

CASTING A WIDE NET TO CATCH THE BIG FISH:  
A COMPREHENSIVE INITIATIVE TO REDUCE HUMAN TRAFFICKING IN THE  
GLOBAL SEAFOOD CHAIN

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*Millions of Americans devour the “All You Can Eat Shrimp” buffets at large seafood restaurants without a second thought that their fish could be the product of human trafficking and forced labor. In contrast, off the coasts of Thailand, in an industry with very little oversight or regulation, rogue captains buy crew members from human traffickers, subject them to a life of slavery with no means of escape, and use them to plunder the fishing grounds of surrounding nations, creating “a perfect storm” of slavery and environmental degradation. These abhorrent practices are deeply embedded in many global seafood supply chains.*

*The disjointed structure of the global supply chain has served as a corporate shield to hide forced labor and human trafficking. With no clear-cut international or national enforcement mechanisms to monitor the integrity of supply chains, little risk of punishment, diminishing courses of action in court, and a fragmented consumer base to hold corporations accountable, corporations have little incentive to maintain transparency in their supply chains.*

*This article evaluates the strengths and inadequacies of proposed international guidelines, current domestic global supply laws, and federal and state transparency legislation in the United States. The article then recommends a comprehensive initiative based on a model international standard that would serve as a platform to harness the strengths of individual countries’ legal, legislative, and economic endeavors in a synergistic and collective fashion.*

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## INTRODUCTION AND EXECUTIVE SUMMARY

### A. Introduction

Dramatic stories of imprisoned workers being pulled from antiquated factories, and of gaunt, dazed women and girls escaping from hidden sex brothels regularly dot our nightly newscasts on human trafficking.<sup>1</sup> A common theme in their stories is the sliver of hope that kept these enslaved workers alive until they escaped or were rescued. However, for one specific category of trafficked workers unbeknownst to most Americans, there is no such hope. These are workers lured to a harsh and violent life—and sometimes, a watery grave—as fishermen aboard foreign fishing vessels. Surrounded by miles of unending water for months or even years, there is no glimmer of escape from twenty-hour days of hauling fish, except by death.

The United Nations estimates that 7.9% of the world's population is involved in the commercial fishing industry.<sup>2</sup> The largest providers of seafood to the United States are Thailand

<sup>1</sup> See, e.g., Damall Keith, *Human trafficking victims share their stories with FOX 26 News*, FOX NEWS, (updated Oct. 29, 2013), <http://www.myfoxboston.com/story/23672987/2013/10/11/human-trafficking-victims-share-their-stories-with-fox-26-news#ixzz2sn4IRo78>. The Trafficking Victims' Protection Act (TVPA) defines "severe forms of trafficking in persons" as: (a) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age; or (b) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 103(8), 114 Stat. 1464 (2000).

<sup>2</sup> *Fishing People*, FOOD AND AGRIC. ORG. OF THE U.N., FISHERIES AND AQUACULTURE DEP'T, <http://>

and China.<sup>3</sup> Thailand has become a top-ten fishing nation,<sup>4</sup> and, as of 2011, over 650,000 people were employed in the Thailand seafood industry.<sup>5</sup> An investigative report proposed that forty percent of squid shipped from New Zealand was caught on a vessel using coerced labor.<sup>6</sup> In addition, fifteen percent of all New Zealand hoki exports and eight percent of the country's southern blue whiting catch may have originated from slave or trafficked labor.<sup>7</sup> (Hoki is used in fried fish sandwiches in fast food chain restaurants in the U.S. like McDonald's.)<sup>8</sup> Species that are caught on Thai deep-sea trawlers include mackerel, sardines, and "trash fish" used for fish sauce.<sup>9</sup> Thai fish sauce supplies nearly eighty percent of the American market.<sup>10</sup>

The unappetizing fact is a substantial portion of the seafood delicacies on our plates comes at a tremendous human cost that can no longer be dismissed. One out of six pounds of U.S. seafood imports come from Thailand—making it America's second largest seafood supplier.<sup>11</sup> In 2011, Thailand exported over 800 million pounds of seafood to the U.S, worth more than \$2.5 billion.<sup>12</sup> The United States is the world's largest consumer of shrimp.<sup>13</sup> Red Lobster, known for its "all you can eat" lobster and shrimp, is owned by Darden, which directly imports four million kilograms of shrimp per year.<sup>14</sup> The trafficked victims on the high seas—at the remote end of the global supply chain—are responsible for supplying the seafood that we regularly consume.

The "global supply chain" refers to the network for exchanging materials, information, and labor through which products develop—from the acquisition of raw materials to final distribution.<sup>15</sup> The disjointed nature of the global supply chain—with multiple parties along an informal assembly line—has inadvertently served to shield corporations from liability related to forced labor and human trafficking. With no clear cut international or federal enforcement mechanisms to monitor the integrity of supply chains, no risk of punishment, and weak theories of

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[www.fao.org/fishery/topic/13827/en](http://www.fao.org/fishery/topic/13827/en) (last visited Feb. 22, 2014).

<sup>3</sup> NAT'L OCEANIC AND ATMOSPHERIC ADMIN., FISHERIES OF THE U.S. 2011 61, 63 (Alan Lowther ed., 2012), available at [http://www.st.nmfs.noaa.gov/st1/fus/fus11/FUS\\_2011.pdf](http://www.st.nmfs.noaa.gov/st1/fus/fus11/FUS_2011.pdf).

<sup>4</sup> See KELLY GLENN SCHULZ, AN ASSESSMENT OF THE EFFECTIVENESS OF PROTECTION MECHANISMS FOR MIGRANT WORKERS: A CASE STUDY OF FISHERMEN FROM MYANMAR IN THAILAND 2 (ICIRD KNOWLEDGE NETWORK, 2012), <http://www.icird.org/2012/files/papers/Kelly%20Glenn%20Schulz.pdf>.

<sup>5</sup> ENVTL. JUSTICE FOUND., SOLD TO THE SEA 4 (2013), [http://ejfoundation.org/sites/default/files/public/Sold\\_to\\_the\\_Sea\\_report\\_lo-res-v2.pdf](http://ejfoundation.org/sites/default/files/public/Sold_to_the_Sea_report_lo-res-v2.pdf).

<sup>6</sup> Benjamin E. Skinner, *The Fishing Industry's Cruellest Catch*, BLOOMBERG BUSINESS WEEK, Feb. 23, 2012, <http://www.businessweek.com/printer/articles/22538-the-fishing-industrys-cruellest-catch>.

<sup>7</sup> *Id.*

<sup>8</sup> *From Deep Pacific, Ugly and Tasty, with a Catch*, N.Y. TIMES, Sept. 10, 2009, at A1.

<sup>9</sup> Patrick Winn, *Did Slaves Catch Your Seafood?*, SALON (May 21, 2012), [http://www.salon.com/2012/05/21/did\\_slaves\\_catch\\_your\\_seafood/](http://www.salon.com/2012/05/21/did_slaves_catch_your_seafood/).

<sup>10</sup> *Id.*

<sup>11</sup> Patrick Winn, *Did These Ex-slaves Catch Your Lunch?*, GLOBAL POST (May 21, 2012), <http://www.globalpost.com/dispatch/news/regions/asia-pacific/thailand/120425/seafood-slavery-part-1>.

<sup>12</sup> NAT'L OCEANIC AND ATMOSPHERIC ADMIN., *supra* note 3, at 63.

<sup>13</sup> ACCENTURE FOR HUMANITY UNITED, EXPLOITATIVE LABOR PRACTICES IN THE GLOBAL SHRIMP INDUSTRY 7 (2013), [http://humanityunited.org/pdfs/Accenture\\_Shrimp\\_Report.pdf](http://humanityunited.org/pdfs/Accenture_Shrimp_Report.pdf).

<sup>14</sup> *Id.* at 7, 38.

<sup>15</sup> Kate Vitasek, *Supply Chain Management Glossary of Terms*, COUNCIL OF SUPPLY CHAIN MANAGEMENT PROFESSIONALS, [http://cscmp.org/sites/default/files/user\\_uploads/resources/downloads/glossary-2013.pdf](http://cscmp.org/sites/default/files/user_uploads/resources/downloads/glossary-2013.pdf) (last updated Aug. 2013).

corporate liability,<sup>16</sup> the task of maintaining transparency in corporate supply chains has been dismissed as an exercise in public relations. It is not a surprise, therefore, that there has been almost no visible decline in forced labor.<sup>17</sup>

In fact, according to the 2013 Trafficking in Persons Report (TIP Report), only about 40,000 out of an estimated 27 million victims of human trafficking worldwide were identified in the last year.<sup>18</sup> For example, in 2012, Thailand reported that despite an increase in potential investigations, the number of prosecutions significantly decreased from sixty seven in 2011 to only twenty seven in 2012; compared to the twelve convictions made in 2011, in 2012 the government of Thailand convicted only ten offenders in four trafficking-related cases.<sup>19</sup> Out of 7,705 people prosecuted for human trafficking globally in 2012, only half were convicted.<sup>20</sup> Similarly, despite a federal statute specifically providing for civil causes of action for forced labor and human trafficking,<sup>21</sup> the number of successful plaintiffs obtaining restitution against their traffickers in the past decade has also been surprisingly low.<sup>22</sup>

### B. Executive Summary

International communities and individual countries should collectively share information and formulate one model standard to certify, monitor, and audit global supply chains. The resulting model law or convention could then serve as a springboard or foundation that could direct individual countries to adopt their own national counterparts. Within each country, national and regional legislatures could continue to refine burgeoning global supply and product sourcing laws to pressure corporations to comply and could use their leverage to effectuate changed policies in their overseas trading partners. A clearly enunciated, uniform guideline could then be

<sup>16</sup> To date, there have only been a handful of cases addressing the global supply chain. *See, e.g., Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010); *John Roe I v. Bridgestone Corp.*, 492 F. Supp. 2d 988 (S.D. Ind. 2007); *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674 (S.D. Tex. 2009); *Luu v. Int'l Inv. Trade & Serv. Grp.*, CIV.A. G-11-182, 2012 WL 2450773 (S.D. Tex. June 26, 2012); and *Vu v. W&D Apparel*, No. 4:12-CV-00282 (S.D. Tex. dismissed Aug. 16, 2012).

<sup>17</sup> In 2005, the International Labour Office (ILO) estimated that there was a minimum of 12.3 million persons in forced labour. INT'L LABOUR OFFICE, ILO MINIMUM ESTIMATE OF FORCED LABOUR IN THE WORLD 1 (Patrick Belser et al. eds., 2005), available at [http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@declaration/documents/publication/wcms\\_081913.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_081913.pdf). Using data collected between 2002-2011, ILO estimated the number has grown to 20.9 million people. INT'L LABOUR OFFICE, ILO GLOBAL ESTIMATE OF FORCED LABOUR 13 (2012) [hereinafter ILO GLOBAL ESTIMATE OF FORCED LABOR REPORT], available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_182004.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_182004.pdf).

<sup>18</sup> U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 7 (2013).

<sup>19</sup> *Id.* at 359.

<sup>20</sup> *Id.* at 46.

<sup>21</sup> 18 U.S.C. §1595 (2012).

<sup>22</sup> Naomi Jiyoung Bang, *Justice for Victims of Human Trafficking and Forced Labor: Why Current Theories of Corporate Liability Do Not Work*, 43 U. MEM. L. REV. 1047, 1050-51 (2013) ("A surprisingly small number of trafficking cases have been filed in federal district courts, and few of those cases involve the overseas global corporate supply contracting system. Since the 2003 amendment . . . include a private right of action for trafficked victims, [there were] only approximately forty cases [until August 2012]."). Only three more TVPRA cases were located by running searches on PACER, Westlaw, and Bloomberg from August 2012 to August 2013. *See Lainez v. Baltazar*, 5:11-CV-00167-BR, 2013 WL 3288369 (E.D.N.C. June 28, 2013); *Ruiz v. Fernandez*, CV-11-3088-RMP, 2013 WL 2467722 (E.D. Wash. June 7, 2013); *Francisco v. Susano*, No. 12-1376, 2013 WL 2302691 (10th Cir. May 28, 2013).

used to educate courts about new theories of corporate liability that reflect the international agreement and, thus, to expand avenues of relief to victims of forced labor and human trafficking. The model standard would also serve as a guidepost for corporations working in those countries to voluntarily investigate and reform labor abuse found in the global supply structure. And, downstream consumers could rely on those standards as benchmarks to exert power through their dollars to lobby for better labor conditions on behalf of the fishermen and other trafficked workers who put dinner on our table.

After examining some international initiatives, this Article will examine the methods adopted by the United States, both as a whole and by some individual states. Given the fact that the United States is a dominant market leader in the world, it is in a strategic position to use its dominant market share and influence to set an example and pressure its trade partners to join the so called “accountability revolution.”<sup>23</sup> In 2009, Americans consumed a total of 4.8 billion pounds of seafood; the United States continues to be ranked the third largest consumer of fish and shellfish behind China and Japan.<sup>24</sup> It is inconceivable that this exorbitant amount of food is not tainted with the footprints of human trafficking and forced labor. Therefore, this Article will turn to U.S. laws and legislation as examples to evaluate domestic global supply initiatives and extrapolate relevant conclusions.

### C. Outline of Article

While the prevalence of human trafficking and slavery in factories, brothels, and diplomatic mansions around the world cannot be ignored, this Article will focus on the labor conditions of the enslaved fishermen on the high seas as the backdrop for an analysis of the global supply chain. The story of the trafficked fisherman is a compelling component of the “aquaculture”<sup>25</sup> industry, and a vivid example of how such human trafficking and forced labor can be so deeply embedded in a corporate global supply chain with little public attention until very recently.

Part I of the Article will set forth a general background of the seafood or aquaculture industry and analyze the unique nature of obstacles in this sector that give rise to the proliferation of labor abuses aboard foreign fishing vessels. It will also examine the workings of the global supply chain in the seafood industry, using the shrimp sector as an example to examine the effects of how factors such as production and consumption by exporters fuel the cycle of forced labor and human trafficking.

Part II will present an overview of some of the major legal obstacles faced by plaintiffs in court, based on the results of past and pending civil litigation<sup>26</sup> cases filed by trafficked workers in American federal district courts. It will also discuss implications of recent landmark cases and

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<sup>23</sup> See, e.g., Volker Turk & Elizabeth Eyster, *Strengthening Accountability in UNHCR*, 22 Int'l J. Refugee Law 159, 161 (2010).

<sup>24</sup> *Basic Questions About Aquaculture*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., [http://www.nmfs.noaa.gov/aquaculture/faqs/faq\\_aq\\_101.html#6howmuch](http://www.nmfs.noaa.gov/aquaculture/faqs/faq_aq_101.html#6howmuch) (last visited Feb. 22, 2014).

<sup>25</sup> Aquaculture, also known as fish farming, is the “fastest growing food production system.” *Farmed Seafood*, WORLD WILDLIFE FUND, <http://worldwildlife.org/industries/farmed-seafood> (last visited Feb. 22, 2014). Seafood that is normally caught in the wild is, instead, bred and raised domestically in aquaculture farms. *What is Aquaculture?*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., [http://www.nmfs.noaa.gov/aquaculture/what\\_is\\_aquaculture.html](http://www.nmfs.noaa.gov/aquaculture/what_is_aquaculture.html) (last visited Feb. 22, 2014).

<sup>26</sup> 18 U.S.C. § 1595 (2012).

propose possible expansions of existing legal remedies, such as the “economic realities test” under the “joint employer” doctrine to hold corporations accountable for the actions of their overseas contractors.

Part III will examine U.S. federal and state legislative responses developed to address the need for transparency in the global supply chain. In particular, this Section will examine the progress of the recently enacted California Transparency in Supply Chains Act (also known as “S.B. 657”).<sup>27</sup> It will also discuss federal securities laws and other statutes that have been used to curtail the importation of tainted goods into the United States and change the behavior of corporations overseas. Additionally, Part III will consider how Corporate Social Responsibility (CSR) could align with transparency legislation to further strengthen the private sector’s contribution to the fight against human trafficking and slave labor.

Part IV will review current international legislative efforts to issue guidelines and standards to redress corporations that avoid accountability by distancing themselves from the global supply chains on which they rely.

Part V will set forth recommendations supporting a comprehensive initiative that is based on uniform international guidelines and would give birth to national and regional transparency laws, expansion of theories of corporate liability in court, consumer activism, and education of both potential victims and the industry in source countries.

Part VI will summarize the recommendations and set forth the conclusion.

## I. THE GLOBAL SEAFOOD SUPPLY CHAIN AS A BREEDING GROUND FOR HUMAN TRAFFICKING AND FORCED LABOR

### A. *Human Trafficking in the Fishing Industry*

Today, the International Labor Office (ILO) estimates that 20.9 million people are in forced labor as a result of trafficking.<sup>28</sup> The ILO, a United Nations agency created in 1919 as part of the Treaty of Versailles,<sup>29</sup> has played a crucial role internationally in the prevention of and fight against forced labor and human trafficking.<sup>30</sup> While the media has covered hundreds of cases of sex trafficking and slavery, the less glamorous forced labor practices in industries such as agriculture and aquaculture account for 14.2 out of the 20.9 million in forced labor.<sup>31</sup>

Generally, forced labor occurs because “[a] firm’s goal is to maximize profit . . . [and since] labor is such a large part of business costs, a small increase in the cost of labor can

<sup>27</sup> California Transparency in Supply Chains Act of 2010, CAL. CIV. CODE § 1714.43 (West 2010).

<sup>28</sup> ILO GLOBAL ESTIMATE OF FORCED LABOR REPORT, *supra* note 17, at 13.

<sup>29</sup> *Origins and History*, INT’L LABOUR ORGANIZATION, <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm> (last visited Feb. 22, 2014).

<sup>30</sup> In 1998, governments, and workers and employers’ organizations embraced the ILO Declaration on Fundamental Principles and Rights at Work, which called upon states to eradicate all forms of forced labour. *See History*, INT’L LABOUR ORGANIZATION, <http://www.ilo.org/declaration/thedeclaration/history/lang--en/index.htm> (last visited Feb. 22 2014); INT’L LABOUR OFFICE, CAUGHT AT SEA: FORCED LABOUR AND TRAFFICKING IN FISHERIES 2 (2013), [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_214472.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_214472.pdf) (“ILO is also the depository of the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105).”) [hereinafter CAUGHT AT SEA].

<sup>31</sup> Simon Rushton, *Rights Group: 21 Million Now in Forced Labor*, CNN FREEDOM PROJECT (June 1, 2012), <http://thecnnfreedomproject.blogs.cnn.com/2012/06/01/rights-group-21-million-now-in-forced-labor/>.

significantly increase the cost of production and decrease profit.”<sup>32</sup> Moreover, given the globalization and intermingling of the world’s economies, the use of trafficked labor is easily hidden in the process, and the worker becomes invisible.<sup>33</sup> In the case of the aquaculture industry, discussed below, workers are even more vulnerable than their counterparts in other industries such as garment, agriculture, and construction.

Trafficking in the fishing sector is not a new phenomenon, but it has not received as much attention as other areas of business or manufacturing that produce more luxury goods, such as designer clothes and high-end coffee products. In the fishing industry, studies have focused on the human trafficking of migrant workers from Southeast Asian countries, such as young men from Laos promised better jobs in Thailand who are fooled with false offers and forced to work without pay on fishing boats at gunpoint.<sup>34</sup> The government of Thailand, in its Department of Fisheries Report of January 2013, estimates that there are “over 300,000 workers . . . on fishing vessels that operate both in national and international waters.”<sup>35</sup> International organizations have also found similar plights of trafficked workers in the fishing industry in places such as Kaliningrad Oblast,<sup>36</sup> Scotland, and Ireland;<sup>37</sup> Ukrainian fishermen exploited by Turkey, Russia, and South Korea;<sup>38</sup> and the economic zone (EEZ) off West African coastal states.<sup>39</sup>

### B. Demand for Trafficked Goods Fueling Consumption

International consumers—primarily in Europe and the United States—desire cheap and plentiful seafood, but must ignore their role in the increase of human trafficking and forced labor.<sup>40</sup> The statistics are daunting. In Thailand, the booming demand for seafood has vastly

<sup>32</sup> Elizabeth M. Wheaton, Edward J. Schaur & Thomas V. Galli, *Economics of Human Trafficking*, 48 INT’L MIGRATION 114, 128 (2010).

<sup>33</sup> See *id.* at 129 (explaining the “coercive nature of human trafficking” and the multiple levels between the trafficked laborers and the international corporations).

<sup>34</sup> WORLD VISION AUSTRALIA, FISHY BUSINESS: TRAFFICKING AND LABOUR EXPLOITATION IN THE GLOBAL SEAFOOD INDUSTRY (2013), <http://campaign.worldvision.com.au/wp-content/uploads/2013/04/Trafficking-and-labour-exploitation-in-the-global-fishing-industry-fact-sheet.pdf>.

<sup>35</sup> DEP’T OF FISHERIES, MINISTRY OF AGRI. AND COOPERATIVES (THAILAND), ACTION PLAN AND IMPLEMENTATION BY THE DEP’T OF FISHERIES IN ADDRESSING LABOUR ISSUES AND PROMOTING BETTER WORKING CONDITIONS IN THAI FISHERIES INDUSTRY 11 (2013), <http://www.nocht.m-society.go.th/album/download/367802a4be46d2f4132c7a028e50980f.pdf>.

<sup>36</sup> CAUGHT AT SEA, *supra* note 30, at 11.

<sup>37</sup> *UK Deportation Threat to Filipino Seafarers*, INT’L TRANSPORT WORKERS’ FED., (June 19, 2009), <http://www.itfglobal.org/news-online/index.cfm/newsdetail/3422/region/0/section/0/order/1>.

<sup>38</sup> INT’L ORG. FOR MIGRATION, TRAFFICKING OF MEN – A TREND LESS CONSIDERED: THE CASE OF BELARUS AND UKRAINE 60 (2008), [http://publications.iom.int/bookstore/free/MRS\\_36.pdf](http://publications.iom.int/bookstore/free/MRS_36.pdf); REBECCA SURTEES, INT’L ORG. FOR MIGRATION & NEXUS INSTITUTE, TRAFFICKED AT SEA: THE EXPLOITATION OF UKRAINIAN SEAFARERS AND FISHERS (2012), [http://publications.iom.int/bookstore/free/Trafficked\\_at\\_sea\\_web.pdf](http://publications.iom.int/bookstore/free/Trafficked_at_sea_web.pdf).

<sup>39</sup> CAUGHT AT SEA, *supra* note 30, at 5, 11-12; see also ENVTL. JUSTICE FOUND., ALL AT SEA: THE ABUSE OF HUMAN RIGHTS ABOARD ILLEGAL FISHING VESSELS 18-20 (2010), [http://ejfoundation.org/sites/default/files/public/media/report-all%20at%20sea\\_0.pdf](http://ejfoundation.org/sites/default/files/public/media/report-all%20at%20sea_0.pdf).

<sup>40</sup> See *GOAL Projection: Surging Demand to Challenge Aquaculture Capacity*, GLOBAL AQUACULTURE ALLIANCE (Nov. 2010), <http://www.gaalliance.org/newsroom/news.php?GOAL-Projection-Surging-Demand-To-Challenge-Aquaculture-Capacity-23> (discussing how the rising global demand for seafood is also driven by a rapidly growing middle class in China and other Asian nations, increasing pressure on the aquaculture industry to find sustainable

contributed to the fishing sector becoming a vital component of its emerging economy.<sup>41</sup> There, “[t]he lucrative deep-sea fishing aspect of [Thailand’s] booming economy alone brings in well over an estimated four billion U.S. dollars every single year.”<sup>42</sup> Thailand’s seafood industry employed more than 650,000 individuals and earned \$7.3 billion in exports in 2011 through seafood processing, aquaculture, and marine fisheries.<sup>43</sup> Fish is one of the most traded commodities globally and is of particular importance to developing countries.<sup>44</sup> Some 55.7 million tons of fish were exported in 2009.<sup>45</sup> In 2011, nation states exported fish valued at \$125 billion.<sup>46</sup>

The largest importers of fish from Thailand to the U.S. in 2011 include such familiar names such as: Chicken of the Sea, the largest seafood importer;<sup>47</sup> Wal-Mart, the largest retailer of shrimp;<sup>48</sup> as well as Kroger,<sup>49</sup> Costco,<sup>50</sup> Safeway,<sup>51</sup> and Trader Joes.<sup>52</sup> Other household names include: Costco Wholesale, America’s largest wholesaler and the world’s seventh-largest retailer; P.F. Chang’s China Bistro, a U.S.-based chain “with more than 200 restaurants worldwide and more than \$1.2 billion in annual revenue;” and P&E Foods, which supplies to Sam’s Club, a 47 million-member wholesaler.<sup>53</sup> Other New Zealand fishing companies, such as Sanford,<sup>54</sup> have similar ties to U.S. based companies and businesses, such as Wal-Mart, Safeway, and Whole Foods.<sup>55</sup>

### C. Unique Vulnerabilities of Workers in the Fishing Industry

The significant volume of estimated slave laborers in the aquaculture/fishing sector is unsurprising given the context of the industry. First, the nature of long-distance fishing operations is extremely labor intensive, with crews’ wages accounting for 30 to 50 percent of operating

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ways to increase productivity).

<sup>41</sup> See MELISSA BRENNAN, SOLIDARITY CTR., *OUT OF SIGHT, OUT OF MIND: HUMAN TRAFFICKING & EXPLOITATION OF MIGRANT FISHING BOAT WORKERS IN THAILAND* 3 (2009).

<sup>42</sup> SCHULZ, *supra* note 4, at 1 (citing KATE BOLLINGER & KIM MCQUAY, THE ASIA FOUNDATION, *HUMAN TRAFFICKING RAMPANT IN THAILAND’S DEEP-SEA FISHING INDUSTRY* (2012)).

<sup>43</sup> ENVTL. JUSTICE FOUND., *supra* note 5.

<sup>44</sup> FOOD AND AGRIC. ORG. OF THE U.N., *FOREWORD: THE STATE OF WORLD FISHERIES AND AQUACULTURE* (2012).

<sup>45</sup> *Id.* at 15.

<sup>46</sup> *Id.*

<sup>47</sup> ACCENTURE, *supra* note 13, at 30.

<sup>48</sup> *Id.* at 33.

<sup>49</sup> *Id.* at 34.

<sup>50</sup> *Id.* at 35.

<sup>51</sup> *Id.* at 36.

<sup>52</sup> *Id.*

<sup>53</sup> Skinner, *supra* note 6.

<sup>54</sup> *Id.* (noting that Sanford is a 130-year-old New Zealand-based company worth \$383 million).

<sup>55</sup> *Id.* Sanford supplies to \$10 billion supermarket chain Whole Foods Market and Nova Scotia-based High Liner Foods. *Id.* High Liner’s customers include U.S. retailers such as Safeway, America’s second-largest grocery store chain, and Wal-Mart Stores, the world’s largest retailer. *Id.*



costs.<sup>56</sup> Therefore, the use of forced labor and trafficking can significantly lower fishing companies' costs, greatly increasing their profit margins and giving them a competitive edge.<sup>57</sup>

Second, the difficult manual tasks and harsh working conditions make this sector dangerous and unappealing to potential workers. When fishing vessels reach their fishing grounds, intensive periods of hard work must take place to gather and process the fish, leading to eighteen to twenty hour work days, seven days a week, regardless of adverse weather conditions.<sup>58</sup> The workers must also operate hazardous machinery.<sup>59</sup> Living quarters are cramped and dirty, and vessels may not have toilets.<sup>60</sup> Food is scarce, often requiring victims to survive on fish and bait.<sup>61</sup>

Third, chances of detection or rescue by authorities are slim on "long-haul fishing boats because they do not return to . . . shores for many weeks or months at a time and it is not possible for fishermen to escape or to receive assistance if their working conditions become unacceptable."<sup>62</sup> Being far off the coastal waters of any country also means there is almost no external observation or protection for these workers aboard boats where captains have unfettered control over almost every aspect of their lives<sup>63</sup>: "[w]ith very little oversight or regulation, rogue Thai captains buy crew members from human traffickers and use them to plunder the fishing grounds of surrounding nations," making it "a perfect storm of slavery and environmental degradation."<sup>64</sup> In fact, a 2009 survey by the United Nations Inter-Agency Project on Human Trafficking (UNIAP) found that fifty-nine percent of interviewed migrants trafficked aboard Thai fishing boats reported witnessing the murder of a fellow worker<sup>65</sup> when they were too weak or sick to work. Bodies are disposed of overboard.<sup>66</sup> Some interviewees reported seeing a fellow crewmember tortured<sup>67</sup> for trying to escape as well as witnessing multiple murders.<sup>68</sup> Loss of life

<sup>56</sup> CAUGHT AT SEA, *supra* note 30, at 6.

<sup>57</sup> ENVTL. JUSTICE FOUND., *supra* note 5, at 5 ("In their efforts to make maximum profits from minimum costs, illegal fishing vessel owners and officers can ruthlessly exploit their crews, who often face the prospect of verbal and physical abuse, imprisonment, extortion and the withholding of pay.").

<sup>58</sup> CAUGHT AT SEA, *supra* note 30, at 19.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*; see also Christina Stringer et al., *Not in New Zealand's Waters, Surely? Labour and Human Rights Abuses Aboard Foreign Fishing Vessels* 13 (N.Z. Asia Institute, Working Paper No. 11-01, 2011) ("Often crews were fed just fish and rice or indeed in the case of one entire crew they were fed rotten fish bait.").

<sup>62</sup> See SCHULZ, *supra* note 4, at 3.

<sup>63</sup> See PHILIP ROBERTSON, *TRAFFICKING OF FISHERMEN IN THAILAND* 7 (2011).

<sup>64</sup> SHANNON SERVICE & BECKY PALMSTROM, *Illegal Fishing, Molotov Cocktails, A Daring Escape*, NPR, Jun. 20, 2012, available at <http://www.npr.org/2012/06/20/155048186/illegal-fishing-molotov-cocktails-a-daring-escape> (quoting U.S. State Department's Ambassador-at-Large at the Office to Monitor and Combat Trafficking in Persons, Luis CdeBaca); see also SUPANG CHANTAVANICH ET AL., *MITIGATING EXPLOITATIVE SITUATIONS OF MIGRANT WORKERS IN THAILAND* 27 (2007).

<sup>65</sup> STRATEGIC INFORMATION RESPONSE NETWORK (SIREN), UNITED NATIONS INTER-AGENCY PROJECT ON HUMAN TRAFFICKING (UNIAP): PHASE 3, *EXPLOITATION OF CAMBODIAN MEN AT SEA: FACTS ABOUT THE TRAFFICKING OF CAMBODIAN MEN ONTO THAI FISHING BOATS* 5 (2009) [hereinafter SIREN]; see also ROBERTSON, *supra* note 63, at 7.

<sup>66</sup> BRENNAN, *supra* note 41, at 11.

<sup>67</sup> ENVTL. JUSTICE FOUND., *supra* note 5, at 20. One victim reported that a man helping others to escape was tied to a tree, covered with fire ants, stabbed in the stomach with a knife, then dripped with hot plastic and ink before dying. *Id.*

at sea takes place without repercussions. Even if workers do get sent home, they often leave with little or no pay and are blacklisted from any other jobs in the sector if they report violations.<sup>69</sup>

The bargaining power of the reluctant fisherman is virtually nonexistent aboard a ship under the complete control of the master of the vessel. Like other trafficked workers, fishing workers are frequently asked to surrender their identity documents while on board and restricted in their movements in foreign ports.<sup>70</sup> Many trafficking victims are sold to boat owners for a price that the workers must work off before earning any wages.<sup>71</sup> This results in slavery, leaving the fishers working for months or years without pay under brutal conditions.<sup>72</sup> Moreover, communications back to family and friends from ships are limited or require special communication equipment aboard. Tracing of a particular vessel is dependent on available radio or satellite signals, meaning that workers are cut off from the rest of the world and thus made even more vulnerable.<sup>73</sup> Moreover, these victims suffer exposure injuries from the seawater and sun. An inadequate supply of protective clothing leads to skin and other medical ailments<sup>74</sup> such as seasickness.<sup>75</sup> The lack of medical care<sup>76</sup> contributes to the fact that the fisheries sector has one of the highest fatality rates of employment.<sup>77</sup> Sleep deprivation, lack of health care, and malnourishment further subject fishers to accidents while working with dangerous machinery.<sup>78</sup>

Fourth, many trafficked workers in the fishing industry may be even more vulnerable than their domestic counterparts. As some countries' economic positions improve,<sup>79</sup> the only people willing to take these hazardous jobs are migrant fishermen from other countries such as Myanmar, a pool even more susceptible to the risk of human trafficking for labor exploitation by boat captains, recruitment agents, government authorities, and even the police.<sup>80</sup> Since the vast majority of migrant fishermen on Thai fishing boats have not registered with the Ministry of Labor (MOL), they are considered "undocumented workers" in violation of Thailand's

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<sup>68</sup> *Id.* at 4.

<sup>69</sup> Skinner, *supra* note 6.

<sup>70</sup> SURTEES, *supra* note 38, at 19-20.

<sup>71</sup> Brokers who smuggle trafficking victims from Burma into Thailand will charge a fee that they tell the victims to work off in few months through a job in Thailand. BRENNAN, *supra* note 41, at 6. In some cases, the victims realize they have been bought by the employer. *Id.* In addition to broker fees, "the advances routinely paid prior to a fishing expeditions [sic] serve to bind workers to their jobs." *Id.* at 13.

<sup>72</sup> See ROBERTSON, *supra* note 63, at 7.

<sup>73</sup> See SURTEES, *supra* note 38, at 126.

<sup>74</sup> *Id.* at 19.

<sup>75</sup> See Annuska Derks, *Migrant Labour and the Politics of Immobilisation: Cambodian Fishermen in Thailand*, 38 Asian J. Soc. Sci. 915, 925 (2010) ("The particularities of the work on fishing boats are especially hard for newcomers, who may suffer for weeks and sometimes up to months from the seasickness before they are adjusted to laboring at sea.").

<sup>76</sup> CAUGHT AT SEA, *supra* note 30, at 20.

<sup>77</sup> GUDRUN PETURSDOTTIR ET AL., SAFETY AT SEA AS AN INTEGRAL PART OF FISHERIES MANAGEMENT 1 (2001).

<sup>78</sup> Stringer et al., *supra* note 61 at 13; Derks, *supra* note 75, at 924.

<sup>79</sup> See SCHULZ, *supra* note 4, at 2 ("As a result of their relative economic prosperity, masses of Thai workers no longer desire to work in labor-intensive sectors such as fishing and fish processing").

<sup>80</sup> Sally Cameron & Edward Newman, *Trafficking in Humans: Structural Factors*, in TRAFFICKING IN HUMANS: SOCIAL, CULTURAL, AND POLITICAL DIMENSIONS 27-29 (Sally Cameron & Edward Newman eds., 2008).

immigration law.<sup>81</sup> According to Human Rights Watch, up to 250,000 Burmese migrants may work within the Thai fishing industry with little to no rights at all.<sup>82</sup> As a result, they live in constant fear of deportation and choose to silently suffer through exploitative working conditions and discrimination in order to maintain a low profile.

Fifth, the fishing industry suffers from a lack of regulation, monitoring, and enforcement.<sup>83</sup> These deficiencies contribute to the lack of attention given to the brutality of working conditions, which leads to more workers recanting or withdrawing any complaints. In New Zealand, for example, “there is no independent auditing of catch method once” the fish has been processed.<sup>84</sup> In fact, investigators have discovered that it is not uncommon for exact quantities of sales to be untraceable through public shipping records or for corporate officials to be unresponsive to requests for comment about sales and abuse allegations.<sup>85</sup> Even the prominent United Fisheries founder, Kypros Kotzikas, thought that New Zealand’s labor laws “did not necessarily apply beyond New Zealand’s 12-mile territorial radius.”<sup>86</sup>

Sixth, in areas where slave laborers are most likely to be recruited, endemic corruption undermines investigatory and law enforcement response mechanisms. For example, in Thailand, police raided a shrimp factory that used child slaves and charged the owner a mere \$2,100 fine while allowing him to continue operations.<sup>87</sup> “[C]orruption runs rampant through the protective structure in Thailand as the police and other government authorities are simply paid off to look the other way . . .” thereby facilitating exploitation and trafficking.<sup>88</sup> Similarly, in recent reports, a group of Rohingya Muslims who fled from Myanmar were captured by the Indian Coastguard and then sold as slaves into Thailand’s 8 billion dollar profit seafood industry.<sup>89</sup> In another report, Cambodian workers ages fifteen to fifty-three aboard long-haul fishing boats were deceived and then enslaved for up to two years through debt bondage.<sup>90</sup>

Seventh, even when the workers escape or are freed, the fishermen may come into contact with police and immigration officials, leading to arrest, fines, caning, and deportation.<sup>91</sup> A lack of awareness on the part of law enforcement agents frequently leads to them treating these fishermen as criminals rather than victims of human trafficking. In addition, when fishermen have escaped, there are accounts of re-trafficking the same men back onto other boats or plantations.<sup>92</sup>

<sup>81</sup> ROBERTSON, *supra* note 63 at 11, 21.

<sup>82</sup> HUMAN RIGHTS WATCH, FROM THE TIGER TO THE CROCODILE: ABUSE OF MIGRANT WORKERS IN THAILAND 11 (2010) (“250,000 Burmese migrant fishermen and women work in Thailand’s fishing industry, at sea and in fish-processing factories, but only 70,000 are legally registered.”).

<sup>83</sup> See PBS News Hour, *Thai Shrimp Industry Exploits Workers to Whet Global Appetite for Cheap Shrimp*, PBS (Sept. 20, 2012), [http://www.pbs.org/newshour/bb/world/july-dec12/thaishrimp\\_09-20.html](http://www.pbs.org/newshour/bb/world/july-dec12/thaishrimp_09-20.html) (describing conditions in shrimp peeling sheds in Thailand).

<sup>84</sup> Skinner, *supra* note 6.

<sup>85</sup> See *id.*

<sup>86</sup> *Id.*

<sup>87</sup> See Winn, *supra* note 9.

<sup>88</sup> SCHULZ, *supra* note 4, at 8.

<sup>89</sup> Jason Szep & Stuart Grudgings, *Special Report: Thai Authorities Implicated in Rohingya Muslim Smuggling Network*, REUTERS (Jul. 17, 2013, 7:31 AM), <http://www.reuters.com/article/2013/07/17/us-myanmar-exodus-specialreport-idUSBRE96G02520130717>.

<sup>90</sup> See SIREN, *supra* note 65, at 1, 3, 5.

<sup>91</sup> See generally *id.*

<sup>92</sup> *Id.* at 1.

In sum, as one investigator observed, “[w]hat stands out is the severity of abuse, even when compared to . . . other forms of human trafficking.”<sup>93</sup> The harshness of the elements and required work, the isolation of the workplace, the strong competition spurred by the booming fishing industry, the desperate and ready supply of vulnerable migrant workers afraid to speak up,<sup>94</sup> and the corruption and greed of local law enforcement who are complicit in the industry make human trafficking abuses in this sector particularly difficult to detect, investigate, prosecute, and prevent.

#### D. *The Mechanics of the Global Seafood Supply Chain*<sup>95</sup>

Abhorrent labor abuses are not uncommon in both the technologically developed chains in Thailand<sup>96</sup> and the traditional versions of the seafood supply chain in poorer countries like Bangladesh.

The beginning of a typical seafood supply chain traditionally starts with the workers at the plant or work location who process, assemble, or produce the final product. This product enters a network of various middlemen who negotiate conditions of purchase until the product finally lands in the hands of the overseas consumer. The real story, however, starts much earlier and involves the recruitment of the fishermen, workers who are lured from their village or migrant ports to work on fishing vessels to catch seafood for direct consumption by downstream consumers. If the catch is not fit for human consumption, much of this “trash fish” is used indirectly to make fishmeal, which is fed to shrimps and prawns being raised for export to supermarkets in the UK and elsewhere.<sup>97</sup>

The global supply chain that yields shrimp is a prime example of modern day slavery. In fact, “in March 2011, Humanity United prioritized slavery in the global shrimp industry as a primary focus.”<sup>98</sup> The enslaved efforts of the fishermen who provide the fishmeal (fed to shrimp) can be considered encompassed by the global shrimp supply chain since their labor is in the chain that brings food to the end consumer. Therefore, the findings from the shrimp supply chain data – which has already been the focus of several specific studies<sup>99</sup> and of the media<sup>100</sup> and represents a

<sup>93</sup> CAUGHT AT SEA, *supra* note 30, at 19.

<sup>94</sup> *See id.* at 1.

<sup>95</sup> *See* Vitasek, *supra* note 15 (explaining that the supply chain involves the process from raw materials to the “final customer using the finished goods” and that “[a]ll vendors, service providers and customers are links in the supply chain”).

<sup>96</sup> *See* ACCENTURE, *supra* note 13, at 26-28 (discussing Thailand’s seafood chain).

<sup>97</sup> Jim Wickens, *Special Report: The Slavery Behind Our Seafood*, THE ECOLOGIST (Sept. 20, 2012), [http://www.theecologist.org/News/news\\_analysis/1596323/the\\_slavery\\_behind\\_our\\_seafood.html](http://www.theecologist.org/News/news_analysis/1596323/the_slavery_behind_our_seafood.html).

<sup>98</sup> ACCENTURE, *supra* note 13, at 8. Accenture prioritized this issue after a 2010 report conducted by Verite traced slave labor in 25 global commodities. The highest vulnerability to slave labor in the fishing industry are S.E. Asia and West Africa. *Forced Labor Commodities Atlas: Fish*, VERITE, <http://www.verite.org/Commodities/Fish> (last visited Feb. 25, 2014).

<sup>99</sup> *See, e.g.*, ACCENTURE, *supra* note 13; Int’l Labor Rights Forum & Warehouse Worker United, *The Wal-Mart Effect: Child and Workers Rights Violations at Narong Seafood, Thailand’s Model Shrimp Processing Factory* (June 6, 2013), [http://www.laborrights.org/sites/default/files/publications-and-resources/Narong%20Shrimp%20Report\\_0.pdf](http://www.laborrights.org/sites/default/files/publications-and-resources/Narong%20Shrimp%20Report_0.pdf).

<sup>100</sup> *See* Tom Philpott, *Did a Slave Process the Shrimp in Your Scampi?*, MOTHER JONES (June 17, 2013), <http://www.motherjones.com/tom-philpott/2013/06/did-slave-process-shrimp-your-scampi>.

significant share of exports from Asian countries to the rest of the world,<sup>101</sup> most notably, the United States – can be used to extrapolate findings relevant to the seafood sector at large. The abusive labor practices in this sector are further exacerbated by the fact that the revenue from the exportation of shrimp forms a significant component of the national economies of producing countries;<sup>102</sup> authorities are simply not willing to disrupt the money flow.

Thailand's global seafood chain stems from backyard hatcheries that cultivate shrimp in bulk and then deliver them to large-scale aquaculture farms.<sup>103</sup> There, the shrimp are grown in high-yield ponds or tanks and then traded in the seafood market to large processing plants.<sup>104</sup> Labor in these large processing plants is required for freezing, packaging, or breeding the products, another under-regulated link of the chain.<sup>105</sup> In contrast, poor coastal families in Bangladesh “collect wild shrimp to deliver to the tidal ponds of low-tech shrimp farmers, who raise the shrimp” and sell them in networks of exporters that ship their product to overseas markets.<sup>106</sup> Those shrimp are minimally processed.

After the shrimp has been caught, cleaned, processed, and made suitable for export, it enters the “most concentrated part of the supply chain” and ends up in the hands of manufacturers or retailers, such as Wal-Mart, who operate their own integrated supply chains.<sup>107</sup> Other large U.S. retailers include Kroger, Costco, Safeway, Publix, Trader Joe's, and Darden (which supplies Red Lobster, Olive Garden, and Long John Silvers).<sup>108</sup> In fact, “Americans consume more shrimp than any other seafood product.”<sup>109</sup> While in 2012, the United States imported 533,500 tons of shrimp,<sup>110</sup> the quantity has vastly grown, as “[s]hrimp imports have increased by 95 percent since 1995.”<sup>111</sup> More than 20 years ago, 80 percent of shrimp consumed in America originated from domestic wild fisheries.<sup>112</sup> Today, we import 90 percent of shrimp.<sup>113</sup> It has only been within the past few years that international organizations and non-governmental agencies have seriously started investigating the exploitive conditions in this industry.<sup>114</sup>

<sup>101</sup> See *Fishing People*, *supra* note 2 (finding that Asian countries of China, Thailand, Vietnam, Indonesia, India and Bangladesh account for nearly 80 percent of the world's fishers and fish farmers).

<sup>102</sup> See INTERNATIONAL LABOUR ORGANIZATION, *Thailand's Shrimp and Seafood Industry – a World Leader* (Aug. 2013), [http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms\\_220513.pdf](http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_220513.pdf).

<sup>103</sup> ACCENTURE, *supra* note 13, at 6.

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

<sup>105</sup> *Id.*

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

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 33-39.

<sup>109</sup> Benjamin L. England & Rick D. Quinn, *The Two Things FDA Constantly Tests For in Imported Shrimp*, SEAFOODSOURCE.COM (Dec. 13, 2012), <http://www.seafoodsource.com/en/commentary/guest-insights/35-fdaimports-com/23504-the-two-things-fda-constantly-tests-for-in-imported-shrimp>.

<sup>110</sup> *Prawn (or Shrimp?) Prices on the Rise in the US*, SPEND MATTERS (June 24, 2013, 2:22 PM), <http://spendmatters.com/2013/06/24/prawn-or-shrimp-prices-on-the-rise-in-the-us/>.

<sup>111</sup> *Import Alert: Surging Shrimp Imports Raise Consumer Health Concerns*, FOOD AND WATER WATCH, 1 (July 2007), <http://documents.foodandwaterwatch.org/doc/IAShrimpForDinner.pdf>.

<sup>112</sup> Tom Philpott, *Shrimp's Carbon Footprint Is 10 Times Greater Than Beef's*, MOTHER JONES (Feb. 22, 2012), <http://www.motherjones.com/tom-philpott/2012/02/all-you-can-eat-shrimp-side-ecological-ruin>.

<sup>113</sup> *Id.*

<sup>114</sup> See, e.g., BRENNAN, *supra* note 41; SURTEES, *supra* note 38; DEP'T OF FISHERIES, *supra* note 34; ENVTL.

## II. GLOBAL SUPPLY CASES IN COURT<sup>115</sup>

In 2000 the United States enacted the Victims of Trafficking and Violence Protection Act (TVPRA),<sup>116</sup> America's first comprehensive law designed to combat forced labor and sex trafficking. In 2003, the TVPRA was amended to include a civil remedy for trafficked victims to bring cases in federal district court.<sup>117</sup> Since 2003, Congress has reauthorized the TVPRA three times, most recently on March 7, 2013.<sup>118</sup>

This statute, however, has not yielded many complete victories for victims of human trafficking – especially those employed in a global supply chain. First, since the inception of the statute, there have been only about forty three cases<sup>119</sup> filed seeking a civil remedy against corporate traffickers under 18 U.S.C. § 1595. Second, of the forty-three cases, only three involved a global supply context in which a corporation had hired middlemen and denied corporate liability for the forced labor and human trafficking in the chain used to produce the final goods.<sup>120</sup> Third, even when legally victorious and morally vindicated, the collection of any funds is extremely difficult. For example, on April 16, 2002, a federal court of the United States awarded a \$3.5 million judgment against corporate giant Daewoosa after trial in a human trafficking case.<sup>121</sup> Yet, not one dollar of that judgment has been recovered<sup>122</sup> in spite of the heinousness of the crime, as evidenced by one trafficker being sentenced to forty years in prison for the same actions alleged

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JUST. FOUND., *supra* note 5; HUMAN RIGHTS WATCH, *supra* note 82.

<sup>115</sup> This Section contains excerpts and summaries from an article written by the same author, Naomi Jiyoung Bang, *Navigating the Complexities of Corporate Liability in Human Trafficking and Forced Labor Cases*, 75 TEX. B.J. 766 (2013).

<sup>116</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464.

<sup>117</sup> 18 U.S.C. § 1595 (2006 & Supp. 2008); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875.

<sup>118</sup> Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558; William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044; Trafficking Victims Protection Reauthorization Act of 2013, Pub. L. No. 113-14, 127 Stat. 54.

<sup>119</sup> Total number of cases were calculated by running searches on PACER, Westlaw, and Bloomberg from August 2012 to August 2013, in conjunction with research results in Naomi Jiyoung Bang, *Justice for Victims of Human Trafficking and Forced Labor: Why Current Theories of Corporate Liability Do Not Work*, 43 U. MEM. L. REV. 1047, 1050 & n.7, 51 (2013) (finding approximately forty cases from the inception of the statute until August 2012). Only three TVPRA cases were decided since August 2012: *Lainez v. Baltazar*, 5:11-CV-00167-BR, 2013 WL 3288369 (E.D.N.C. June 28, 2013); *Ruiz v. Fernandez*, CV-11-3088-RMP, 2013 WL 2467722, at \*1 (E.D. Wash. June 7, 2013); *Francisco v. Susano*, 525 F. App'x 828, 829 (10th Cir. 2013).

<sup>120</sup> See *Vu v. W&D Apparel*, No. 4:12-CV-00282 (S.D. Tex. dismissed July 20, 2012) (failing to address theories of secondary liability such as agency and joint employment); *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674 (S.D. Tex. 2009) (still pending since the court granted in part and denied in part defendants' motion to dismiss); *Ruiz v. Fernandez*, CV-11-3088-RMP, 2013 WL 2467722, at \*1 (E.D. Wash. June 7, 2013).

<sup>121</sup> *Jiang Shunzhe v. Daewoosa Samoa, Ltd.*, No. 68-99 (High Ct. Am. Samoa, Trial Div., Apr. 16, 2002); Fili Sagapolutele, *High Court of American Samoa Issues \$3.5 Million Judgment Against Daewoosa Samoa*, PACIFIC ISLANDS REPORT (Apr. 19, 2002), <http://pidp.org/archive/2002/April/04-19-up1.htm>.

<sup>122</sup> To date, plaintiffs in the *Daewoosa* case, despite numerous legal and political attempts to collect from the Vietnamese government, have not collected any monies on their judgment. Interview with Virginia Sudbury, co-counsel for Plaintiffs in the *Daewoosa* case (Aug. 2013); see also VIRGINIA LYNN SUDBURY, *SWEATSHOPS IN PARADISE: A TRUE STORY OF SLAVERY IN MODERN AMERICA* (2012) (discussing the garment factory/sweatshop class-action lawsuit *Nga v. Daewoosa*, which took place in the territory of American Samoa from 1999 until 2001).

in that civil action.<sup>123</sup> Even as recently as November 16, 2011, in another federal district court case, plaintiffs initially obtained only a nominal judgment of one dollar and no punitive damages in a TVPRA case, before they appealed the case which was remanded for further consideration regarding the award.<sup>124</sup>

The tremendous cost, time, and anxiety of civil litigation against deep-pocketed defendants comprise one set of explanations for the dismally low instances of court victories.<sup>125</sup> Another explanation is that existing legal theories of corporate liability tend to favor the corporation especially when applied to the attenuated facts of corporate connections to their contractors in a global supply context.<sup>126</sup> The following is a brief overview of the most popular theories used to date.<sup>127</sup>

#### A. Aiding and Abetting Under Alien Torts Claims Act

The Alien Torts Claim Act (ATCA)<sup>128</sup> was used quite frequently by plaintiffs in human rights and human trafficking cases with facts occurring overseas, before its extra-territorial application was severely curtailed by the US Supreme Court's holding in the *Kiobel* case.<sup>129</sup> Most of the relevant ATCA cases primarily involved corporations that provided support or funding or contracted with tortfeasors in serious violations of human rights.<sup>130</sup> Even before *Kiobel*,<sup>131</sup> however, plaintiffs still had to overcome a high bar in that they were required to prove that the corporation aided and abetted through a demonstration of the corporation's intent—or purposefulness—to engage in conduct that it knew would facilitate or cause serious human rights violations.<sup>132</sup>

<sup>123</sup> See *United States v. Lee*, 472 F.3d 638, 641 (9th Cir. 2006).

<sup>124</sup> See *Francisco*, 525 F. App'x at 829.

<sup>125</sup> Since the inception of the *Adhikari* civil federal lawsuit, plaintiffs' counsel have expended more than 20,000 hours litigating against 3 multinational law firms, each with hundreds of lawyers. Interview with Agnieszka Fryszman, counsel for Plaintiffs, *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674 (S.D. Tex. 2009) (Aug. 15, 2013).

<sup>126</sup> See *Abecassis v. Wyatt*, 785 F. Supp. 2d 614 (S.D. Tex. 2011); *Vu v. W&D Apparel*, No. 4:12-CV-00282 (S.D. Tex. dismissed July 20, 2012).

<sup>127</sup> For a more in-depth discussion of liability theories in this context, see Naomi Jiyoung Bang, *Justice for Victims of Human Trafficking and Forced Labor: Why Current Theories of Corporate Liability Do Not Work*, 43 U. MEM. L. REV. 1047 (2013).

<sup>128</sup> 28 U.S.C.A. § 1350 (West 2013). The ATCA bestows original jurisdiction upon U.S. district courts “of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

<sup>129</sup> See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013). There, the Court severely curtailed the extraterritoriality application of ATCA to scenarios occurring overseas, stating that its decision was controlled by “the presumption against extraterritoriality.” Congress is presumed not to intend its statutes to apply outside the United States unless it provides a “clear indication” otherwise. *Id.* Notably, the Court unanimously concluded that courts may not recognize an action in a suit by aliens against foreign corporations for allegedly aiding and abetting the commission of human rights abuses on foreign soil. *Id.*

<sup>130</sup> See *In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig.*, 792 F. Supp. 2d 1301 (S.D. Fla. 2011); *Doe v. Nestle. S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010), *vacated*, 738 F.3d 1048 (9th Cir. 2013); *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674 (S.D. Tex. 2009); *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007); see also BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 7, 79-80 (1996) (stating that “slavery and the slave trade are internationally recognized tons of long historical standing”).

<sup>131</sup> See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013).

<sup>132</sup> See *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 34-35 (D.C. Cir. 2011) *vacated* 527 F. App'x 7 (D.C. Cir.

Even now, assuming a US corporation could overcome the jurisdictional issues pertaining to extra-territoriality, the standard to find corporate liability still remains a high bar and difficult task, as its destructive application in *Nestle* illustrates.<sup>133</sup> Although *Nestle* was vacated,<sup>134</sup> the case is instructive to demonstrate the tremendously high hurdle. There, the court found that the plaintiffs—Malian children who were forced to labor in cocoa fields in Cote d’Ivoire under extreme conditions that involved coercion with guns and whips and being locked into sleeping areas at night—failed to prove that Nestle intentionally aided and abetted the local contractor. In dismissing the ATCA claim, the court incredulously held that it was not enough to state that Nestle provided general support, which, in turn, allowed the farmers to continue farming.<sup>135</sup> Instead, plaintiffs needed to allege the assistance furthered the alleged crimes; for example, that Nestle provided guns and whips or locks that were used to “threaten and intimidate the plaintiffs.”<sup>136</sup>

While observers had expected the U.S. Supreme Court to abolish corporate liability under the ATCA, the Court side-stepped the issue and instead substantially weakened the extraterritorial reach of the ATCA.<sup>137</sup> Therefore, the ruling in *Nestle* contributes to the further narrowing of the avenues of relief for victims of human trafficking. Perhaps, with clear global and national transparency guidelines for corporations to follow, the law will move in the opposite direction.

### B. Principal-Agent Common Law Theory of Liability

Victims in human trafficking cases have had limited success in imputing liability to a corporation through its agents in the supply chain. Although agency law is a matter of state law, the main tenets of the test stem from the common law. The use of the agency theory to find a corporation liable for actions committed by its contractors has been less than successful.

In *Adhikari*,<sup>138</sup> plaintiffs alleged an agency relationship in seeking liability for KBR, a military contractor, for the actions of its sub-contractor, which committed various human rights violations including human trafficking. Even though the court found that the plaintiffs had met the initial legal threshold to survive a motion to dismiss<sup>139</sup> by alleging the principal-agent

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2013), reh’g en banc dismissed (July 26, 2013) (outlining the criteria for civil tort liability for aiding and abetting: “(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation”) (quoting *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983)) (internal citations omitted).

<sup>133</sup> *Doe v. Nestle*, 748 F. Supp. 2d at 1082-87, vacated, 738 F.3d 1048.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 1100.

<sup>136</sup> *Id.* at 1101.

<sup>137</sup> *See* *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013). The Court said that its decision was controlled by “the presumption against extraterritoriality.” *Id.* Congress is presumed not to intend its statutes to apply outside the United States unless it provides a “clear indication” otherwise. *Id.* Notably, the Court unanimously concluded that courts may not recognize an action in a suit by aliens against foreign corporations for allegedly aiding and abetting the commission of human rights abuses on foreign soil. *Id.*

<sup>138</sup> *Adhikari*, 697 F. Supp. 2d at 694.

<sup>139</sup> *See* *Bell Alt. Corp. v. Twombly*, 550 U.S. 544 (2007) (To survive a motion to dismiss for failure to state a claim upon which relief can be granted, factual allegations must be enough to raise a right to relief above the speculative level.); *see also* *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).



relationship, that finding appears to have been based on other evidence of explicit control; evidence included the contractual relationship between KBR and its subcontractor and KBR's authority to regulate its subcontractor's personnel.<sup>140</sup> Similar theories have been advanced in other courts, with mixed results.<sup>141</sup> Therefore, it is unclear whether a pure global supply arrangement, without such specific terms of control enumerated in the contract, would suffice for a court to find a corporation and its contractor had a principal-agent relationship.

Other plaintiffs have attempted to argue that the overseas contractor was the corporation's alter ego and, therefore, liability for the inhumane acts of a subcontractor should be imputed to the U.S. corporation. This theory requires plaintiffs to demonstrate that the parent controlled the subsidiary "to such a degree as to render the latter the mere instrumentality of the former."<sup>142</sup> The dearth of cases arguing this indicates that it is a very high standard of proof requiring extraordinary evidence.<sup>143</sup>

### C. Civil RICO Theories

Enacted as part of the Organized Crime Control Act of 1970, the RICO Act<sup>144</sup> allows for the leaders of a syndicate to be tried for the crimes they ordered others to commit or assist. Under RICO, plaintiffs must prove that (1) the corporation was engaged in labor trafficking on a systematic, widespread scale; (2) the American defendant gained substantial economic benefit through this activity; and, (3) this gain occurred at the expense of trafficked workers.<sup>145</sup> The pleading requirements of RICO are extensive and complex. Furthermore, the plaintiffs "must show at least two racketeering predicates that are related, and that they amount to or pose a threat of continued criminal activity."<sup>146</sup>

Even if trafficking victims can survive motions to dismiss their RICO claims, they must still endure arduous discovery to satisfy the numerous prerequisites of each individual claim. Moreover, the RICO statute has also been subject to extra-territoriality arguments in overseas actions.<sup>147</sup> Finally, the four-year statute of limitations is relatively short for victims who suffer debilitating effects of psychological abuse from past physical abuse—such as foreign victims in the fishing scenario, who may take years to tell their story, complete necessary investigation, and find competent willing counsel. Arguments such as equitable tolling have generally not been

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<sup>140</sup> See *Adhikari*, 697 F. Supp. 2d at 694.

<sup>141</sup> See Second Amended Complaint at 14, *David v. Signal Int'l, L.L.C.*, 257 F.R.D. 114 (E.D. La. 2009) (No. 08-1220) 2010 WL 4879194, at ¶ 68 (concerning protective orders and discovery issues).

<sup>142</sup> See *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001) (quoting *Calvert v. Huckins*, 875 F. Supp. 674, 678 (E.D. Cal. 1995)).

<sup>143</sup> See *Bowoto v. Chevron Texaco Cor.*, 312 F. Supp. 2d 1229, 1246 (N.D. Cal. 2004) (The Court rejected plaintiff's argument for alter-ego liability despite allegations that the corporation "knew of and approved CNL's use of and payments to the Nigerian military.") (quoting Plaintiff's Opposition Brief at 15, *Bowoto*, 312 F. Supp. 2d 1229 (No. 99-2506)).

<sup>144</sup> Racketeer Influenced and Corrupt Organizations Act [RICO], Pub.L. 91-452, 84 Stat. 922 (1970) (codified as amended at 18 U.S.C. § 1961-1968).

<sup>145</sup> This test is derived from the RICO theory which makes it unlawful to operate or manage an enterprise that conducts its affairs, directly or indirectly, through a pattern of racketeering activity. See *id.*

<sup>146</sup> *American Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1291 (11th Cir. 2010) (citing *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 240 (1989)).

<sup>147</sup> See *Adhikari*, 697 F. Supp. 2d at 691 (finding RICO had extra-territorial application in trafficking case).

successful.<sup>148</sup>

Although RICO litigation is complex, there is an ongoing need for human rights lawyers to learn “how to fight effectively against fishing operators who are essentially using models of organized crime to conduct their fishing operations.”<sup>149</sup>

#### D. Contractual Privity Based on Third Party Beneficiary Theory

Some plaintiffs have attempted to argue that the corporation owed a duty to the workers stemming from the fact that “[a] promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty.”<sup>150</sup> Relying on this theory, plaintiffs have argued that they were third party beneficiaries of the global supply contract between the corporation and the contractor. In the 2009 case of *Doe v. Wal-Mart Stores, Inc.*,<sup>151</sup> plaintiffs who endured substandard, grueling work conditions in Wal-Mart’s contractors’ foreign factories brought claims—including of forced labor—against Wal-Mart.<sup>152</sup> They alleged that the corporation was liable to them because it promised suppliers—who were responsible for the abusive labor conditions suffered by plaintiffs—that it would monitor the suppliers’ compliance with basic labor standards.<sup>153</sup> Therefore, the workers argued that “Wal-Mart necessarily intended to benefit Plaintiffs by incorporating its code of conduct in its supplier agreements, and making a binding commitment to enforce the code for Plaintiffs’ benefit.”<sup>154</sup> They also used Wal-Mart’s public pronouncements as additional proof of a duty to plaintiffs, arguing that “Wal-Mart knew or should have known that its failure to adequately monitor code compliance would injure Plaintiffs.”<sup>155</sup> Much to the workers’ chagrin, the court held that since the contract was between the corporation and the contractor, “no such promise [to inspect or monitor] flow[ed] to Plaintiffs as third-party beneficiaries.”<sup>156</sup>

Interestingly, even though the court refused to impute any duty to Wal-Mart to monitor the suppliers, stating that there was no duty because privities did not extend to the workers,<sup>157</sup> just a few years later, in January 2012, the California legislature enacted the California Business Transparency Law. This revolutionary transparency law imposes obligations of certification, auditing, and monitoring of third party suppliers to ensure that California’s imports will be

<sup>148</sup> See, e.g., *Forbes v. Eagleson*, 228 E3d 471, 489 (3d Cir. 2000).

<sup>149</sup> E-mail from Thomas Harré, Legal Team, Slave Free Seas (Aug. 12, 2013).

<sup>150</sup> *Doe v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th Cir. 2009) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 304 (1981)).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 680.

<sup>153</sup> *Id.* at 683.

<sup>154</sup> Appellants’ Reply Brief at III(B)(3), *Doe v. Wal-Mart Stores, Inc.*, 572 F.3d 677 (9th Cir. 2009) (No. 08-55706), 2008 WL 6690743.

<sup>155</sup> *Id.* at 14. Plaintiffs supported their argument by noting that in third-party beneficiary negligence cases, “the contract is of significance only in creating the legal duty, and the negligence of the defendant should not be considered as a breach of contract, but as a tort governed by tort rules.” *Id.* (quoting *Eads v. Marks*, 39 Cal.2d 807, 810-11 (1952)).

<sup>156</sup> *Wal-Mart Stores, Inc.*, 572 F.3d at 682 (citing *Marina Tenants Ass’n v. Deauville Marina Dev. Co.*, 226 Cal. Rptr. 321, 327 (Cal. Ct. App. 1986)) (“A third party beneficiary cannot assert greater rights than those of the promisee under the contract.”).

<sup>157</sup> *Id.* at 685.

trafficking-free.<sup>158</sup>

### *E. Joint Employer Theory*

Given the above limitations on available theories of corporate liability, it is not surprising that litigation often results in long, drawn-out, expensive failures in court,<sup>159</sup> and that plaintiffs face tremendous difficulty in obtaining restitution.<sup>160</sup> Some plaintiffs have creatively challenged the status quo of current laws to expand theories of recovery. For instance, some recently argued that a corporation was a joint employer<sup>161</sup> with its sub-contractor,<sup>162</sup> and therefore, should be liable as a co-employer.<sup>163</sup> Traditionally, courts employ the “common law” test, which examines the extent of control and authority of the employer over the employee.<sup>164</sup> Some victims have argued, however, that the courts should instead employ the “economic realities” test that focuses on the worker’s dependency on the corporation. Not surprisingly, corporations have advocated for the common law test in global supply scenarios,<sup>165</sup> since its core analysis focuses on the indicia of direct control of the employer over the employee.<sup>166</sup> Unfortunately, it is challenging for workers in another country to demonstrate traditional facts of corporate control in these global supply cases, where the corporation and plaintiff are thousands of miles away from each other.

As part of a comprehensive battle against human trafficking in the global supply context, plaintiffs should nonetheless continue to advocate for courts to adopt and expand the “economic realities” test.<sup>167</sup> This test focuses on worker dependency factors such as employer’s degree of control, opportunities for profit or loss, investment in facilities, permanency of relation, and skill required. While the economic realities version of the joint employer test still stands strong under the FLSA, state workmen’s compensation acts, the Family and Medical Leave Act, the Worker Adjustment and Retraining Act, Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act,<sup>168</sup> it has yet to be applied in the global

<sup>158</sup> See Section III.

<sup>159</sup> See generally *id.*; *Abecassis v. Wyatt*, 785 F. Supp. 2d 614 (S.D. Tex. 2011).

<sup>160</sup> See *United States v. Lee (Daewoosa)*, 472 F.3d 638 (9th Cir. 2006); see also *Francisco v. Susano*, 525 F. App’x 828, 829 (10th Cir. 2013) (reversing and remanding district court’s determination of one dollar in restitution for victims under TVPRA).

<sup>161</sup> *Ruiz v. Fernandez*, CV-11-3088-RMP, 2013 WL 2467722, at \*38 (E.D. Wash. June 7, 2013) (finding a “joint employer” relationship between a membership organization that recruited Chilean sheepherders and a ranch owner who employed the sheepherders in a TVPRA/FLSA case through use of “economic realities” test).

<sup>162</sup> See *Vu v. W&D Apparel*, No. 4:12-CV-00282 (S.D. Tex. dismissed July 20, 2012); *Adhikari*, 697 F. Supp. 2d at 684; *Lee*, 472 F.3d at 643.

<sup>163</sup> See *Plaintiffs’ Opposition to Motion to Dismiss, Vu v. W&D Apparel*, No. 4:12-CV-00282 (S.D. Tex. dismissed July 20, 2012).

<sup>164</sup> RESTATEMENT (FIRST) OF AGENCY § 220 (1933).

<sup>165</sup> *Vu v. W&D Apparel*, No. 4:12-CV-00282 (S.D. Tex. dismissed July 20, 2012); *Wal-Mart Stores, Inc.*, 572 F.3d at 682.

<sup>166</sup> See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (“In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished.”) (internal citations omitted).

<sup>167</sup> See *United States v. Silk*, 331 U.S. 704, 713 (1947) (holding that “employees included workers who were such as a matter of economic reality”) (internal quotations omitted).

<sup>168</sup> See, e.g., *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 66 (2d Cir. 2003) (applying the economic realities

supply chain context.<sup>169</sup> The economic realities test should be recognized as a powerful precedent in areas directly impacting human trafficking and forced labor since it has already been used in garment production scenarios domestically<sup>170</sup> and should be applied to U.S. corporations who perpetuate unjust labor practices internationally. In addition, the courts have already extended FLSA protections to undocumented workers who were trafficked into the United States.<sup>171</sup> It is time for the legislature to incorporate this standard into the TVPRA or create a federal global transparency law.

Innovative theories, such as expanding the joint employer doctrine, are the next logical step in the courts reducing human trafficking in the corporate global supply chain and can be used in conjunction with a multi-faceted war against human trafficking. As one author aptly noted, “[l]awsuits—even if unsuccessful—hit a corporation where it hurts most, in the court of public opinion, because they inform the public of a business’s actual practices beyond the corporate propaganda.”<sup>172</sup>

As seen above, the low rate of success in court appears connected to the complex legal hurdles associated with narrow theories of corporate liability and the tremendous cost of litigation. Because the existing remedies are insufficient to provide a clear cut test of corporate complicity, a comprehensive international initiative could provide a credible standard to expand the basis of corporate liability theories in court, set a benchmark for national and regional transparency laws for businesses that would prevent trafficking in the first place, and set a ready standard to instigate consumer activism.

### III. GLOBAL SUPPLY ISSUES IN LEGISLATION AND CORPORATE COMPLIANCE: THE STICK AND THE CARROT

To date, most of the burden of preventing or punishing human trafficking has fallen on government agencies, social service providers, and non-profit organizations. In 2014, there were 879 non-profit organizations and social service organizations or coalitions in the United States working in the field of human trafficking and forced labor.<sup>173</sup> In contrast, in 2012, the Department

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test in the FLSA context); *Penton v. Crown Zellerbach Corp.*, 699 F.2d 737, 741 (5th Cir. 1983) (applying the economic realities test in the workmen’s compensation context); see generally Susan N. Houseman, *Determining Independent Contractor Status*, DEPARTMENT OF LABOR, <http://www.dol.gov> (Aug. 1999), [http://www.dol.gov/oasam/programs/history/herman/reports/futurework/conference/staffing/9.1\\_contractors.htm#19](http://www.dol.gov/oasam/programs/history/herman/reports/futurework/conference/staffing/9.1_contractors.htm#19) (“The economic realities test is used to determine employee status under the Family and Medical Leave Act . . . the Fair Labor Standards Act . . . and the Worker Adjustment and Retraining Act . . . . Additionally, it is often applied by courts in determining independent contractor status in civil rights cases under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act.”).

<sup>169</sup> For an in-depth discussion on the economic realities theory as a novel theory of corporate liability in the international global supply context, see generally Naomi Jiyoung Bang, *Unmasking the Charade of the Global Supply Contract: A Novel Theory of Corporate Liability in Human Trafficking and Forced Labor Cases*, 35 HOUS. J. INT’L L. 255 (2013).

<sup>170</sup> Naomi Jiyoung Bang, *Justice for Victims of Human Trafficking and Forced Labor: Why Current Theories of Corporate Liability Do Not Work*, 43 U. MEM. L. REV. 1047, 1095-96 (2013) (citing *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 78-80 (2d Cir. 2003)).

<sup>171</sup> *Id.*

<sup>172</sup> Haley Revak, *Corporate Codes of Conduct: Binding Contract or Ideal Publicity?*, 63 HASTINGS L.J. 1645, 1669 (2012).

<sup>173</sup> THE FREEDOM REGISTRY, <http://freedomregistry.org/organizations> (last visited Feb. 7, 2014).

of Justice convicted only 138 traffickers, a decline from the 151 convictions in 2011.<sup>174</sup>

Admittedly, some belated action has been taken by the private sector—in large part due to media outcry and consumer response—and usually after the release of high profile stories of trafficked laborers found in corporate supply chains.<sup>175</sup> Some writers have advocated for a stronger role by the private sector,<sup>176</sup> noting that some corporations already monitor, or claim to monitor, their own supply chains.<sup>177</sup> The private sector has more financial resources to devote to the issue of human trafficking, and is better situated upstream to apply pressure on their suppliers. While it may be true that the profits of many corporations exceed the GDPs of many small countries,<sup>178</sup> convincing corporations to divert those dollars to fighting the faceless evil of human trafficking is another task. This is especially true when a corporation's *raison d'être* is the maximization of profits.<sup>179</sup> Simply, it appears that corporations will comply either in response to legal and economic pressure with the risk of costly sanctions or voluntarily because of the benefits to be derived.<sup>180</sup> Thus, this Section addresses the “carrot and the stick” approaches to encouraging corporate compliance in global supply chains:

#### A. *The Stick: Transparency Laws*

Given the scarcity and novelty of laws that attempt to set forth, let alone enforce, standards of compliance in corporate global supply chains, it may be pre-mature to draw any

<sup>174</sup> U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 383 (2013), available at <http://www.state.gov/documents/organization/210737.pdf> (“During FY 2012, DOJ convicted a total of 138 traffickers in cases involving forced labor, sex trafficking of adults, and sex trafficking of children, compared to 151 such convictions obtained in 2011. Of these, 105 were predominantly sex trafficking and 33 were predominantly labor trafficking, although some cases involved both.”).

<sup>175</sup> See, e.g., *Nike Faces New Worker Abuse Claims in Indonesia*, HUFFINGTON POST (Sept. 12, 2011), [http://www.huffingtonpost.com/2011/07/13/nike-faces-new-worker-abuse-indonesia\\_n\\_896816.html](http://www.huffingtonpost.com/2011/07/13/nike-faces-new-worker-abuse-indonesia_n_896816.html); *Nike Admits Abuse at Indonesian Plants*, BBC NEWS (Feb. 22, 2001), <http://news.bbc.co.uk/2/hi/asia-pacific/1184103.stm>.

<sup>176</sup> See Jonathan Todres, *The Private Sector's Pivotal Role in Combating Human Trafficking*, 3 CAL. L. REV. CIRCUIT 80, 85-89 (2012) (discussing the qualities of the private sector that can benefit the fight against human trafficking).

<sup>177</sup> See Robert J. Bowman, *Forging Responsible Supply Chains: Are Companies Growing Up?*, SUPPLY CHAIN BRAIN (Nov. 5, 2012), <http://www.supplychainbrain.com/content/blogs/think-tank/blog/article/font-size2forging-responsible-supply-chains-are-companies-growing-upfont/> (“[M]ore than 80 percent of the 750 companies polled had some kind of internal system for monitoring their social and environmental practices. Fewer than a third, however, had extended such efforts to their supplier networks. And that’s where many of the worst problems occur.”) (citing Chief Supply Chain Officer Report, SCM WORLD (May 11, 2011), <http://www.scmworld.com/Research/Reports/2011-Chief-Supply-Chain-Officer-Report/>).

<sup>178</sup> Todres, *supra* note 176, at 88-89; see also Jason Hanna, *Report: California Slips to World's 9th Largest Economy*, CNN (Jan. 13, 2012, 8:20 PM), <http://news.blogs.cnn.com/2012/01/13/report-california-slips-to-worlds-9th-largest-economy/> (“[California] dropped to ninth on the list of the world’s largest economies as measured by gross domestic product . . .”).

<sup>179</sup> ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION & PRIVATE PROPERTY* 9 (1991).

<sup>180</sup> See *Top 50 Socially Responsible Companies 2013*, MACLEAN'S (June 6, 2013), <http://www2.macleans.ca/canada-top-50-socially-responsible-corporations-2013/> (“Philips Electronics—one of the few companies to feature its social and environmental performance alongside its financial performance in reports. Worked with more than 300 suppliers in 2012 to investigate the presence of conflict minerals in its products, encouraging their participation in the Electronics Industry Citizenship Coalition’s Conflict Free Smelter program. In 2012, sales from Green Products rose to 45 per cent, up from 39 per cent in 2011—on track to reach the company’s new target of 50 per cent in 2015.”).

conclusions on the effectiveness of such laws. Nevertheless, the corporate and public response to two bills in the United States, a state law that was adopted by the State of California and a federal law that recently died in the U.S. House of Representatives, may shed some light on the effect of legislation to influence corporate behavior. In addition, this Section will discuss other relevant federal legislation that has positively altered corporate behavior in regulating the entry of tainted goods into the United States that could be used as guidance for future laws.

### B. California Transparency in Supply Chains Act of 2010

While several states are presently deciding whether to adopt global supply disclosure laws<sup>181</sup> and others have already declined to do so,<sup>182</sup> California appears to be the only American state proactive enough to have enacted specific measures to address the murkiness of the global supply system. In 2010, Governor Schwarzenegger signed California's Transparency in Supply Chains Act of 2010 ("California Transparency Act"),<sup>183</sup> and on January 1, 2012, the Act became enforceable.

There is no mistaking the intent in the stark language of the California Transparency Act that recognizes that "slavery and human trafficking . . . are often hidden from view . . . difficult to uncover and track,"<sup>184</sup> and that "[l]egislative efforts to address the market for goods and products tainted by slavery . . . have been lacking."<sup>185</sup> This leads to the situation where "[c]onsumers and businesses are inadvertently promoting and sanctioning these crimes through the purchase of goods and products that have been tainted in the supply chain."<sup>186</sup> "Absent . . . disclosures, consumers are at a disadvantage in being able to distinguish companies on the merits of their efforts to supply products free from the taint of slavery and trafficking."<sup>187</sup> In other words, the California legislature recognized that purchasers were not only being deprived of casting their dollar votes against slavery and trafficking, but may have in fact been unwittingly promoting it.

As its name connotes, the California Transparency Act compels companies meeting certain threshold requirements<sup>188</sup> to disclose their efforts to eradicate slavery and human

<sup>181</sup> See *All Pending Legislation*, POLARIS PROJECT (Jan. 17, 2014), <http://www.polarisproject.org/what-we-do/policy-advocacy/national-policy/all-pending-legislation>. Connecticut's legislature is currently considering "An Act Concerning Exploitative Labor in Supply Chains," a bill that would require retailers and manufacturers to disclose their efforts to identify and remove exploitative labor from their supply chains. H.B. 5461, Conn. Gen. Assemb., Reg. Sess. (Ct. 2013). The bill was referred to the Joint Committee on Commerce on January 22, 2013. *Id.*

<sup>182</sup> The Florida legislature's Exploitive Labor Act died in the Business and Professional Regulation Subcommittee on May 3, 2013. H.B. 777, 2010 Leg., Reg. Sess. (Fl. 2013). The bill would have required retailers and manufacturers to disclose efforts to identify and eradicate human trafficking, slavery, and exploitive labor from supply chains, to post such disclosure on retailer's or manufacturer's website or provide written disclosure, provided minimum requirements for disclosure, including annual reports to the Governor and legislature, and mandated injunctive relief or divestment of state funds for violations. *Id.*

<sup>183</sup> Cal. Civ. Code § 1714.43 (West 2012). The bill became effective as of January 1, 2012. *Id.*

<sup>184</sup> S.B. 657, Cal. Gen. Assemb., Reg. Sess. § 2(c) (Cal. 2012).

<sup>185</sup> *Id.* at § 2(f).

<sup>186</sup> *Id.* at § 2(h).

<sup>187</sup> *Id.* at § 2(i).

<sup>188</sup> See Cal. Civ. Code § 1714.43 (West 2012). Specifically, any seller or manufacturer doing business in California that has more than \$100,000,000 in gross receipts must provide a written disclosure to the public addressing the extent to which the seller or manufacturer (1) verifies product supply chains to evaluate risks of human trafficking and slavery and whether a third party conducted the verification; (2) audits suppliers and whether such audit was independent

trafficking from their supply chains. Specifically, SB 657 mandates that any manufacturer or retailer with worldwide annual gross receipts of at least \$100 million that is “doing business” in the State of California disclose on its website its policies on, and measures undertaken to, combat forced labor and trafficked persons in its supply chain.<sup>189</sup> The new law is expected to apply to approximately 3,200 global companies.<sup>190</sup>

While this bill has been a source of hope for those concerned with labor abuses in the supply chain<sup>191</sup> and may be more effective than voluntary corporate codes of conduct,<sup>192</sup> there are practical gaps in the California law. For example, the exclusive remedy for a violation of the disclosure obligations is an action brought by the California Attorney General for injunctive relief,<sup>193</sup> which neither addresses any past harm already suffered by the trafficked workers nor provides for any enforcement mechanism. So far, retailers and manufacturers subject to the Act have responded by including language in their agreements with suppliers that covers business ethics and human rights in general, describes certification requirements, and evinces a readiness to cooperate during audits as set forth in the bill.<sup>194</sup> No injunctions have been issued, and there is no indication of the significance of this compliance.

Moreover, since the California law is only a disclosure law, the true deterrent may be the fear of public shaming. In fact, it is too early to determine whether disclosure will result in any change at all. Ironically, corporations who report on their website that they are doing the minimum towards or even bluntly assert that they are doing nothing at all to audit, certify, or monitor their global supply changes, would still be in compliance with the letter of the law.<sup>195</sup>

As an example of powerless enforcement, as recently as 2012, Walmart claimed that it stopped buying from Narong, a company alleged to commit human rights abuses in their shrimp processing facilities as a “result of [their] auditing process”.<sup>196</sup> However, a reporter discovered,

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and unannounced; (3) requires suppliers to certify that materials incorporated into its products comply with slavery and human trafficking laws of the countries in which they are doing business; (4) maintains internal accountability standards and procedures for employees or contractors; (5) provides training to employees in supply chain management on human trafficking and slavery in the global supply chain. *Id.* at (a)-(c).

<sup>189</sup> *Id.*

<sup>190</sup> ALLIANCE TO END SLAVERY & TRAFFICKING, *Beyond SB 657: How Businesses Can Meet and Exceed California's Requirements to Prevent Forced Labor in Supply Chains*, 2 (Jan. 2013), [http://www.endslaveryandtrafficking.org/sites/default/files/ATEST%20Report%20Beyond%20SB657%20final\\_0.pdf](http://www.endslaveryandtrafficking.org/sites/default/files/ATEST%20Report%20Beyond%20SB657%20final_0.pdf).

<sup>191</sup> Mark K. Neville, Jr., *Diamonds are a Warlord's Best Friend – Enforcing Human Rights in the Supply Chain*, J. INT'L TAX'N, Sept. 2012, at 19, 21 n. 5 (“Some nongovernmental organizations have gone so far as to tout [the California Supply Chain Transparency Act] as a ‘corporate slavery disclosure’ law.”).

<sup>192</sup> For insightful discussion of the lack of legal liability, enforcement, and effectiveness in combating human trafficking found in Wal-Mart's touted Global Procurement Program and Wal-Mart's Standards/Ethical Sourcing Program, see Revak, *supra* note 172.

<sup>193</sup> Cal. Civ. Code § 1714.43(d) (West 2012).

<sup>194</sup> ALAN S. GUTTERMAN, 7 Business Transactions Solutions § 37:44 (Thomas Reuters 2014).

<sup>195</sup> Todres, *supra* note 176, at 97 (“Ironically, for the company that openly declares it does nothing, it arguably has a better case for stating that it meets the . . . language of the disclosure requirement.”); see REMSEN KINNE ET AL., K&L GATES, CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT – FIRST 90 DAYS (2012), available at <http://www.klgates.com/california-transparency-in-supply-chains-act--first-90-days-04-12-2012/> (“The Act requires that companies disclose the information about their supply chain compliance activities referred to above, but does not require companies to take specific verification, audit, certification, internal accountability and training actions.”).

<sup>196</sup> Tom Philpott, *Did a Slave Process the Shrimp in Your Scampi?*, MOTHER JONES (June 17, 2013 2:20 AM GMT), <http://www.motherjones.com/tom-philpott/2013/06/did-slave-process-shrimp-your-scampi>.

through Warehouse Workers United and U.S. customs data, that Walmart “may have imported 36,000 pounds of Narong shrimp as recently as March 21, 2013, directly contradicting the company’s claim that it had stopped buying Narong shrimp in 2012;” when pressed further about the transparency of the shrimp supply chain, shipping documents, audits, export licenses, and other related questions, Walmart responded that it had “nothing further to share.”<sup>197</sup>

Without an enforcement mechanism, there appear to be no consequences for companies that refuse to disclose more than what is minimally required. Incidentally, domestic and international watch-dog organizations, such as the Alliance to End Slavery & Trafficking (ATEST),<sup>198</sup> have offered numerous public suggestions, including extending the bill to cover the service sector in areas such as janitorial services, landscaping, security, recruitment, construction, and travel services that are not covered by the California Transparency Act.<sup>199</sup>

### C. *The Business Transparency on Trafficking and Slavery Act*

The federal counterpart to the California Transparency Act—which some had hoped would be the debut of federal guidelines for the unregulated field of the corporate global supply chain—died in the same year it was introduced in the US Congress. The Business Transparency on Trafficking and Slavery Act (“H.R. 2759”) introduced on August 1, 2011 during the 112<sup>th</sup> Congress by U.S. Representative Carolyn Maloney (D-NY14) would have required publicly listed companies to include similar disclosures in their annual reports filed with the Securities and Exchange Commission.<sup>200</sup> Specifically, H.R. 2759 mandated anti-forced labor human trafficking policies, certification of products, verification and audits of suppliers, assessments of global supply chains, internal accountability standards, training, and mandatory policies regarding recruitment.<sup>201</sup> Furthermore, the bill aggressively required companies to disclose what, if any, measures they have taken to “identify and address conditions of forced labor, slavery, human trafficking, and the worst forms of child labor within [their] supply chains.”

However, perhaps in lieu of H.R. 2759, Congress appears to have mustered enough support<sup>202</sup> to enact a more benign reporting provision regarding global supply practices as an amendment to the TVPRA in 2013 that ordered, within two years, the Comptroller General to “submit a report on the use of foreign labor contractors.”<sup>203</sup> Nonetheless, this is significant as a

<sup>197</sup> *Id.*

<sup>198</sup> ATEST is a coalition of 11 U.S.-based human rights organizations that combat human trafficking. ATEST, <http://www.endslaveryandtrafficking.org/> (last visited Feb. 9, 2014).

<sup>199</sup> ATEST, BEYOND SB 657: HOW BUSINESSES CAN MEET AND EXCEED CALIFORNIA’S REQUIREMENTS TO PREVENT FORCED LABOR IN SUPPLY CHAINS 7 (2013), available at [http://www.endslaveryandtrafficking.org/sites/default/files/ATEST%20Report%20Beyond%20SB657%20final\\_0.pdf](http://www.endslaveryandtrafficking.org/sites/default/files/ATEST%20Report%20Beyond%20SB657%20final_0.pdf); Letter from ATEST to Geoffrey R. Way, Chief Counsel, California Franchise Tax Board (May 21, 2012), available at [http://endslaveryandtrafficking.org/research\\_resources/atest-urges-ca-franchise-tax-board-release-confidentiality-information-important](http://endslaveryandtrafficking.org/research_resources/atest-urges-ca-franchise-tax-board-release-confidentiality-information-important).

<sup>200</sup> Business Transparency on Trafficking and Slavery Act, H.R. 2759, 112th Cong. (2011).

<sup>201</sup> *Id.* at § (2)(r)(1).

<sup>202</sup> On Feb. 28, 2013, Congress voted 286 Ayes, 138 Noes, and 7 No Votes on the Violence Against Women Reauthorization Act of 2013, which included the TVPRA as an amendment. *Final Vote Results For Roll Call 55*, HOUSE.GOV, <http://clerk.house.gov/evs/2013/roll055.xml> (last visited Feb. 9, 2014).

<sup>203</sup> Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 1235(a), 127 Stat. 54, 146 (2013). Specifically, the report “shall — (1) describe the role of labor recruiters or brokers working in countries that are sending workers and receiving funds, including any identified involvement in labor abuses; (2) describe the role and practices of employers in the United States that commission labor recruiters or brokers or directly recruit foreign workers;



first step to expose this crucial issue. Moreover, the defeat of Rep. Mahoney's bill should only be viewed as a temporary setback. After all, it took almost three years to pass the TVPRA after a presidential directive and seven decades after the international community had promulgated specific conventions against slavery. On March 11, 1998, President Bill Clinton had first called for legislative action to combat human trafficking. Recognizing the Universal Declaration for Human Rights of 1948 and the Supplement Convention on the Abolition of Slavery,<sup>204</sup> the Slave Trade and Institutions and Practices similar to Slavery of 1956,<sup>205</sup> the Clinton administration sought relief for victims of trafficking and harsher penalties for those who profited from trafficking schemes.<sup>206</sup> On October 28, 2000, the TVPA was finally passed.<sup>207</sup>

#### D. Other Statutes that Regulate Tainted Goods

By contrast, Congress and the Executive branch have not been afraid to pass similar laws requiring businesses to certify the source of some commodities with questionable sources, such as "blood diamonds"<sup>208</sup> or "conflict minerals."<sup>209</sup>

For instance, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) by inserting an amendment to the Securities Exchange Act of 1934<sup>210</sup> requiring persons to disclose whether "conflict minerals" are used in their products. Although Dodd-Frank does not specifically apply to trafficking, "Congress recognized that the presence of conflict minerals in products may indicate that forced labor was used to obtain the minerals and trigger other laws."<sup>211</sup> The penalty for failure to verify such in good faith is that any company in violation of the Act would be subject to Exchange Act Section 18 liability.<sup>212</sup> Indeed,

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(3) describe the role of Federal departments and agencies in overseeing and regulating the foreign labor recruitment process, including certifying and enforcing under existing regulations; (4) describe the type of jobs and the numbers of positions in the United States that have been filled through foreign workers during each of the last 8 years, including positions within the Federal Government; (5) describe any efforts or programs undertaken by Federal, State and local government entities to encourage employers, directly or indirectly, to use foreign workers or to reward employers for using foreign workers; and (6) based on the information required under paragraphs (1) through (3), identify any common abuses of foreign workers and the employment system, including the use of fees and debts, and recommendations of actions that could be taken by Federal departments and agencies to combat any identified abuses. *Id.* at § 1235(c).

<sup>204</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/210(III) (Dec. 10, 1948).

<sup>205</sup> Trafficking Victims Protection Act of 1999, H.R. REP. NO. 106-487, pt. 1, at 3.

<sup>206</sup> MaryAnne McReynolds, *The Trafficking Victims Protection Act: Has the Legislation Fallen Short of its Goals?*, 15 GEO. WASH. UNIV. J. OF PUB. POL'Y & PUB. ADMIN. 33, 36 (2008).

<sup>207</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 22 U.S.C.A. §§ 17101-13 (West 2014).

<sup>208</sup> Clean Diamond Trade Act of 2003, 19 U.S.C. §§ 3901-13 (West 2014).

<sup>209</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78 (2010).

<sup>210</sup> *Id.*

<sup>211</sup> Anna Williams Shavers, *Human Trafficking, the Rule of Law, and Corporate Social Responsibility*, 9 S.C. J. INT'L L. & BUS. 39, 54-55 (2012) (citing Alexandra R. Harrington, *Faceting the Future: The Need for and Proposal of the Adoption of a Kimberley Process-Styled Legitimacy Certification System for the Global Gemstone Market*, 18 TRANSNAT'L L. & CONTEMP. PROBS. 353, 354-355 (2009) (noting it is likely that other illicit activities such as human trafficking accompany the mining of diamonds and other gemstones)).

<sup>212</sup> See 17 C.F.R. Pts. 240, 249b (West 2014). The SEC's Conflict Minerals Final Rule provides that reports on Form SD and Conflict Minerals Reports will be "filed" with the SEC. Thus, issuers will have liability under Exchange

“[w]hat is remarkable about the conflict minerals legislation is that human rights activists were successful in imposing this responsibility on publicly traded companies under the securities laws.”<sup>213</sup>

Similarly, in 2003, Congress enacted the Clean Diamond Trade Act,<sup>214</sup> noting that millions of people had died or been displaced in the previous decade from civil wars in Angola, Sierra Leone, and the DRC, over the control of lucrative diamond mines, and put into place a voluntary certification program<sup>215</sup> to assure that the diamonds were not ‘blood diamonds.’<sup>216</sup> Likewise, the Foreign Corrupt Practices Act of 1977 (FCPA) “makes it unlawful for a company to make a payment to a third party while knowing that all or a portion of the payment will go directly or indirectly to a foreign official for the purpose of influencing the official in his decision-making capacity.”<sup>217</sup> While the FCPA met great resistance in earlier years, it is now taken very seriously by corporations wishing to do business overseas, where there was previously little monitoring.<sup>218</sup>

Therefore, in spite of the temporary legislative defeats and watered down legislation, popular pressure should continue to be applied to pass stronger legislation because it is “proactive rather than reactionary and gives corporations, local businesses, and politicians an opportunity to win public favor.”<sup>219</sup> As will be demonstrated and argued in Part V, one uniform set of guidelines involving monitoring of global supply chains could be adopted internationally and then implemented nationally by all countries. This, in turn, could form the basis for future legislation with more teeth, in the aftermath of a clear cut standard with international support.

#### E. *The Carrot – Time for Corporate Social Responsibility?*

Corporations exist to make a profit for their owners.<sup>220</sup> However, the methods to produce that profit are also strongly influenced by compliance with legislation, fear of corporate liability,

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Act Section 18 for non-compliance or false or misleading material statements in those reports. However, the issuer can prove they acted in good faith as a defense. Although not a specific legal implication of SEC’s final rule, issuers would not be able to use “conflict-free” labels, which has been demanded by consumers and human rights organizations in recent years. *Id.*

<sup>213</sup> Neville, *supra* note 191, at 21.

<sup>214</sup> Clean Diamond Trade Act, 19 U.S.C. §§ 3901-3913 (West 2003).

<sup>215</sup> Exec. Order No. 13,312, 31 C.F.R. Pt. 592 (2011).

<sup>216</sup> *Id.*

<sup>217</sup> See 7 Business Transactions Solutions § 37:44 (citing 15 U.S.C.A. § 78dd-(a)(3)).

<sup>218</sup> See *Spotlight on Foreign Corrupt Practices Act*, SEC, <http://www.sec.gov/spotlight/fcpa.shtml> (last updated Nov. 14, 2012) (“The SEC may bring civil enforcement actions against issuers and their officers, directors, employees, stockholders, and agents for violations of the anti-bribery or accounting provisions of the FCPA. Companies and individuals that have committed violations of the FCPA may have to disgorge their ill-gotten gains plus pay prejudgment interest and substantial civil penalties. Companies may also be subject to oversight by an independent consultant.”); *SEC Enforcement Actions: FCPA Cases*, SEC, <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (last updated May 29, 2013). FCPA cases have been brought against Ralph Lauren Co., Tyco Intl., Pfizer, Johnson & Johnson, Tyson Foods, Halliburton, Monsanto, Siemens, GE, IBM, Dow Chemical Co. and Chevron Corp, among others. *Id.*

<sup>219</sup> See Revak, *supra* note 172 at 1670 (citing Katherine E. Kenny, *Code or Contract: Whether Wal-Mart’s Code of Conduct Creates a Contractual Obligation Between Wal-Mart and the Employees of its Foreign Suppliers*, 27 NW. J. INT’L L. & BUS. 453, 463 (2007)).

<sup>220</sup> See BERLE & MEANS, *supra* note 179.

consumer reactions that reduce the demand for a product, and other social factors. Corporate social responsibility (CSR)—“the integration of social, environmental, and economic concerns into business operations”<sup>221</sup>—is one such factor. Some scholars have defined CSR as “actions that appear to further some social good, beyond the interests of the firm and that which is required by law.”<sup>222</sup>

Corporations that fail to sufficiently report about their corporate structures and practices prevent clarity about their true impact in countries around the world. As a result, the world’s largest companies may contribute to an environment in which evils such as human trafficking and forced labor can thrive. Transparency is especially important when companies operate through a network of interconnected subsidiaries, affiliates, joint-ventures, other holdings, or agents or contractors in diverse jurisdictions.<sup>223</sup> Applying CSR to the human trafficking and forced labor context, “recommendations for domestic and international corporate social responsibility plans should be implemented not only for the benefit that accrues to the company, but also for the benefits that may be realized by existing and potential victims through a reduction in the supply and demand for trafficked goods or services.”<sup>224</sup>

In 2012, Transparency International, a global civil society organization with more than 90 chapters worldwide,<sup>225</sup> issued findings from a comprehensive analysis of 105 of the world’s largest companies—collectively worth more than 11 trillion U.S. dollars, with operations affecting people in more than 200 countries—regarding transparency relating to anti-corruption programs, organizational transparency, and country reporting.<sup>226</sup> The report, *Transparency in Corporate Reporting: Assessing the World’s Largest Companies* concluded that “[m]ultinationals have a long way to go to improve transparency.”<sup>227</sup> With such tremendous financial impact on the world, greater corporate transparency through means such as “publicly reporting on activities and operations” provides “necessary information for investors, journalists, activists and citizens to monitor their behaviour.”<sup>228</sup>

For instance, during the 1990s, Nike’s dismissive attitude towards overseas sweatshop allegations changed “when widespread associations between Nike, child labor, and women’s exploitation caused the company’s capitalized value and brand reputation to plummet.”<sup>229</sup> Even

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<sup>221</sup> Shavers, *supra* note 211, at 88 (internal quotations omitted); Carole Ramsay, *Corporate Social Responsibility: A Framework for Understanding the Legal Structure*, 57 ROCKY MTN. MIN. L. INST. 17-A (2011); see CSR EUROPE, A GUIDE TO CSR IN EUROPE: COUNTRY INSIGHTS BY CSR EUROPE’S NATIONAL PARTNER ORGANIZATIONS 4 (2010), available at [http://www.mas-business.com/documentos/guide\\_to\\_csr.pdf](http://www.mas-business.com/documentos/guide_to_csr.pdf) (observing, for example, that “growing attention is being paid to the voluntary actions that companies take as part of their CSR strategies to manage their economic, social and environmental impacts”).

<sup>222</sup> Abigail McWilliams et al., *Corporate Social Responsibility: Strategic Implications*, 43 J. MGMT. STUD. 1, 4 (2006) (quoting Abigail McWilliams & Donald Siegel, *Corporate Social Responsibility: A Theory of the Firm Perspective*, 26 Acad. Mgmt. Rev. 117, 117 (2001)).

<sup>223</sup> *Id.* at 118.

<sup>224</sup> Shavers, *supra* note 211, at 88.

<sup>225</sup> TRANSPARENCY INT’L, *TRANSPARENCY IN CORPORATE REPORTING: ASSESSING THE WORLD’S LARGEST COMPANIES 2* (2012).

<sup>226</sup> *Id.* at 4.

<sup>227</sup> *Id.* at 5.

<sup>228</sup> *Id.*

<sup>229</sup> Debra Cohen Maryanov, *Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labor Standards in the International Supply Chain*, 14 Lewis & Clark L. Rev. 397, 404 (2010).

after Nike adopted a code of conduct in 1992, the Portland Public School Board still debated in 1996 “whether to reject a multimillion dollar donation from Nike because of its practice to contract with sweatshops.”<sup>230</sup> Since then, the company has become an industry leader in CSR.<sup>231</sup>

Companies desiring to adopt anti-trafficking measures and comply with CSR guidelines, such as the Guiding Principles,<sup>232</sup> can readily find them. There is an abundance of third party auditors, certifying agencies, monitors, and literature to assist the willing corporation.<sup>233</sup> As further discussed in Section V, an increasing number of consumers are pressuring companies to identify tainted products through such consumer generated tactics as mobile applications (apps)—like Free2Work or Made in a Free World<sup>234</sup>—and demand for “free-trade” product labels.<sup>235</sup> This shift in consumer behavior can influence corporate behavior and have tremendously positive effects on reducing human trafficking in the global supply chain. Finally, from a shareholder’s perspective, there can be increased profits stemming from a more positive view of a corporation’s reputation and credibility, flowing from a CSR-influenced business plan.

#### IV. INTERNATIONAL COMMUNITY AND GUIDELINES

Since the turn of the century, the international community has set the example for individual countries in dealing with issues of slavery, human trafficking, and forced labor. In 1904, the International Congress passed the International Agreement for the Suppression of the White Slave Traffic.<sup>236</sup> Thereafter, the League of Nations (precursor to the United Nations)<sup>237</sup> issued the first international agreement abolishing slavery the League of Nations Slavery Convention of 1926.<sup>238</sup> The prohibition of slavery was strengthened with the adoption of the Universal Declaration of Human Rights (UDHR) in 1948; the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery

<sup>230</sup> *Id.*

<sup>231</sup> See *Top 50 Socially Responsible Companies 2013*, *supra* note 180 (Nike Inc. is “[o]ne of the few manufacturers to have an executive-level committee in place, chaired by the CEO, charged with driving sustainable innovation. Nike’s materials sustainability index assigns scores to materials used in production based on sustainability factors such as the amount of water they require. Efficient materials and vendors stand a better chance of being selected as Nike suppliers.”).

<sup>232</sup> See, e.g., U.N. Human Rights Office of the High Commissioner, *The Corporate Responsibility To Respect Human Rights: An Interpretive Guide* (2012), HR/PUB/12/02 (2012), [http://www.ohchr.org/Documents/Publications/HR.PUB.12.2\\_En.pdf](http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf) (enumerating and discussing the Guiding Principles focused on human rights); Consortium Symbiosis, *Corporate Social Responsibility: Strategies and Tools for Stakeholders Engagement – The Handbook* (Nov. 2010), <http://www.eurodesk.it/sites/default/files/The%20Handbook.pdf>.

<sup>233</sup> See, e.g., BUREAU VERITAS GROUP, <http://www.bureauveritas.com> (last visited Feb. 8, 2014); INTERNATIONAL INITIATIVE TO END CHILD LABOR, <http://endchildlabor.org> (last visited Feb. 8, 2014); CSRHUB, <http://www.csrhub.com> (last visited Feb. 8, 2014).

<sup>234</sup> See NOT FOR SALES, *Free2Work Mobile Application*, available at <http://www.free2work.org>; SLAVERY FOOTPRINT *Made in a Free World app*, available at <http://slaveryfootprint.org/about/#getapp/>.

<sup>235</sup> See FREE THE SLAVES, *About Slavery: FAQ*, <https://www.freetheslaves.net/SSLPage.aspx?pid=304> (last visited Feb. 8, 2014) (“Goods that are produced and distributed through Fair Trade networks are more likely to be slave-free.”).

<sup>236</sup> International Agreement for the Suppression of White Slave Traffic, May 18, 1904, 35 Stat. 426, 92 U.N.T.S. 19 (amended 1949).

<sup>237</sup> *History of the United Nations*, U.N., <http://www.un.org/en/aboutun/history> (last visited Feb. 8, 2014).

<sup>238</sup> Slavery Convention, September 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253.

(Supplementary Convention on the Abolition of Slavery) in 1956; and the International Covenant on Civil and Political Rights in 1966.<sup>239</sup> The first international agreement to specifically prohibit human trafficking was the U.N. 1949 Convention for the Suppression of Trafficking in Persons and the Exploitation of Others.<sup>240</sup>

In 2000, the United Nations issued the U.N. Convention against Transnational Organized Crime<sup>241</sup> and the accompanying Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children<sup>242</sup> (Trafficking Protocol, also called Palermo Protocol). Referencing exploitation, the Trafficking Protocol makes a direct link between forced labor, and practices similar to slavery like human trafficking in the global economy.<sup>243</sup> The Trafficking Protocol was widely ratified with 147 member States.<sup>244</sup> It was unique from other treaties because it mandated law enforcement. In fact, the Trafficking Protocol directed parties to take action to penalize trafficking, protect victims of trafficking, and grant victims temporary or permanent residence in the countries of destination.<sup>245</sup> Countries used the international standard as a framework for their national provisions.<sup>246</sup> The United States incorporated the provisions in its federal anti-human trafficking statute TVPRA, which was passed as an amendment to the Violence Against Women Reauthorization Act.<sup>247</sup>

#### A. International Labour Organization (ILO)

ILO is an international agency,<sup>248</sup> which has played a central role globally in the prevention of and fight against forced labor and human trafficking. Importantly, its universal guidelines and standards have been adopted by many countries and international organizations. These conventions are crucial to creating and developing a well-regulated sector that can identify, report, investigate, prosecute, and penalize corporations that rely on trafficked labor in their supply chains. Even as far back as 1930, the ILO has sought to address human trafficking,<sup>249</sup> promulgating Forced Labor Convention No. 29, which outlawed forced labor.<sup>250</sup> In 1957, the ILO

<sup>239</sup> *Id.* at 19.

<sup>240</sup> *Id.* at 20.

<sup>241</sup> U.N. Convention against Transnational Organized Crime, Nov. 15, 2000, 2225 U.N.T.S. 209.

<sup>242</sup> Trafficking Protocol, Nov. 15, 2000, 2237 U.N.T.S. 319.

<sup>243</sup> *Id.*

<sup>244</sup> CAUGHT AT SEA, *supra* note 30, at 27.

<sup>245</sup> *See* Trafficking Protocol, Nov. 15, 2000, 2237 U.N.T.S. 319.

<sup>246</sup> 124 countries became parties to the treaty. A “party” refers to a State that gives its explicit consent to be bound by the treaty. A party is legally bound by the provisions within the treaty and accepts all the treaty’s obligations, subject to legitimate reservations, understandings, and declarations.

<sup>247</sup> *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, §§ 1201-1264, 127 Stat. 54, 136-60; *see also* H.R. 3887, 110th Cong. § 403(13) (2007) (enacted) (citing Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime as a basis for the enactment of TPVRA).

<sup>248</sup> “The ILO was created in 1919, as part of the Treaty of Versailles that ended World War I, to reflect the belief that universal and lasting peace can be accomplished only if it is based on social justice. . . . In 1946, the ILO became a specialized agency of the newly formed United Nations.” *Origins and History*, INT’L LABOUR ORG., <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm> (last visited Aug. 25, 2013).

<sup>249</sup> ILO GLOBAL ESTIMATE OF FORCED LABOUR, *supra* note 17, at 28.

<sup>250</sup> FREE THE SLAVES, *supra* note 235, at 19-20.

issued the Abolition of Forced Labor Convention No. 105, which urged States “to ‘[s]uppress and not make use of any form of forced or compulsory labor’ that is used as a means of political coercion and economic development.”<sup>251</sup>

“In 1998, governments, workers and employers’ organizations adopted the ILO Declaration on Fundamental Principles and Rights at Work, calling upon States to eliminate all forms of forced labour.”<sup>252</sup> In the fishing industry, the ILO was the first to address the forced labor issues and adopt the International Labour Conference on the Work in Fishing Convention No. 188 in 2007,<sup>253</sup> which guides companies to reduce exploitive labor conditions on fishing vessels. The ILO has also highlighted protection for groups with special needs, including the unemployed and migrant workers.<sup>254</sup>

A first step is for states who have committed to the elimination of forced labor and human trafficking in the fisheries sector to implement the core provisions of the Convention. There appears to be some movement. In May 2012, representatives of the European Union’s employers’ and trade unions in the sea fisheries sector signed an agreement, which is an important step towards implementing Convention No. 188 at the EU level.<sup>255</sup>

### B. Existing International Principles and Guidelines

Note should also be taken of the development of several non-binding principles developed as part of various international and regional responses to human trafficking, that should be consulted and incorporated as part of any future binding legal standards. Two examples dealing with the economic sector are set forth below.

The UN Global Compact (UNGC) is a broad-based multi-stakeholder initiative established to provide resources, tools, and examples of good practices to assist companies in developing more sustainable supply chains.<sup>256</sup> Its participants are comprised of governments, employers, civil society groups, and trade unions, working on principles drawn from key UN and ILO standards,<sup>257</sup> with human trafficking figuring prominently in the categories of human rights and labor. It is a forum that encourages businesses to promote markets, commerce, technology, and finance in ways that benefit economies, societies, and the environment.<sup>258</sup> Since the UNGC’s launch in July 2000, 8,000–10,000 participants from over 140 countries have joined.<sup>259</sup>

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<sup>251</sup> Anne Gallagher, *Using International Human Rights to Better Protect Victims of Trafficking: The Prohibitions on Slavery, Servitude, Forced Labor, and Debt Bondage*, in *THE THEORY AND PRACTICE OF INTERNATIONAL CRIMINAL LAW: ESSAYS IN HONOR OF M. CHERIF BASSIOUNI* 397, 424 & n.102 (Leila Nadya Sadat & Michael P. Scharf 2008).

<sup>252</sup> See *CAUGHT AT SEA*, *supra* note 30, at 2.

<sup>253</sup> See *id.* (“Until recently the fisheries sector lacked a holistic legal framework to secure fishers’ working conditions. This gap was filled in 2007 when the International Labour Conference adopted the Work in Fishing Convention (No. 188), which together with other labor and safety standards, will contribute to preventing and curbing forced labor and human trafficking in the fisheries sector.”).

<sup>254</sup> *Id.* at 26.

<sup>255</sup> *Id.* at 28.

<sup>256</sup> See *Overview of the UN Global Compact*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/index.html> (last updated Apr. 22, 2013).

<sup>257</sup> See *id.*

<sup>258</sup> See *id.*

<sup>259</sup> See *Corporate Sustainability in the World Economy*, UNITED NATIONS GLOBAL COMPACT, <http://www.>

The UN Guiding Principles on Business and Human Rights are standards which cover aspects of human rights that were endorsed by the UN Human Rights Council in June 2011.<sup>260</sup> The UN Human Rights Council established a Working Group on the issue of human rights and transnational corporations and other business enterprises to promote the Guidelines.<sup>261</sup> These Guidelines provide a common, authoritative standard and reference point for mitigating negative human rights linked to businesses, such as forced labor and human trafficking.<sup>262</sup> The principles clarify the respective roles of State actors and business enterprises on human rights, emphasizing the objective of enhancing standards and practices to achieve socially sustainable globalization.<sup>263</sup> Again, these are not binding.

While there appear to be committed organizations, innovative collaborations, several well intentioned guidelines, and numerous well researched reports, there are still no binding agreements with the authority to mandate enforcement by signatory members. Therefore, a model international standard that specifically responds to the unique need for transparency in the global supply chain *and* mandates specific enforcement measures is necessary. This standard would provide an underlying legal framework for uniform and concerted action by ratifying individual nation states, who were signatories to the agreement or protocol. “Legally-binding instruments are central reference points for business. For ratifying countries, they set out the framework for national law to which companies and employers must adhere in every jurisdiction in which they operate”<sup>264</sup> and be a source of credibility, enforcement, and adherence. A binding international statute could also provide the necessary leverage in some countries to create a legal framework for monitoring global supply chains that would protect foreign documented and undocumented workers rather than punishing them, provide public authorities with a legal mechanism and with guidance to implement laws effectively, and decrease punitive actions by corrupt law enforcement.<sup>265</sup> As seen above, there is already a history, an international commitment, and an abundance of initiatives, conventions, organizations, and movements upon which to develop an effective and comprehensive international initiative.

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[unglobalcompact.org/docs/news\\_events/8.1/GC\\_brochure\\_FINAL.pdf](http://unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf) (last visited Mar. 1, 2014).

<sup>260</sup> See *Business and Human Rights*, UNITED NATIONS HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx> (last visited Feb. 9, 2014) (On June 16, 2011, “the UN Human Rights Council endorsed Guiding Principles on Business and Human Rights for implementing the UN ‘Protect, Respect and Remedy’ Framework, providing – for the first time – a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity.”).

<sup>261</sup> *Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UNITED NATIONS HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx> (last visited Feb. 9, 2014).

<sup>262</sup> See *Business and Human Rights*, *supra* note 260.

<sup>263</sup> *Id.*

<sup>264</sup> PHILIP HUNTER & QUINN KEPES, HUMAN TRAFFICKING & GLOBAL SUPPLY CHAINS: A BACKGROUND PAPER 5 (2012), available at <http://www.ohchr.org/Documents/Issues/Trafficking/Consultation/2012/BackgroundPaper.pdf>.

<sup>265</sup> See *id.* at 11 (discussing key concerns associated with implementation of national laws).

## V. RECOMMENDATIONS

### A. *Model International Guidelines*

Both the multiplicity of terms and the presence of conflicting terms in the various international and domestic certification guidelines<sup>266</sup> may actually provide corporations and foreign governments with opportunities to deflect blame by claiming confusion—or even compliance. A uniform standard, therefore, would neutralize this excuse. It would also provide regulators and importers with clearly delineated standards, empower plaintiffs by providing the courts with a practical standard against which to hold corporations accountable, encourage further federal and state transparency statutes and certification programs, and educate consumers by establishing credible benchmarks against which to measure corporations' actual compliance in lieu of their glitzy public relations messages.

First, uniform standards should build on existing structures and fora.<sup>267</sup> For instance, as set forth in Part II, the ILO and other non governmental organizations, such as the International Maritime Organization (IMO), have already established several “binding legal instruments that will improve fishers’ safety and working conditions.”<sup>268</sup>

Second, specific strategic points in the supply chain must be identified to determine any direct links between certain fishing practices or operations with forced labor.<sup>269</sup> Such findings should be publicly distributed so that another corporate excuse to plead ignorance is dismantled. In fact, Ambassador CdeBaca believes that:

[T]he supply chain isn't as murky as fish companies say, and he points to how quickly companies move to correct their chain when there's a health concern like food poisoning or salmonella. 'It's a matter of connecting the dots . . . and finding out who the abusive contractors, farmers or ship captains are.'<sup>270</sup>

Third, certifications under a uniform standard should stress labor content and tease out human trafficking and forced labor. Certain existing standards, such as BAP and the Global G.A.P., include only “standards on health and safety, but fail to address other key labor issues” that arise from human trafficking and forced labor.<sup>271</sup> Specifically, any adopted guideline should

<sup>266</sup> See ACCENTURE, *supra* note 13, at 41 (discussing Food and Agriculture Organization's Technical Guidelines on Aquaculture Certification).

<sup>267</sup> See CAUGHT AT SEA, *supra* note 30, at 84.

<sup>268</sup> Comment to *Caught at Sea: Fighting Forced Labour in the Fishing Industry*, INT'L LABOUR ORG. (May 31, 2013), [http://www.ilo.org/global/about-the-ilo/newsroom/comment-analysis/WCMS\\_214522/lang-en/index.htm](http://www.ilo.org/global/about-the-ilo/newsroom/comment-analysis/WCMS_214522/lang-en/index.htm); see also, e.g., Int'l Labour Office [ILO], *Work in Fishing Convention*, Res. C188, June 14, 2007; Int'l Maritime Org. [IMO], 1993 Torremolinos Protocol Relating to the 1977 Torremolinos International Convention for the Safety of Fishing Vessels, April 2, 1993 [hereinafter 1993 Torremolinos Protocol]; ILO, *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers*, July 7, 1978 [hereinafter *Convention on Standards of Training*]; see also CAUGHT AT SEA, *supra* note 30, at 2 (discussing “non-binding recommendations and codes, some of which were developed jointly between [the International Labour Office], the Food and Agriculture Organization (FAO), and the [International Maritime Organization].”).

<sup>269</sup> See CAUGHT AT SEA, *supra* note 30, at 82.

<sup>270</sup> Shannon Service & Becky Palstrom, *Illegal Fishing, Molotov Cocktails, A Daring Escape*, NPR (Jun. 20, 2012, 3:18 AM), <http://www.npr.org/2012/06/20/155048186/illegal-fishing-molotov-cocktails-a-daring-escape>.

<sup>271</sup> See ACCENTURE, *supra* note 13, at 43.



not permit the use of national standards and laws if they fall under international standards.<sup>272</sup> Any model standard must meet international human rights standards to avoid denial of abuses, such as occurred in Thailand. Researchers in Thailand have cautioned that “the government is effectively turning a blind eye to the plight of migrant labor within this industry.”<sup>273</sup> In fact, the Director General of the International Affairs Department for the Office of the Attorney General of Thailand considers the fishing business to be “an honest business like other industries” with “most[ly] . . . good employers who hire migrants with good pay and fair work conditions.”<sup>274</sup> His characterization of the workers as “illegal economic migrants, not victims, until the facts concerning the exploitation are revealed to the authorities,”<sup>275</sup> should be even more telling.

Fourth, important aspects of certification, monitoring, and auditing have already been flagged as important by *reputable non-corporate leaders* in the field, such as ILO, should be incorporated. By contrast, the private sector should have a limited role on certifying bodies due to the inherent conflict of interest. Certain groups, such as Social Accountability International, which monitored garment factories in Pakistan where a deadly fire broke out in a garment factory killing hundreds, derived the majority of its funds from corporations such as Apple and Nestle in 2010.<sup>276</sup> Social Accountability International earned much of its income from member companies, as well as from accreditation fees from for-profit auditors.<sup>277</sup> Despite evidence of malnourished, weakened, and injured workers on his vessels,<sup>278</sup> the founder of United Fisheries, Kypros Kotzikas, represented that “he had heard of no complaints from crew on board the ships, and he had personally boarded the vessels to ensure that the conditions ‘are of very high standard.’”<sup>279</sup>

Finally, each nation should be encouraged to incorporate this uniform international standard as part of its national domestic law. The adoption of the asylum and refugee law into the United States Immigration and Nationality Act<sup>280</sup> in 1980 is an example of how a major international treaty promulgated by the United Nations<sup>281</sup> was successfully ratified and effectively implemented by the United States.<sup>282</sup> Such federal statutes would also boost the credibility and enforcement power of individual states’ initiatives, such as the California Transparency Act, discussed in Section III.

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<sup>272</sup> *See id.*

<sup>273</sup> *See* SCHULZ, *supra* note 4, at 3.

<sup>274</sup> Wanchai Roujanavong, *Human Trafficking: A Challenge to Thailand and the World Community*, in ANNUAL REPORT FOR 2011 AND RESOURCE MATERIAL SERIES NO. 87, 134, 137 (Aug. 2012), available at [http://www.unafei.or.jp/english/pdf/RS\\_No87/No87\\_00All.pdf](http://www.unafei.or.jp/english/pdf/RS_No87/No87_00All.pdf).

<sup>275</sup> *Id.*

<sup>276</sup> AMERICAN FED’N OF LABOR-CONGRESS OF INDUSTRIAL ORGS., RESPONSIBILITY OUTSOURCED: SOCIAL AUDITS, WORKPLACE CERTIFICATION AND TWENTY YEARS OF FAILURE TO PROTECT WORKER RIGHTS 22 (2010); *see also* Declan Walsh & Steven Greenhouse, *Inspectors Certified Pakistani Factory as Safe Before Disaster*, N.Y. TIMES, (Sept. 19, 2012), <http://www.nytimes.com/2012/09/20/world/asia/pakistan-factory-passed-inspection-before-fire.html>.

<sup>277</sup> Walsh & Greenhouse, *supra* note 276.

<sup>278</sup> *See* Skinner, *supra* note 6 (describing abuse and coercion reported to and witnessed by New Zealand observers).

<sup>279</sup> *Id.*

<sup>280</sup> 8 U.S.C. § 1158 (2012).

<sup>281</sup> Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150.

<sup>282</sup> *See* DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 2 (5th ed. 2012).

### B. Harnessing Consumer Power

A complimentary solution will involve the consumers who desire abundant commodities, such as shrimp and seafood, and generate the underlying demand for the products. “[A]s far back as the late 19th and early 20th centuries, when sweatshops proliferated in this country, women exercised their economic power and shopped from ‘white lists’ of ‘stores that treated their employees well.’”<sup>283</sup> “In addition, the National Consumers League introduced a label in the early 1900s that certified garments ‘made under clean and healthful conditions.’”<sup>284</sup> During the anti-slavery movement in Britain and United States, abolitionists influenced the public through various means such as advertisements.<sup>285</sup> Organizations fought child labor, “through anti-sweatshop campaigns and labeling programs.”<sup>286</sup>

Today, technology allows rapid dissemination of information and resources that can instantly direct consumer behavior, which can then have a tremendous mobilizing influence on corporate behavior. For example, the iPhone app “Free2Work,” delivers instant product ratings to consumers as they shop for anything from food to footwear.<sup>287</sup> Another free mobile app, “Slavery Footprint,” awards points for contacting more than 1,000 brands for verification of supply chains, or sending preferences for slave-free products to retailers.<sup>288</sup> With a few strokes on a keyboard, any consumer can evaluate the slave content in raw materials in consumer items derived from vetted data from the Trafficking in Persons Report and The Freedom House index.<sup>289</sup>

Consumers can also pressure the government or mount publicity campaigns to corporations to ban the use of certain products that have a proven connection to human trafficking. For instance, children are needed as workers in the fishing industry in Ghana, because “their small, nimble fingers are useful in releasing the fish from the ever smaller nets.”<sup>290</sup> Therefore, “[t]he Government should ban the use of nets with tiny holes,” says Jack Dawson, Executive Director of APPLE, a local NGO that works in several fishing villages. “Doing so would . . . discourage the use of kids because there would be no need for such small hands.”<sup>291</sup>

Simply stated, “the most important thing is to work on reducing the demand for products that have been produced by slave labor. This means choosing to buy only from companies that

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<sup>283</sup> Naomi Jiyong Bang, *Unmasking the Charade of the Global Supply Contract: A Novel Theory of Corporate Liability in Human Trafficking and Forced Labor Cases*, 35 Hous. J. Int’l L. 255, 270 n.71 (2013) (citing Kim Strosnider, *Sweatshops Have Long History, U.S. Garment Workers in the Late 19th Century Faced Similar Poor Conditions*, Maine Sunday Telegram, Oct. 13, 1996, at 16A, available at 1996 WLNR 4805527).

<sup>284</sup> *Id.*

<sup>285</sup> See Cornell Univ. Library, *Abolitionist Strategies*, “I WILL BE HEARD!” ABOLITIONISM IN AMERICA, <http://rnc.library.cornell.edu/abolitionism/strategies.htm> (last visited Feb. 9, 2014).

<sup>286</sup> Univ. of Iowa, Child Labor in U.S. History, CHILD LABOR PUBLIC EDUCATION PROJECT, [http://www.continuetolearn.uiowa.edu/laborctr/child\\_labor/about/us\\_history.html](http://www.continuetolearn.uiowa.edu/laborctr/child_labor/about/us_history.html), (last visited Feb. 9, 2014).

<sup>287</sup> See Claire Provost, *Could an iPhone App Help in the Fight Against Slave Labour?*, THE GUARDIAN (Dec. 3, 2010), <http://www.theguardian.com/global-development/poverty-matters/2010/dec/03/iphone-slavery-app>.

<sup>288</sup> Elizabeth Flock, *What is Your Slavery Footprint? A New App can Tell You*, WASH. POST (Nov. 1, 2011), [http://www.washingtonpost.com/blogs/blogpost/post/what-is-your-slaveryfootprint/2011/11/01/gIQAOrGNdM\\_blog.html](http://www.washingtonpost.com/blogs/blogpost/post/what-is-your-slaveryfootprint/2011/11/01/gIQAOrGNdM_blog.html).

<sup>289</sup> Eric Blattberg, *32 Slaves Work For Me, How About You?*, WIRED.CO.UK (Sept. 23, 2011), <http://www.wired.co.uk/news/archive/2011-09/23/slavery-footprint-app>.

<sup>290</sup> Raggie Johansen, *Child Trafficking in Ghana*, UNODC, <http://www.unodc.org/unodc/en/frontpage/child-trafficking-in-ghana.html>, (last visited Feb. 9, 2014).

<sup>291</sup> *Id.*

have proven their supply chains to be slave free.”<sup>292</sup>

## VI. CONCLUSION

In conclusion, a coordinated and multi-faceted initiative involving all the major international and national stakeholders in the relevant forums that address human trafficking and forced labor in global supply chains is necessary, and possible in our lifetime. The foundation of this strategy rests on first formulating or coordinating a uniform international standard of certification, monitoring, auditing and enforcement that is vetted by reputable international organizations.

Like the TVPA and the Asylum Act, that standard should then be adopted by individual nations as part of their national law. Moreover, these standards of conduct could then serve as a legal guideline against which individual countries or even regional associations of countries could expand or formulate new theories of corporate liability in global supply chains in their national courts, empower individual states with a national foundation strengthening a state’s basis to enact similar or more aggressive laws, and provide consumers with a credible benchmark against which to hold corporations accountable. Without legal benchmarks explicitly founded upon the goals of reducing slavery in the supply chain, any consumer boycott would simply be a temporary distraction “primarily orientated toward satisfying particular consumer and market demands.”<sup>293</sup>

Only through a comprehensive solution incorporating the strengths of legal, legislative, and economic forums in a synergistic and collective fashion could there be any hope of freedom for those laboring under abhorrent conditions, such as the enslaved and trafficked fishermen.

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<sup>292</sup> Interview with Thomas Harré, Legal Team, Slave Free Seas (Aug. 12, 2013).

<sup>293</sup> David J. Doorey, *In Defense of Transnational Domestic Labor Regulation*, 43 VAND. J. TRANSNAT’L L. 953, 973 (2010) (citing Kevin Kolben, *Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes*, 48 HARV. INT’L L.J. 203, 213-14 (2007)).