissed a year earlier. See Posting of Bama Athreya to Labor is Not a Commodity, http://laborrightsblog.typepad.com/international_labor_right/2008/06/chocolate-wars.html#more (June 16, 2008).

170. See Tom Dochat, *'Transparency' Sought About Cocoa Suppliers, Shareholder Seeks Info on Hershey Suppliers*, THE PATRIOT-NEWS, Apr. 2, 2006, at A01.

171. Convention Concerning Minimum Age for Admission to Employment, June 26, 1973, 1015 U.N.T.S. 298; see also INT'L LABOR RIGHTS FUND, *supra* note 143, at 1.

172. Critics have claimed that the fundamental flaw of the Protocol is that it does not "call for concrete steps to ensure that farmers are getting a fair price for their product." INT'L LABOR RIGHTS FUND, *supra* note 143, at 1.

173. *Id.* at 1, 3.

174. Titled "Consultative Group to Eliminate the Use of Child Labor and Forced Labor in Imported Agricultural Products."

Bill.¹⁷⁵ Section 3205(b) establishes a *Consultative Group to Eliminate the Use of Child Labor and Forced Labor in Imported Agricultural Products*,¹⁷⁶ and its duties are delineated under Section 3205(c).¹⁷⁷ Section 3205(c)(1) directs the consultative group to

develop . . . recommendations relating to a standard set of practices for independent, third-party monitoring and verification for the production, processing, and distribution of agricultural products or commodities to reduce the likelihood that [these products] imported into the United States are produced with the use of forced labor or child labor.¹⁷⁸

The consultative group will submit their recommendations by June 2010 to the Secretary of Agriculture,¹⁷⁹ who will release the resulting guidelines for public comment not more than a year after receipt of recommendations from the consultative group.¹⁸⁰

Sections 3205(d) and (e) provide for the structural organization of the consultative group. The group will include thirteen members from the agricultural, labor, and state departments, and the private and public sectors,¹⁸¹ and will be chaired by a representative of the United States

175. Food, Conservation, and Energy Act of 2008 Pub. L. No. 110-234, 122 Stat. 923 (2008).

176. Pub. L. No. 110-246 § 3205(b), 122 Stat. 1838, 1838 (2008). Section 3205(a) defines “child labor” by incorporating the definition of the “worst forms of child labor” under ILO Convention 182. § 3205(a); *see supra* note 6. Subsection (a) also defines “forced labor” by referencing the Trafficking Victims Protection Act of 2000. § 3205(a)(3); *see* Pub. L. No. 109-164, 119 Stat. 3558 (2006).

177. § 3205(c).

178. § 3205(c)(1).

179. *Id.*

180. § 3205(c)(2).

181. § 3205(d):

- (1) 2 members shall represent the Department of Agriculture, as determined by the Secretary;
- (2) 1 member shall be the Deputy Under Secretary for International Affairs of the Department of Labor;
- (3) 1 member shall represent the Department of State, as determined by the Secretary of State;
- (4) 3 members shall represent private agriculture-related enterprises, which may include retailers, food processors, importers, and producers, of whom at least 1 member shall be an importer, food processor, or retailer who utilizes independent, third-party supply chain monitoring for forced labor or child labor;
- (5) 2 members shall represent institutions of higher education and research institutions, as determined appropriate by the Bureau of International Labor Affairs of the Department of Labor;
- (6) 1 member shall represent an organization that provides independent, third-party certification services for labor standards for producers or importers of agricultural commodities or products; and
- (7) 3 members shall represent organizations described in section 501(c)(3) of the Internal Revenue Code of 1986 that have expertise on the issues of international child labor and do not

Department of Agriculture (USDA).¹⁸² Under Section 3205(f), the consultative group will meet at least four times a year to develop its recommendations¹⁸³ and, under subsection (h), will submit annual progress reports.¹⁸⁴ The authority of the consultative group terminates at the end of 2012.¹⁸⁵

According to subsection (c)(2)(A) of Section 3205, adoption of the certification initiative will be voluntary, but will be used to make effective the prohibition in the Trafficking Victims Protection Reauthorization Act of 2005 (TVPRA)¹⁸⁶ against the importation of goods produced by forced or child labor.¹⁸⁷ Under Section 105(b)(2)(C) of the TVPRA, the Department of Labor (DOL) is required “to develop and make available to the public a list of goods from countries that the Bureau of International Labor Affairs has reason to believe are produced by forced labor or child labor in violation of international standards.”¹⁸⁸ Further, under Section

possess a conflict of interest associated with establishment of the guidelines issued under subsection (c)(2), as determined by the Bureau of International Labor Affairs of the Department of Labor, including representatives from consumer organizations and trade unions, if appropriate.

Id. On September 23, 2009, the Secretary of Agriculture announced the members of the consultative group. They are: Burnham John Philbrook (Chairperson), Deputy Under Secretary for Farm and Foreign Agricultural Services, U.S. Department of Agriculture; Ann Wright, Deputy Under Secretary for Marketing and Regulatory Programs, U.S. Department of Agriculture; Sandra Polaski, Deputy Undersecretary for International Affairs, U.S. Department of Labor; Michael Posner, Assistant Secretary of State for Democracy, Human Rights and Labor, U.S. Department of State; Bama Athreya, Executive Director, International Labor Rights Forum; Dorianne Beyer, Agricultural Labor Consultant, Social Accountability International; Eric Edmonds, Associate Professor of Economics, Dartmouth University; Kimberly Elliott, Senior Fellow, Center for Global Development, Visiting Fellow, Peterson Institute; Bill Guyton, President, World Cocoa Foundation; Dennis Macray, Director, Ethical Sourcing and Global Responsibility, Starbucks Coffee Co.; Edward Potter, Director, Global Workplace Rights, Coca-Cola Co.; Margaret Roggensack, Senior Advisor for Business and Human Rights, Human Rights First; and Auret Van Heerden, President and CEO, Fair Labor Association. U.S. Dep’t of Labor, Food, Conservation, and Energy Act of 2008 (“Farm Bill”): Members of Consultative Group Announced, <http://www.dol.gov/ILAB/programs/ocft/fcea.htm> (last visited May 10, 2010); Int’l Labor Rights Forum, Vilsack Names Members to Child and Forced Labor Consultative Group, <http://www.laborrights.org/stop-child-forced-labor/child-labor-free-certification-initiative/news/12124> (last visited May 10, 2010).

182. Pub. L. No. 110-246 § 3205(e) (2008).

183. § 3205(f).

184. § 3205(h).

185. § 3205(i).

186. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006) (codified as amended in scattered sections of 18, 22 and 42 U.S.C.).

187. § 3205(c)(2)(A). Under the TVPRA, the Department of Labor must “ensure that products made by forced labor and child labor in violation of international standards are not imported into the United States.” Pub. L. No. 109-164, § 105(b)(2)(E), 119 Stat. 3558, 3567 (2006).

188. § 105(b)(2)(C). On September 10, 2009, the Department of Labor included cocoa from Côte d’Ivoire, Ghana, Cameroon, Guinea, and Nigeria on its list of products believed to be produced by child or forced labor. U.S. DEP’T OF LABOR, THE DEPARTMENT OF LABOR’S LIST OF GOODS

105(b)(2)(D), the DOL must “create a standard set of practices that will reduce the likelihood that such persons will produce goods using the labor described in [105(b)(2)(C)].”¹⁸⁹

B. Lobbying Against Section 3205 of the 2008 Farm Bill

The agricultural industry’s reaction to the earliest wording of the current Section 3205¹⁹⁰ mirrored the chocolate industry’s negative response to the legislation proposed by Representative Engel after the media allegations of the child labor abuses in their production chains surfaced.¹⁹¹ Archer Daniels Midland Co. and Cargill, companies that manufacture chocolate along with other agricultural products,¹⁹² intensely

PRODUCED BY CHILD LABOR OR FORCED LABOR: REPORT REQUIRED BY THE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACTS OF 2005 AND 2008 15–16, 18 tbl.1 (2009), available at <http://www.dol.gov/ilab/programs/ocft/PDF/2009TVPRA.pdf>. In May 2008, National Confectioners Association asked that cocoa not be included on the list of products compiled under the TVPRA, citing that this

would lead to the logical question, ‘if cocoa is on the list despite the enormous resources devoted by the industry, governments and NGO partners, why mount such an effort?’ . . . If the list is to have credibility, and be consistent with its statutory purpose, cocoa should not be included.

Graham testimony, *supra* note 127. “Some of our trading partners may retaliate if a decision is made to treat imported products differently than those produced within the US and could well be viewed by our trading partners as ‘yet another effort by US agriculture’ to harm farmers in developing countries.” Letter from Chocolate Mfrs. Ass’n et al. to Senate Agric. Comm. Member (Feb. 12, 2008), available at http://www.ncpa.org/content/newsroom/2008/february/oppose_sec_3104%20_2_.pdf. For the NCA’s unhappy response to the inclusion of cocoa on the Department of Labor’s list, see Press Release, NCA, Cocoa Industry Calls on U.S Department of Labor to Recognize and Encourage Progress in Côte d’Ivoire and Ghana (Sept. 10, 2009), available at <http://www.candyusa.com/News/PRdetail.cfm?ItemNumber=1797>.

189. Pub. L. No. 109-164, § 105(b)(2)(D)(2006). The House Committee on International Relations explained the intent behind sections 105(b)(2)(C) and (b)(2)(D): “The Committee believes that public-private partnerships are essential to combat the scourge of forced and child labor and encourages such partnerships. Private industry, both domestic and foreign, must be vigilant to ensure that none of its products are created by or use imports from forced or child labor.” H.R. Rep. No. 109-317, pt. I, at 23 (2005).

190. Referred to as Section 3105, and titled “Voluntary Certification of Child Labor Status of Agricultural Imports,” the original wording of the provision called for the Secretaries of Agriculture and Labor to develop a standard set of practices to reduce the likelihood that agricultural products imported and sold in the United States were produced by child or forced labor. S. 2302, 110th Cong. § 3105(d)(2)(A) (2007). The standard set of practices would then be developed into a voluntary certification program. § 3105(d)(3). The provision included several minimum requirements for the voluntary certification program: (1) traceability and inspection across the supply chain; (2) allowance of multi-stakeholder participation; (3) onsite inspection; and (4) anonymous grievance procedure accessible by third parties. § 3105(d)(3).

191. See *supra* note 29.

192. See ADM, ADM Food Ingredients, <http://www.adm.com/en-US/products/food/Pages/default.aspx> (last visited May 10, 2010); Cargill, Product Lines, <http://www.cargill.com/food/na/en/products/index.jsp> (last visited May 10, 2010).

lobbied to keep the amendment out of the 2008 Farm Bill.¹⁹³ The CMA joined other agricultural trade groups in signing a letter sent to Senate Agricultural Committee members opposing inclusion of the provision in the 2008 Farm Bill.¹⁹⁴

Although both the industry letter and the Cargill statement may have valid points regarding the difficulty in certifying individual farms, their opposition highlights a general unwillingness by the industry to seriously address the child labor practices within their supply chains.¹⁹⁵ NGOs swiftly criticized the industry and questioned its motives for failing to accept accountability.¹⁹⁶

Section 3205 is simply a way to make effective already-existing national law banning the importation of goods produced by child labor.¹⁹⁷ Unless pressured to do so through enforcement of this legislation, it is doubtful that the industry will make any real progress on its own, as demonstrated by the failure of the Protocol.¹⁹⁸

193. See Press Release, Global Exchange, Cargill, ADM Lobbying to Drop Provision from Farm Bill, to Protect Their Forced Labor Practices (Apr. 4, 2008), available at <http://www.globalexchange.org/update/press/5582.html>; see also Christine MacDonald, *Conservation Corp.: Enviro Ally with Big Grain Traders*, MULTINATIONAL MONITOR, Sept./Oct. 2008, available at <http://www.multinationalmonitor.org/mm2008/092008/macdonald.html>.

194. The trade groups argued that the onsite inspections and traceability requirements were practically infeasible and that the certification program would be costly to implement across the entire agricultural system. The letter further expressed concern that United States trading partners would see the provision as a protectionist measure. Letter from Chocolate Mfrs. Ass'n et al. to Senate Agric. Comm. Member (Feb. 12, 2008), available at http://www.nopa.org/content/newsroom/2008/february/oppose_sec_3104%20_2_.pdf. However, as applied to the cocoa industry, the provision cannot be said to be an economic protectionist measure since the United States does not grow or harvest cocoa. See *Int'l Labor Rights Fund v. United States*, 29 Ct. Int'l Trade 1050, 1055 (Ct. Int'l Trade 2005). Signatories to the letter are: Chocolate Manufacturers Association, National Confectioners Association, American Meat Institute, American Soybean Association, Fresh Produce Association of the Americas, Georgia Fruit and Vegetable Growers Association, Grocery Manufacturers Association, International Dairy Foods Association, National Association of Manufacturers, National Association of Wheat Growers, National Barley Growers Association, National Coffee Association, National Corn Refiners Association, National Potato Council, National Oilseed Processors Association, North American Millers Association, Peanut & Tree Nut Processors Association, Sweetener Users Association, Texas Produce Association, United Fresh Fruit & Vegetable Association, United Fresh Produce Association, and Western Growers Association. See Letter from Chocolate Mfrs. Ass'n et al. to Senate Agric. Comm. Member, *supra* note 188.

195. See *supra* Part IV.B.

196. See, e.g., Posting of Tim Newman to Labor Rights Blog, http://laborrightsblog.typepad.com/international_labor_right/2008/04/cargill-adm-sup.html (Apr. 4, 2008) ("If Cargill and ADM are already obeying international and U.S. laws against using forced and child labor, then they should have nothing to fear about this provision. So the question is: what are Cargill and ADM afraid of and why are they paying their lobbyists to defend slave labor?").

197. See the Tariff Act, 19 U.S.C. § 1307 (2006); Trafficking Victims Protection Reauthorization Act, Pub. L. No. 109-164 (2006).

198. See *supra* Part IV.B.

C. Section 3205 Distinguished from Protocol

The shortcomings of the Protocol demonstrate the ineffectiveness of voluntary initiatives in achieving substantial results, leading to the conclusion that the U.S. government should take primary control in regulating the behavior of transnational corporations. National governments, along with intergovernmental organizations such as the United Nations, are accountable to their constituents for promoting human rights law, and they should not entirely pass on their responsibilities to private industries or NGOs.¹⁹⁹ Although the government should exercise regulatory power over the practices of transnational corporations, it is not limited to command-and-control regulation.²⁰⁰ Instead, the government can choose to develop flexible regulatory mechanisms in order to regulate transnational corporations.²⁰¹ This approach works best where the problem of child labor in global supply chains is a complicated one. Although the Protocol also advocated a flexible, voluntary approach, there are important distinctions between the Protocol and Section 3205 of the 2008 Farm Bill.

Section 3205 is unlike traditional regulation because it has no “brightline rules or clear enforcement” mechanisms that one associates with state regulation.²⁰² But “legislation may take on different roles in a continuum, from soft to hard norms.”²⁰³ The characteristic that most distinguishes Section 3205 from the Protocol is its emphasis on already-existing national laws—namely, the TVPRA.²⁰⁴ By focusing primarily on fulfilling the points of the Protocol, the chocolate industry seemed to conveniently forget that it was already mandated by law to ensure that cocoa products imported into the United States were not produced by child labor.²⁰⁵ Instead, industry representatives believed that their obligations were voluntarily assumed and that they had flexibility in interpreting their obligations under the Protocol to create a certification system.²⁰⁶ The

199. See Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 155 (1997).

200. See *infra* note 203 and accompanying text.

201. See *infra* note 203 and accompanying text.

202. McInerney, *supra* note 81, at 191.

203. Wouters & Chanet, *supra* note 45, at 266. “It may create several incentives for corporations, including preferential public procurement; regulatory bodies with certain monitoring tasks; requirements for reporting on human rights issues; or civil or criminal remedies against non-complying corporations, among other options. Indeed, regulation may be used to make a voluntary approach more efficient.” *Id.*

204. See *supra* note 187 and accompanying text.

205. See the Tariff Act, 19 U.S.C. § 1307 (2006); Trafficking Victims Protection Reauthorization Act, Pub. L. No. 109-164 (2005).

206. See *supra* Part IV.B.3.

failure of the Protocol demonstrates that voluntary initiatives are not substitutes for effective enforcement of national law; rather, in order to be meaningful, voluntary initiatives must depend on existing national law as a reference.²⁰⁷ As one commentator states, “there are limits to what even the most socially committed firm can accomplish in the absence of responsible government practices and policies.”²⁰⁸ By the language of Section 3205, the consultative group will have the mandate of the TVPRA as a frame of reference while they develop their recommendations.²⁰⁹ Therefore, the goal of Section 3205 is to reinforce the regulatory effectiveness of already-existing national law.²¹⁰

Section 3205 has added legitimacy that the Protocol lacked in that the consultative group created by Section 3205 includes members from the Departments of Agriculture, Labor, and State, in addition to industry and NGO representatives, and is chaired by a member of the Department of Agriculture.²¹¹ The government has a more prominent role in developing the certification system and does not exceedingly rely on industry representatives and third parties, as it did under the Protocol.²¹² A voluntary program with government supervision also carries an implicit threat of more traditional legislation, which should encourage compliance as corporations seek to avoid more intrusive state regulation.²¹³ As seen by the actions of the chocolate industry in 2001 following the possibility of a slave-free label for chocolate products, the threat of legislation can encourage an industry to act.²¹⁴ However, government representatives must be posed to actually carry out that implicit threat.

207. See *supra* notes 111–12 and accompanying text.

208. VOGEL, *supra* note 89, at 170.

209. Pub. L. No. 110-246, § 3205(c)(1), 122 Stat. 1838, 1838 (2008).

210. See *id.*

211. §§ 3205(d), (e).

212. *Id.*

213. See VOGEL, *supra* note 89, at 10 (“[Corporations] facing civil pressures may . . . adopt socially responsible practices in order to avoid state intervention.”).

214. See *supra* note 36 and accompanying text. Another example of the effects of threatening legislation: anticipating trade penalties if the pending Child Labor Deterrence Bill were enacted, employers immediately dismissed some 40,000 children from factories. Mayne, *supra* note 82, at 242.

VI. PROPOSAL: IMPROVEMENTS UPON SECTION 3205

The Protocol has failed to establish a child-labor-free certification system for cocoa and cocoa products from Côte d'Ivoire and other West African nations.²¹⁵ However, alternative solutions are available through recently enacted legislation, the 2008 Farm Bill.²¹⁶ Section 3205 of the 2008 Farm Bill establishes a consultative group under the direction of the Department of Agriculture to develop recommendations to reduce the likelihood that agricultural products imported into the United States are produced by child labor.²¹⁷ This provision should be relied upon as a vehicle for change in the approach to the child labor problem on West African cocoa farms. Although any measures proposed by the consultative group to combat child labor in the agricultural industry will be voluntary, there is added bite to the measure that the Harkin-Engel Protocol lacked.²¹⁸ Additionally, changes can be made in implementing the recommendations that will make it more effective.

Section 3205 places the consultative group within a state-regulatory framework because the consultative group will work with the Department of Labor to make the TVPRA effective.²¹⁹ This marks a step in the right direction in addressing child labor issues in the agricultural setting, but enforcement standards for the resulting certification system and incentives to adopt it are necessary in order to make it effective.

First, the role of NGOs in implementing an effective certification system within the structures of Section 3205 should be enhanced. In terms of enforcing compliance with the voluntary certification, NGOs can and should play an important role. Specifically, an accessible complaint and investigative procedure must be in place in order to ensure compliance with the voluntary certification program; NGOs, even if limited to organizations represented by the three members included in the consultative group, should have the authority to accept and initially investigate these complaints.

Second, the ILO should remain involved in developing and implementing the certification system—specifically, the ILO should train onsite inspectors and publish the results of these inspections.

215. *See supra* Part III.B.

216. § 3205.

217. § 3205(b).

218. *See supra* note 213 and accompanying text.

219. § 3205(c)(2)(A).

Third, a safe-harbor provision should be created so that companies that adopt the voluntary certification program and are faithfully compliant with its requirements are shielded from lawsuits if labor rights abuses are still discovered. A safe-harbor provision will encourage corporations to voluntarily adopt the certification program, and careful monitoring will ensure that corporations are complying with its requirements. The corporation will be required to demonstrate that it has complied with the requirements of the certification process before being granted safe harbor from lawsuit. Another approach to incentives is to impose fines on corporations if they fail aspects of the onsite inspection and verification, but to impose lower fines on corporations that report noncompliance before discovered through third-party inspection.

Fourth, results of the onsite inspections should be made public through press releases by the ILO and other international and national media reports. This provides another incentive for corporations to adopt the certification program and demonstrate to the public that they are acting ethically and responsibly, while also providing disincentives for corporations to simply adopt the program for public relations purposes without fully complying with it.

Finally, voluntary adoption of the guidelines should remain voluntary for only a limited time period. Rather than terminating the authority of the consultative group in 2012, as stated under subsection (i),²²⁰ the consultative group should instead be required to reconvene in 2012 to review the successes and failures of its certification system and revise the guidelines as necessary. Following a revision that includes only the best practices in implementing the certification system, the United States legislature should create laws to make adoption of the certification system mandatory for corporations acting abroad. Even before the certification system becomes legally mandatory, the National Confectioners Association can make voluntary adoption of the certification system a condition of membership.

VII. CONCLUSION

TNCs that profit directly from the labor rights violations of its middlemen are complicit in these human rights violations and should be held accountable. Although international law may be ineffective in directly regulating TNCs in the human rights context, under the Tariff Act and the

220. § 3205(i).

Trafficking Victims Protection Reauthorization Act, the United States already bans the importation of goods produced by forced or child labor; yet United States chocolate manufacturers have escaped from complying with these mandates with regard to cocoa from West African cocoa farms. Section 3205 of the 2008 Farm Bill establishes a consultative group that will develop a certification system to ensure that products made with child labor will not be imported into the United States. Once a viable certification system with proper monitoring and verification is in place, better enforcement of the Tariff Act and the Trafficking Victims Protection Reauthorization Act will be possible, and chocolate manufacturers will no longer be complicit in the child labor abuses on West African cocoa farms.

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