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THE BUSINESS TRANSPARENCY ON TRAFFICKING AND SLAVERY ACT: FIGHTING FORCED LABOR IN COMPLEX GLOBAL SUPPLY CHAINS

*Sophia Eckert**

INTRODUCTION

“American consumers make purchasing decisions every day, but very few Americans know that it’s virtually impossible to get dressed, drive to work, talk on the phone, or eat a meal without touching products tainted by forced labor.”¹ Despite great international and domestic efforts to curb forced labor worldwide,² the problem of coercive labor conditions in the production of U.S. goods abroad persists.³ Global corporate supply chains have become increasingly complex networks that provide little to no transparency. This lack of transparency poses a very real challenge to uncovering forced labor in market activities.⁴ A recent federal legislative proposal, the Business Transparency on Trafficking and Slavery Act (“BTA”), seeks to ameliorate this problem by obliging corporations to disclose their efforts, if any, to bring to light forced labor conditions in their supply chains and the measures taken to remedy these conditions.⁵

The purpose of this note is to analyze the efficacy of the BTA in curbing forced labor in U.S. corporations’ supply chains in foreign countries. Part I provides a brief overview over the factual background by laying out the basic facts and statistics about the current problem of forced labor worldwide and by analyzing the complex nature of modern global supply chains and their relevance to the challenge of addressing forced labor. Part II examines the Business Transparency Act as proposed. Part III identifies potential defects in the Business Transparency Act as it relates to forced labor. Part IV proposes that the Business Transparency Act would need to be changed in several important respects to give teeth to the mandates of the Act. The note concludes that the Business Transparency Act as modified could substantially advance the international efforts to reduce forced labor and help pave the way to products free of forced labor in the United States.

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¹ Press Release, Hon. Carolyn Maloney, Congresswoman, U.S. H.R., Maloney Introduces Bipartisan Bill to Fight Human Trafficking (Aug 3, 2011), <http://maloney.house.gov/press-release/maloney-introduces-bipartisan-bill-fight-human-trafficking>.

² See *infra* text accompanying notes 43 and 44.

³ See Int’l Labour Office, Special Action Programme to Combat Forced Labor [SAP-FL], *ILO Global Estimate of Forced Labour: Results and Methodology* 13 (2012) [hereinafter Int’l Labour Office, *ILO Estimate*], available at http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_182004.pdf. (estimating that 20.9 million persons are currently victims of forced labor worldwide).

⁴ See Kriss Deiglmeier, *Transparency in Supply Chains: A Convergence of Possibilities*, CENTER FOR SOC. INNOVATION (Feb. 4, 2013, 12:50 PM), <http://csi.gsb.stanford.edu/transparency-supply-chains-convergence-possibilities> (discussing the complexity and lack of transparency in modern supply chains).

⁵ Business Transparency on Trafficking and Slavery Act, H.R. 2759, 112th Cong. § 1(c)(1) (2011).

I. FACTUAL BACKGROUND ON FORCED LABOR AND CORPORATE SUPPLY CHAINS

Forced labor in corporate supply chains is becoming an increasingly concerning issue since the growing complexity of supply chains with outsourcing and multiple layers of suppliers inhibits the transparency needed in order to uncover forced labor violations in supply chains.⁶ The following section will provide an overview over the global problem of forced labor and the nature of modern global supply chains.

A. Forced Labor – Facts and Statistics

20.9 million persons are victims of forced labor around the world today.⁷ This roughly translates to three out of every one thousand persons worldwide who are working under forced labor conditions at any given moment.⁸ Of these 20.9 million forced laborers, 14.2 million (68%) are exploited for economic activities in industries that are relevant to global supply chains such as agriculture, construction, and manufacturing.⁹

Forced labor is “amongst the most egregious forms of abuse that humans commit against each other, in the name of commercial profit,”¹⁰ and it has many faces. Tirto, for example, was a forced laborer who worked on an Indonesian shrimping platform.¹¹ Tirto and others worked eighteen to twenty hours a day.¹² When they became exhausted and made mistakes, they were verbally abused or beaten.¹³ Tirto wanted to leave, but he could not as the platform was too far out in the ocean to safely get to the shore and leaving would have meant that he would not receive any pay for the work he already performed.¹⁴ So, Tirto stayed and worked under inhumane conditions until his contract ended.¹⁵

Forced laborers all over the world live under horrendous conditions and are usually unable to leave their situation. They often reside on their employer’s premises where they are completely isolated from the community around them and where they have no access to

⁶ See INTERFAITH CENTER ON CORPORATE RESPONSIBILITY ET AL., EFFECTIVE SUPPLY CHAIN ACCOUNTABILITY: INVESTOR GUIDANCE ON IMPLEMENTATION OF THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT AND BEYOND 2 (2011) [hereinafter INTERFAITH CENTER ET AL.], available at <http://www.calvert.com/NRC/literature/documents/WP10009.pdf> (highlighting that modern supply chains are complex and consists of a “multitude of recruiters, and suppliers used throughout a production process”).

⁷ Int’l Labour Office, *ILO Estimate*, *supra* note 3, at 13. The International Labour Office’s estimates cover the period between 2002 and 2011. *Id.* at 11.

⁸ *Id.* at 13.

⁹ *Id.*

¹⁰ Business Transparency on Trafficking and Slavery Act, H.R. 2759, 112th Cong. § 1(c)(1) (2011).

¹¹ VERITÉ, RESEARCH ON INDICATORS OF FORCED LABOR IN THE SUPPLY CHAIN OF FISH IN INDONESIA: PLATFORM (JERMAI) FISHING, SMALL-BOAT ANCHOVY FISHING, AND BLAST FISHING 44-45 (2012) [hereinafter VERITÉ, SUPPLY CHAIN OF FISH IN INDONESIA], available at http://www.verite.org/sites/default/files/images/Research%20on%20Indicators%20of%20Forced%20Labor%20in%20the%20Indonesian%20Fishing%20Sector__9.16.pdf.

¹² *Id.* at 45.

¹³ *Id.* at 44.

¹⁴ *Id.* at 44-45.

¹⁵ *Id.* at 45.

drinking water, sanitation, waste management,¹⁶ and news media.¹⁷ Often, the premises are guarded and workers are not allowed to leave.¹⁸ Their daily shifts often reach sixteen hours,¹⁹ sometimes even eighteen to twenty-four hours a day,²⁰ and as was the case with Tirtó, when workers make mistakes, they are verbally or physically mistreated.²¹ The forced workers frequently do not receive payment at all, but are instead compensated through the provision of food.²² Most of them want to leave, but are terrified by the consequences and decide to remain in their employment.²³

Many forced laborers have incurred or inherited debt that they are then coerced into working off, like Mr. Kuku, who was forced into bonded labor when he borrowed money from his employer at the age of fourteen to pay for his family's everyday expenses.²⁴ He never received wages, but, instead, was provided with food as payment.²⁵ When he had children, he let them work for the same employer, so they would receive enough food to survive.²⁶

The percentage of forced labor is particularly high in the Asia-Pacific region.²⁷ Forced labor in this region comprises over half of the forced labor found worldwide.²⁸ Considering that China and India, which are both located in this region, are amongst the most popular countries for outsourcing by the United States,²⁹ this percentage is alarming. As the

¹⁶ See VERITÉ, RESEARCH ON INDICATORS OF FORCED LABOR IN THE SUPPLY CHAIN OF SUGAR IN THE DOMINICAN REPUBLIC 76-77 (2012) [hereinafter VERITÉ, SUPPLY CHAIN OF SUGAR IN THE DOMINICAN REPUBLIC], available at http://www.verite.org/sites/default/files/images/Research%20on%20Indicators%20of%20Forced%20Labor%20in%20the%20Dominican%20Republic%20Sugar%20Sector_9.18.pdf (reporting that 99% of workers lived on the employer's premises in the Dominican Republic's sugar industry, 40% had no access to drinking water, 49% did not have access to sanitation, and only 12 % had access to electricity); see *id.* at 46 (highlighting that workers often live in isolation on the employer's premises).

¹⁷ See *id.* at 46 (reporting that only 29% had access to radio).

¹⁸ *Id.* at 47.

¹⁹ VERITÉ, RESEARCH ON INDICATORS OF FORCED LABOR IN THE SUPPLY CHAINS OF BRAZIL-NUTS, CATTLE, CORN, AND PEANUTS IN BOLIVIA 49 (2012) [hereinafter VERITÉ, SUPPLY CHAIN OF BRAZIL-NUTS, CATTLE, CORN, AND PEANUTS IN BOLIVIA], available at http://www.verite.org/sites/default/files/images/Research%20on%20Indicators%20of%20Forced%20Labor%20in%20the%20Bolivia%20Brazilnut%2C%20Cattle%2C%20Corn%2C%20and%20Peanut%20Sectors_9.19.pdf.

²⁰ VERITÉ, SUPPLY CHAIN OF FISH IN INDONESIA, *supra* note 11, at 41.

²¹ See *id.* at 7 (describing that on the fishing platforms in Indonesia, physical and verbal abuse happened as a common routine).

²² See VERITÉ, SUPPLY CHAIN OF BRAZIL-NUTS, CATTLE, CORN, AND PEANUTS IN BOLIVIA, *supra* note 19, at 48 (reporting that 50% of workers were paid in food instead of money in Bolivia's brazil-nuts sector).

²³ See VERITÉ, SUPPLY CHAIN OF FISH IN INDONESIA, *supra* note 11, at 44-45. (describing the story of Tirtó, a young man who was held in forced labor on a fishing platform and verbally abused and who wanted to escape the situation).

²⁴ Int'l Labour Office, Programme on Promoting the Declaration on Fundamental Principles and Rights at Work, *Forced Labour Stories* (2003), available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_fs_18_en.pdf.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Int'l Labour Office, *ILO Estimate*, *supra* note 3, at 16.

²⁸ See *id.* (reporting that 56% of the global total of forced laborers are located in the Asia-Pacific region).

²⁹ See Lisa DiCarlo, *Best Countries for Outsourcing*, FORBES.COM (Aug. 28, 2003), http://www.forbes.com/2003/08/27/cx_id_0827bestcountries.html (displaying a map of popular outsourcing countries for U.S. corporations).

ILO points out, “[f]orced labour is becoming a significant risk for employers, not only for small enterprises on the margins of the formal economy in developing countries, but also for multinational enterprises with complex supply chains and outsourcing operations.”³⁰

B. The Nature of Modern Supply Chains

The supply chains of modern multi-national corporations have developed into complex and opaque webs that extend across the globe. These networks have been facilitated by free trade agreements, by the possibility of operating facilities in low cost countries, and by technological advances that enable the quick physical delivery of goods.³¹ Apple, for example, has 63,000 employees worldwide - twenty thousand of them work abroad - and an additional 700,000 workers are employed by Apple’s contractors.³² Around ninety percent of all of the components for its iPhones, for example, are engineered, manufactured, and assembled in Asia, Europe, and Africa.³³ Apple’s “[a]dvanced semiconductors have come from Germany and Taiwan, memory from Korea and Japan, display panels and circuitry from Korea and Taiwan, chipsets from Europe and rare metals from Africa and Asia. And all of it is put together in China.”³⁴

Apple is an apt example of the interwoven, global supply chains of modern multinational corporations. It employs numerous independent contractors and subcontractors, recruiters, and many layers of suppliers in the course of making its products.³⁵ It operates a multitude of manufacturing facilities and distribution centers³⁶ and their business activities are conducted in distant and inconsistently regulated environments often with little or irregular monitoring.³⁷ Research conducted by Stanford Professor Hau Lee on companies’ social and environmental monitoring mechanisms showed that eighty percent of the surveyed firms had internal monitoring mechanism.³⁸ However, less than one third of the companies examined additionally monitored their direct or indirect suppliers.³⁹ In light of the fact that transparency

³⁰ Roger Plant, *Preface to Int’l Labour Office, SAP-FL, Combating Forced Labour: A Handbook for Employers & Business* 2, 3 (2008) [hereinafter *Int’l Labour Office, A Handbook for Employers & Business*], available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_101171.pdf.

³¹ Trevor W. Nagel & Elizabeth M. Kelley, *The Impact of Globalization on Structuring, Implementing, and Advising on Sourcing Arrangements*, 38 GEO. J. INT’L L. 619, 619 (2007).

³² Charles Duhigg & Keith Bradsher, *How the U.S. Lost Out on iPhone Work*, N.Y. TIMES (Jan. 21, 2012), http://www.nytimes.com/2012/01/22/business/apple-america-and-a-squeezed-middle-class.html?Pagewanted=all&_r=0.

³³ *Id.*

³⁴ *Id.*

³⁵ See INTERFAITH CENTER ET AL., *supra* note 6, at 2 (highlighting that modern supply chains are complex and consists of a “multitude of recruiters, and suppliers used throughout a production process”).

³⁶ ERNST & YOUNG, *SUPPLY CHAIN SEGMENTATION* 3 (2012), available at [http://www.ey.com/Publication/vwLUAssets/Supply-chain-segmentation/\\$FILE/Supply-chain-segmentation_DC0121.pdf](http://www.ey.com/Publication/vwLUAssets/Supply-chain-segmentation/$FILE/Supply-chain-segmentation_DC0121.pdf).

³⁷ Deiglmeier, *supra* note 4.

³⁸ *Id.*

³⁹ *Id.*

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is vital for a sustainable supply chain of such great complexity,⁴⁰ this is an alarmingly low number. Without transparency and accurate information, it is, at best, challenging to track what occurs in the production of goods.⁴¹ The need for transparency is also vital to discover and track instances of forced labor in supply chains. Transparency is all the more vital because the evolution of intricate webs of modern supply chains has greatly increased the risk of forced labor and other human rights violations within corporations' supply chains.⁴²

II. A NEW FEDERAL PROPOSAL TO CURB FORCED LABOR IN GLOBAL SUPPLY CHAINS: THE BUSINESS TRANSPARENCY ON TRAFFICKING AND SLAVERY ACT

A plethora of legal instruments has developed during the twentieth and twenty-first centuries addressing the existence of forced labor. On an international level, various soft law declarations and hard law treaties have been adopted aimed at curbing forced labor.⁴³ Equally, U.S. law has long prohibited forced labor.⁴⁴

As the uncovering of forced labor in complex supply chains has become increasingly challenging, the public's demand for information about the products they invest in or consume in the U.S. market also has grown.⁴⁵ U.S. consumers, public interest groups, and shareholders, however, have few effective means of learning of forced labor, let alone to hold corporations legally accountable for selling products tainted by forced labor in the United States.⁴⁶

⁴⁰ INITIATIVE FOR GLOBAL ENVTL. LEADERSHIP, WHARTON SCHOOL, UNIV. OF PA., SPECIAL REPORT, GREENING THE SUPPLY CHAIN: BEST PRACTICES AND FUTURE TRENDS 8 (2012) *available at* http://knowledge.wharton.upenn.edu/special_section.cfm?specialID=118.

⁴¹ Deiglmeier, *supra* note 4.

⁴² See INTERFAITH CENTER ET AL., *supra* note 6, at 2 (highlighting the risk of human trafficking in complex corporate supply chains under a definition of human trafficking that includes forced labor).

⁴³ *E.g.* Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3; Convention Concerning Forced or Compulsory Labour (ILO No. 29), June 28, 1930, 39 U.N.T.S. 55 [hereinafter Forced Labour Convention]; the American Convention on Human Rights, Nov. 22, 1969, art. 6, 1144 U.N.T.S. 144, 146, 9 I.L.M. 99, 103; the International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 8, 999 U.N.T.S. 171, 175, 6 I.L.M. 368, 371; the International Covenant on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, art. 5(e), 660 U.N.T.S. 195; the European Social Charter, Oct. 18, 1961, art. 1, 529 U.N.T.S. 89, 94; The Convention Concerning the Abolition of Forced Labour (ILO No. 105), June 25, 1957, 320 U.N.T.S. 291 [hereinafter Abolition of Forced Labour Convention]; The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, *adopted* Mar. 21, 1950, 96 U.N.T.S. 271; The Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 4, 213 U.N.T.S. 221, 224-27; Comm'n on Human Rights, Sub-Comm'n on the Promotion and Prot. of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, ¶ 5, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

⁴⁴ See U.S. CONST. amend. XIII (prohibiting slavery and involuntary servitude); Smoot-Hawley Tariff Act of 1930 § 307, 19 U.S.C. § 1307 (2006) (prohibiting importation of goods tainted by forced labor into the U.S. market); 18 U.S.C. § 1583 (Supp. III, 2006) (prohibiting peonage).

⁴⁵ Business Transparency on Trafficking and Slavery Act, H.R. 2759, 112th Cong. § 1(b)(2) (2011).

⁴⁶ See *McKinney v. U. S. Dep't of Treasury*, 9 Ct. Int'l Trade 315 (Ct. Int'l Trade 1985), *aff'd*, 799 F.2d 1544 (Fed. Cir. 1986) (denying consumers, workers and producers, shareholders, handlers, public interest organizations, and legislators standing to challenge the importation of goods produced by forced labor under 19 U.S.C. § 1307); *Int'l Labor Rights Fund v. United States*, 391 F.Supp. 2d 1370 (Ct. Int'l Trade 2005) (denying

The federal government and state legislators have reacted to the lack of transparency by formulating mandatory disclosure laws. California, for example, enacted legislation in 2010 that requires companies with worldwide annual gross receipts of \$ 100 million or more to disclose trafficking and forced labor in their direct supply chains.⁴⁷ President Obama issued an executive order in 2012 that established new requirements for U.S. government contractors and their subcontractors, which are aimed at curbing forced labor and human trafficking.⁴⁸

The most recent federal legislative proposal for a mandatory disclosure law aimed at ending forced labor is the Business Transparency on Trafficking and Slavery Act (“BTA”).⁴⁹ The BTA mandates that publicly-traded or private entities with a minimum of \$100 million in annual global receipts disclose the measures they take to address forced labor, slavery, human trafficking, and the worst forms of child labor within their supply chains. The following sections will highlight what activities are subject to disclosure under the BTA, how forced labor is defined under the BTA, and finally how the BTA seeks to create accountability for forced labor in corporate supply chains.

A. Activities Subject to Disclosure

The Business Transparency Act requires that corporations provide information about the extent to which they undertook a number of activities specified in the provisions of the BTA that are aimed at uncovering and preventing forced labor in their supply chain.⁵⁰ Under the BTA, the term “supply chain” is defined as “*all suppliers of products, component parts of products, and raw materials ... whether or not such person has a direct relationship with the supplier.*”⁵¹ Thus, the information disclosed under the Act reflects all activities within the corporation’s supply chain from the unprocessed materials to the finished product.⁵² The BTA requires that corporations disclose overall ten activities addressing the

the labor rights organization standing to challenge the government’s refusal to inquire into child labor on cocoa plants on the Côte d’Ivoire).

⁴⁷ California Transparency in Supply Chains Act of 2010, ch. 556, 2010 Cal. Stat. 2641 (2010) (codified at CAL. CIV. CODE § 1714.43).

⁴⁸ Press Release, Office of the Press Sec’y, White House, Executive Order - Strengthening Protections Against Trafficking In Persons In Federal Contracts (Sept. 25, 2012), <http://www.whitehouse.gov/the-pressoffice/2012/09/25/executive-order-strengthening-protections-against-trafficking-persons-fe>.

⁴⁹ H.R. 2759. The Business Transparency Act was introduced on August 1, 2011 in the House of Representatives by Congresswoman Carolyn Maloney of the 14th District of New York. *H.R. 2759: Business Transparency on Trafficking and Slavery Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/hr2759#> (last visited Apr. 21, 2013). Although the BTA as introduced in the House of Representatives by Congresswoman Maloney was rejected by the House Committee on Financial Services, the disclosure and definition sections of the BTA were adopted in identical language and under the same title – “Business Transparency on Trafficking and Slavery Act” –

in section 109 of the *Trafficking Victims Protection Reauthorization Act of 2013* (“2013 TVPA”). Trafficking Victims Protection Reauthorization Act of 2013, H.R. 898, 113th Cong. § 109 (1st Sess. 2013). The 2013 TVPA is currently pending before several House Committees. *H.R. 898: Trafficking Victims Protection Reauthorization Act of 2013*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/113/hr898> (last visited Apr. 21, 2013).

⁵⁰ H.R. 2759 §2(r)(1).

⁵¹ *Id.* § 2(r)(5)(D) (emphasis added).

⁵² *Id.*

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prevention, discovery, and remediation of forced labor in their supply chains.⁵³ The first two requirements mandate the disclosure of corporations' official policies addressing forced labor.⁵⁴

Further, the BTA mandates the disclosure of two activities meant to highlight corporations' efforts to inquire into and monitor the conduct of their suppliers in order to assess the risk of forced labor in the production of their goods.⁵⁵ Under the first of the two provisions relating to supply chain investigation, corporations should disclose whether and to what extent they "[e]ngage[] in verification of product supply chains to evaluate and address risks of forced labor, slavery, human trafficking and the worst forms of child labor" including a description of the "greatest risks" uncovered in their supply chains.⁵⁶ "Verification" for the purposes of the Act is defined as an assessment of whether the results of data obtained through monitoring within the supply chain are "reliable and [the] process is credible,"⁵⁷ whether remediation measures are "implemented and effective,"⁵⁸ and whether the corporation adheres to its official policies.⁵⁹ The corporation should also state whether a third party conducted the verification and whether workers themselves or groups representing workers were consulted in the verification.⁶⁰

The second activity that is aimed at showing corporations' active involvement in supply chain assessment requires the disclosure of whether audits were undertaken at the suppliers' facilities to ensure that suppliers adhere to corporations' policies addressing forced labor.⁶¹ If the corporation did not conduct the audits independently and unannounced, the disclosure should make note of that fact.⁶²

Of the remaining six disclosure requirements, two requirements are geared towards showing whether corporations engage their suppliers in efforts to prevent and uncover forced labor,⁶³ three require the description of internal monitoring systems within the corporations

⁵³ *Id.* §§ 2(r)(1)(A)-(J).

⁵⁴ *See id.* §§ 2(r)(1)(A), (B) (requiring companies to disclose whether or not they have a policy in place to combat the risk of forced labor, to lay out the wording of the policy, and release whether they maintain a policy to prevent the use of the corporation's product or premises for maintaining forced labor).

⁵⁵ *Id.* §§ 2(r)(1)(C), (D).

⁵⁶ *Id.* §§ 2(r)(1)(C), (C)(i).

⁵⁷ *Id.* § 2(r)(5)(E)(i).

⁵⁸ *Id.* § 2(r)(5)(E)(ii).

⁵⁹ *Id.* § 2(r)(5)(E).

⁶⁰ *Id.* §§ 2(r)(1)(C)(ii), (iii).

⁶¹ *Id.* § 2(r)(1)(D).

⁶² *Id.*

⁶³ *See id.* §§ 2(r)(1)(E), (F) (imposing the obligation to disclose whether the corporation undertakes evaluations of the suppliers' management and procurement to ensure that risks of forced labor are identified and whether they require the suppliers to certify that all the materials incorporated into their product comply with the facility's national laws regulating forced labor).

and their suppliers,⁶⁴ and the last mandates the disclosure of whether remediation measures were taken for victims of forced labor that are effective and implemented.⁶⁵

B. Definition of Forced Labor under the Proposed BTA

As this section will highlight, forced labor under the BTA is defined as labor situations where no reasonable person with the worker's vulnerabilities and under the worker's specific circumstances would feel free to leave the employment because the employer uses actual or threatened physical force, non-physical force, or abuse of the law to coerce the worker to stay in the employment.

The BTA defines forced labor as "acts that would violate the criminal provisions related to slavery and human trafficking under chapter 77 of title 18 if they had been committed within the jurisdiction of the United States."⁶⁶ The statutory provision that governs forced labor under U.S. law is section 1589.⁶⁷ Section 1589 provides that

- (a)[w]hoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means -
- (1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
 - (2) by means of serious harm or threats of serious harm to that person or another person;
 - (3) by means of the abuse or threatened abuse of law or legal process;
- or
- (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint,
- shall be punished as provided under subsection (d).

....

⁶⁴ See *id.* §§ 2(r)(1)(G), (H), (I) (requiring the description of whether the corporation maintains international accountability mechanisms, of whether training in forced labor standards was undertaken for the supply chain management personnel, and of whether internal monitoring was undertaken to ensure that recruitment practices of the supplier comply with the person's company standards and, if any, to what extent).

⁶⁵ *Id.* §§ 2(r)(1)(J), (5)(E)(ii). This provision successfully addresses past experiences with corporate remediation that, although well-intended, were not effective. An example of ineffective remediation that left workers in even worse forced labor situations after the corporation's remediation attempt is the case of Wal-Mart's firing of underage Bangladeshi children, who worked in the corporation's garment factories in the 1990s. Vanessa A. Waldref, *The Alien Torts Statute After Sosa: A Viable Tool in the Campaign to End Child Labor?* 31 BERKELEY J. EMP. & LAB. L. 160,182 (2010). In the 1990s, U.S. consumers exerted tremendous pressure on Wal-Mart to stop employing child laborers after the television show *60 Minutes* showed children working in the corporation's garment factories in Bangladesh. *Id.* at 182. As a result, Wal-Mart laid the children off, but failed to take appropriate steps to facilitate the children's transition back into school. *Id.* at 183. Most of the children's parents could not afford to pay for schooling, and as a consequence, the children were pushed into the informal sector, most prevalently as child prostitutes, in order to support their families. *Id.* at 182-183.

⁶⁶ Business Transparency on Trafficking and Slavery Act, H.R. 2759, 112th Cong. § 2(r)(5)(A) (2011).

⁶⁷ 18 U.S.C. § 1589 (Supp. II 2006).

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(c) In this section:

(1) The term “abuse or threatened abuse of law or legal process” means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

(2) The term “serious harm” means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.⁶⁸

In order to accurately apply this definition of forced labor to a supply chain analysis, it is essential to understand section 1589’s origins, its evolution into the current legislative provision, and the way that the provision has been interpreted by U.S. courts. Section 1589(a) was originally part of the *Trafficking Victims Protection Act of 2000* (“2000 TVPA”) ⁶⁹ and was modified by the *Wilhelm Wilberforce Trafficking Victims Reauthorization Act of 2008* (“2008 TVRA”).⁷⁰ The purpose of the 2000 TVPA was to overturn the standard of forced labor set by *United States v. Kozminski*,⁷¹ which held that only actual or threatened physical violence or legal harm can constitute forced labor.⁷² Through the 2000 TVPA, Congress meant to include non-physical, non-legal harm in the definition of forced labor under section 1589(a) thereby creating a more liberal and inclusive standard that “will provide federal prosecutors with the tools to combat severe forms of worker exploitation that do not rise to the level of involuntary servitude as defined in *Kozminski*.”⁷³

Since the 2000 TVPA, however, described non-physical harm in fairly vague terms such as “serious harm”⁷⁴ and did not provide further explanations as to what such harm is, courts struggled to adequately assess situations where no physical violence occurred.⁷⁵ As a result, courts often reached inconsistent outcomes in their analysis of forced labor situations under U.S. law.⁷⁶ Thus, in 2008, Congress amended section 1589 by adding another section—section 1589(c)—which provided supplemental information to the definitions of

⁶⁸ *Id.*

⁶⁹ Trafficking Victims Protection Act, Pub. L. 106-386, Div. A., § 102, 114 Stat. 1464, 1486-1487 (2000) (codified as amended at 18 U.S.C. § 1589).

⁷⁰ Wilhelm Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, sec. 222, § 1589(a), Pub. L. No. 110-457, 122 Stat. 5044, 5068 (2008).

⁷¹ H.R. REP. NO. 106-939, at 101 (2000) (Conf. Rep.).

⁷² *United States v. Kozminski*, 487 U.S. 931, 948 (1988), *superseded by* Wilhelm Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, sec. 222, § 1589(a), Pub. L. No. 110-457, 122 Stat. 5044, 5068 (2008).

⁷³ H.R. REP. NO. 106-939, at 101.

⁷⁴ Trafficking Victims Protection Act sec. 102, §§ 1589(a)(2), (3).

⁷⁵ See *United States v. Peterson*, 544 F Supp. 2d 1363, 1375 (M.D. Ga. 2008) (“The terms “abuse or threatened abuse of the law or legal process” are generic terms that are not defined in the statute”); Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409, 440-441 (2011) (discussing the courts’ difficulties in interpreting the term “serious harm”).

⁷⁶ Kim, *supra* note 75, at 441.

non-physical harm.⁷⁷ Section 1589(c) clarified that serious harm can encompass “psychological, financial, or reputational harm.”⁷⁸

The 2008 amendment also created a “reasonable person standard” for a forced labor analysis under section 1589, under which the conduct of the employer is evaluated in the light of “all the surrounding circumstances” and from the standpoint of “a reasonable person of the same background and in the same circumstances” as the forced worker.⁷⁹ Through adding a detailed explanation of what can constitute non-physical harm under section 1589 and mandating that all surrounding circumstances should be taken into account in a forced labor analysis, the 2008 amendments created a more reliable and precise standard for defining forced labor under U.S. law that avoided the previous problem of inconsistent interpretations of section 1589(a).⁸⁰

A significant number of cases have been litigated under section 1589(a) that have further contributed to a more concrete definition of forced labor under U.S. law.⁸¹ Since the

⁷⁷ Wilhelm Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, sec. 222, § 1589(c), Pub. L. No. 110–457, 122 Stat. 5044, 5068 (2008).

⁷⁸ *Id.* § 1589(c)(2).

⁷⁹ *Id.*

⁸⁰ Kim, *supra* note 75, at 450.

⁸¹ See e.g. *United States v. Kaufman*, 546 F.3d 1242 (10th Cir. 2008) (finding forced labor where defendants maintained a farm and a home for persons with mental disabilities and forced their patients to work in the nude on the farm and scripted video tapes in which their patients performed sexual acts); *United States v. Garcia*, No. 02-CR-110S-01, 2003 U.S. Dist. LEXIS 22088 (W.D.N.Y. Dec. 2, 2003) (declaring that 18 U.S.C. § 1589 is not unconstitutionally vague); *United States v. Calimlim*, 538 F.3d 706 (7th Cir. 2008) (finding forced labor where an employer forced an illegal worker from the Philippines into staying employed as a domestic worker by threatening to withhold money intended to be sent to her family and threatening to report her to the immigration authorities); *United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004), *vacated on other grounds*, 545 U.S. 1101 (2005) (finding forced labor where workers from Jamaica were mistreated during their employment on a tree farm in New Hampshire and forced to remain in the employment through non-physical harm such as the taking of their passports); *United States v. Peterson*, 544 F. Supp. 2d 1363 (M.D. Ga. 2008) (dismissing the case due to vagueness of the original statute and lack of specific facts where a county sheriff obtained work from inmates for a private business owned by another defendant’s wife); *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988 (S.D. Ind. 2007) (dismissing the case of forced labor of workers on a Liberian rubber plant for lack of extraterritorial jurisdiction); *United States v. Dann*, 652 F.3d 1160 (9th Cir. 2011) (finding forced labor where an employer led the domestic worker, who was an immigrant, to believe that ending the employment would result in financial, reputational, and immigration harms, as well as harm to defendant’s children); *United States v. Sabhnani*, 599 F.3d 215 (2d Cir. 2010) (inducing two women from Indonesia to work as domestic housekeepers by threatening severe physical and mental harm); *Headley v. Church of Scientology Int’l*, 687 F.3d 1173 (9th Cir. 2012) (dismissing on the ground that church members voluntarily joined the church and were free to leave); *United States v. Marcus*, 487 F. Supp. 2d 289 (E.D.N.Y. 2007) (finding forced labor where the defendant used physical violence and coercion to force a woman to create and maintain a website, which included sexual photographs of her); *Mairi Nunag-Tanedo v. E. Baton Rouge Parish Sch. Bd.*, 790 F. Supp. 2d 1134 (C.D. Cal. 2011) (finding forced labor where employers used a fraudulent scheme and threats of deportation to force workers to enter into and remain in their employment); *United States v. Nnaji*, 447 Fed. Appx. 558 (5th Cir. 2011) (finding forced labor where a couple isolated a domestic worker and took her passport); *Kiwanuka v. Bakilana*, 844 F. Supp. 2d 107 (D.C.D. 2012) (holding that threats of deportation constitute forced labor through the abuse of the legal process); *United States v. Chang*, 237 F. App’x 985 (5th Cir. 2007) (finding forced labor where South Korean women with very limited knowledge of the English language were smuggled into the U.S. and forced to work at the employer’s club to pay off their smuggling debt); *United States v. Paulin*, 329 Fed. Appx. 232 (11th Cir. 2009) (finding forced labor where a 14-year-old girl was brought to the United States from Haiti and kept as a domestic worker for six years); *United States v. Djoumessi*, 538 F.3d 547, 552 (6th Cir. 2008).

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2008 amendment, U.S. courts' analyses of forced labor have increasingly taken into account the victim's special vulnerabilities such as immigration status⁸² and have reaffirmed that psychological harm alone can constitute coercion,⁸³ even in the absence of direct threats by the employer.⁸⁴ In *United States v. Calimlim*, for example, the Court found forced labor based solely on non-physical harm.⁸⁵ In *Calimlim*, the employer of a domestic immigrant worker constrained the domestic worker physically, threatened to stop sending money to her family, and led the worker to believe that she might be deported if she did not follow the employer's orders.⁸⁶

Working conditions that U.S. courts have frequently regarded as indicative of forced labor include situations where workers lived isolated on the employer's premises, they worked inhumanely long hours, and they received unconscionably low wages.⁸⁷ Similar conditions can often be encountered in the context of forced labor in modern supply chains. In the Dominican Republic's sugar industry, for example, the vast majority of workers live isolated from their communities in housing controlled by their employers,⁸⁸ they work excessive overtime at more than twelve hours a day, seven days a week,⁸⁹ and their wages are frequently below the nationally required minimum.⁹⁰

Nevertheless, such working conditions alone do not constitute forced labor under U.S. law. U.S. courts have made clear that such working conditions only rise to the level of forced labor under section 1589 if an element of coercion is present that keeps the worker from leaving the employment.⁹¹ The Court in *Calimlim*, for instance, drew a clear distinction between a merely exploitative work situation and a situation involving forced labor.⁹² When an employee "could quit or change jobs," section 1589 does not apply.⁹³ Only when the worker has no "exit option" because the worker cannot "freely work for another employer in order to escape the threatened harm," forced labor is present.⁹⁴

⁸² See e.g. Djoumessi, 538 F.3d at 552 (considering the status as illegal immigrant as special vulnerability); see also Nnaji, 447 Fed. Appx. at 559, 560 (considering the victim's status as "poor, illiterate, Nigerian widow who spoke little to no English" as vulnerability).

⁸³ See e.g. Kiwanuka, 844 F. Supp. 2d at 114-115 (rejecting the *Kozminski* standard since it is not the controlling standard and too narrow in favor of a standards that recognizes pure psychological harm and threats of deportation as means to abuse the law as sufficient to constitute forced labor).

⁸⁴ *Calimlim*, 538 F.3d at 711.

⁸⁵ *Id.*

⁸⁶ *Id.* at 710, 718.

⁸⁷ See e.g. *id.* at 708-709 (working from 6 am to 10 pm seven days a week as a domestic worker, receiving close to no pay and living in a small room in the basement); Garcia, 2003 U.S. Dist. LEXIS, at *2 (W.D.N.Y. Dec. 2, 2003) (living in unsanitary, overcrowded and isolated housing where pay was withheld and the workers were forced to work excessive amounts of hours); Bradley, 390 F.3d at 148-149 (working excessive hours and living in a rundown shack with no running water); Sabhnani, 599 F.3d at 225-226 (sleeping on carpets or mats, being paid inadequately, and working excessive hours).

⁸⁸ See VERITÉ, SUPPLY CHAIN OF SUGAR IN THE DOMINICAN REPUBLIC, *supra* note 16, at 76 (highlighting that 99% of workers lived in housing provided by the employer).

⁸⁹ *Id.* at 146.

⁹⁰ *Id.* at 67.

⁹¹ See Peterson, 544 F Supp. 2d at 1371 ("an analysis of the overall statutory scheme demonstrates that coercion is a requirement").

⁹² *Calimlim*, 538 F.3d at 712.

⁹³ *Id.* at 712.

⁹⁴ *Id.*

Thus, statutory and case law have created a liberal definition of forced labor under U.S. law, in which coercion is a key element and the specific circumstances and vulnerabilities of the victim are taken into account in forced labor situations. Under U.S. law and as a consequence under the BTA, forced labor exists when no reasonable person with the worker's vulnerabilities and under the worker's specific circumstances would feel free to leave the employment because the employer uses actual or threatened physical force, non-physical force or abuse of the law to coerce the worker to stay in the employment.

C. Accountability under the BTA

The BTA does not directly hold corporations accountable for failing to take actions aimed at ending forced labor in their corporate supply chains.⁹⁵ Only when a company fails to disclose information at all or discloses fraudulent information, does the Securities Exchange Commission ("SEC") have the power to sanction, fine, and otherwise discipline the corporation.⁹⁶ The purpose of the BTA is not to punish corporations for their business practices, but to obligate them to disclose these practices in order to uncover forced labor in the production of goods.⁹⁷ This disclosure is meant to create the necessary transparency to enable consumers to influence corporate behavior by making informed purchasing decisions.⁹⁸ To promote this goal, the BTA requires the use of several publicly accessible channels that makes corporations' disclosure reports available to society at large.⁹⁹ In addition to submitting the disclosure reports to the SEC,¹⁰⁰ the Act requires companies to upload the mandated disclosure reports onto their websites¹⁰¹ and encourages the SEC to make the reports it receives accessible to the public.¹⁰² Through availability of the corporate disclosure reports in public fora, the BTA seeks to create the necessary accountability and transparency to change the situation of forced laborers in corporate supply chains.¹⁰³

III. POTENTIAL DEFECTS IN THE BUSINESS TRANSPARENCY ON SLAVERY AND HUMAN TRAFFICKING ACT AS PROPOSED

The BTA could signify an important step towards ending forced labor in complex global supply chains. However, the BTA has several defects that could lessen its

⁹⁵ See Press Release, Hon. Carolyn Maloney, *supra* note 1 ("We don't tell companies what to do, we're just asking them to tell us what they do").

⁹⁶ See *Enforcement Actions*, SEC.GOV, <http://www.sec.gov/divisions/enforce/enforceactions.shtml> (last visited Feb. 7, 2012) (listing the different enforcement mechanisms of the SEC). The Act provides that the SEC has power over regulating the Act. H.R. 2759 § 2(r)(1).

⁹⁷ See Press Release, Hon. Carolyn Maloney, *supra* note 1 ("We don't tell companies what to do, we're just asking them to tell us what they do").

⁹⁸ See *id.* ("[I]n providing this transparency, we're also empowering consumers with information that could impact their purchasing decisions").

⁹⁹ See Business Transparency on Trafficking and Slavery Act, H.R. 2759, 112th Cong. §§ 2(r)(1), (3), (4) (2011) (requiring three different types of disclosing the information publicly).

¹⁰⁰ *Id.* § 2(r)(1).

¹⁰¹ *Id.* § 2(r)(4).

¹⁰² *Id.* §§ 2(r)(3).

¹⁰³ See *id.* § 1(c)(1) (describing the legislative intent of the BTA).

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effectiveness. First, it is questionable whether disclosure without a duty to remedy forced labor violations will change corporate behavior. Second, the definition of forced labor under the BTA does not give corporations sufficient guidance in addressing forced labor in their supply chains. Third, the language of the BTA is too vague in some provisions to promote its effective implementation. And finally, the BTA's inclusion of the entire supply chain in corporate supply chain evaluations is incompatible with corporate oversight over supply chains, foreign labor practices, the concept of national sovereignty, and corporate business interests.

A. Defect I: Disclosure Alone Is Unlikely to Change Corporate Behavior

The overarching issue regarding the BTA's effectiveness is whether disclosure of human rights violations without an accompanying duty to remedy the violations will be successful in ending the most egregious forced labor conditions in corporate supply chains. The Business Transparency Act does not provide for penalizing corporations with products tainted by human rights violations, but merely makes them subject to sanctions by the SEC if they fail to submit a disclosure of investigations undertaken to eradicate such violations.¹⁰⁴

In theory, disclosure alone would seem to be an effective mechanism to influence corporate behavior. Corporations are in the best position to conduct investigations into their supply chains since they are the most knowledgeable about their own supply chains, they have the most extensive access to their suppliers' facilities, and they have enough resources to bear the costs of supply chain monitoring.¹⁰⁵ Thus, disclosure laws furnish an excellent instrument for creating a situation where accountability and monitoring of corporations' supply chains becomes practically feasible through engaging the corporation itself in these activities and dialogues.

In addition to monitoring current violations, corporations are also seemingly the best equipped to prevent future occurrences of forced labor through technological innovations. In contrast to law enforcement, which can only intervene after the fact, corporations can insert mechanisms to curb forced labor before human rights violations occur.¹⁰⁶ They also have the ability to develop new technologies or practices that can make the use of forced labor redundant by eliminating the need for forced workers.¹⁰⁷ For example, direct corporate involvement was instrumental in eradicating child labor from camel racing in Arab Nations in 2005.¹⁰⁸ Children were frequently trafficked and used as jockeys in these races.¹⁰⁹ After the United Arab Emirates Camel Racing Association banned the use of child jockeys, the private

¹⁰⁴ See *supra* Part II.C.

¹⁰⁵ Jonathan Todres, *The Private Sector's Pivotal Role in Combating Human Trafficking*, 3 CALIF. L. REV. CIRCUIT 80, 85-89 (2012).

¹⁰⁶ *Id.* at 86-87.

¹⁰⁷ *Id.*

¹⁰⁸ *Robots Jockey for Position in Camel Races*, SWISSINFO.CH (Apr. 25, 2005, 9:18 AM), http://www.swissinfo.ch/eng/archive/Robots_jockey_for_position_in_camel_races.html?cid=4473798 (stating that an anonymous Swiss company developed mechanical camel riders out of concern for children's welfare in Arab nations and planned for their production facilities in Qatar in collaboration with the government of Qatar).

¹⁰⁹ *Information on the United Arab Emirates (UAE): Compliance with ILO Convention No.182 on the Worst Forms of Child Labour (ratified in 2001)*, BRIEFING PAPER 2006 (Anti-Slavery International, London, U.K.), May 2006, http://www.antislavery.org/includes/documents/cm_docs/2009/2/2006uae_cameljockeys.pdf.

sector developed a robot jockey to replace children as jockeys which substantially contributed to facilitating compliance with the ban.¹¹⁰ Thus, involving corporations directly in the fight against forced labor through disclosure requirements can help create lasting solutions to the issue of forced labor in certain industries where child labor or coercive labor situations are regarded as unavoidable.

Finally, mandatory disclosure laws also have the advantage of imposing industry-wide requirements that urge all corporations to take action simultaneously. Such laws can influence a much larger number of corporations than litigation alone.¹¹¹ In addition, under the laws criminalizing slavery, only the worst offenders of human rights will be held responsible for their violations.¹¹² Thus, in theory, disclosure laws should be effective since they influence all corporations at once, including those that commit less egregious offenses against human rights.

In practice, however, California's experience with its state equivalent to the Business Transparency Act, the California Transparency in Supply Chains Act ("California Transparency Act")¹¹³ has shown that mandatory disclosure laws do not necessarily elicit a response from corporations that helps ameliorate forced labor conditions in corporate supply chains.¹¹⁴ To the contrary, some corporations interpreted the California statute as a plain disclosure requirement and simply reported that they were not taking any measures at all.¹¹⁵ As the example of the California Transparency Act shows, truly engaging corporations in the fight against forced labor will most likely entail more than merely requiring disclosure of socially undesirable corporate practices.

B. Defect II: The Definition of Forced Labor Under the BTA Does Not Capture Common Forced Labor Situations in Modern Supply Chains

As described in Part II.B, *supra*, forced labor for purposes of the BTA exists when a reasonable person with the vulnerabilities of the worker and under the same circumstances as the worker would feel compelled to remain in the employment because the employer uses actual or threatened physical harm, non-physical harm or abuse of the legal process to keep the worker in the employment. Although this definition seems to apply to forced labor in corporate supply chains, U.S. case law does not give corporations sufficient guidance in effectively identifying forced labor in their supply chains..

¹¹⁰ See Will Knight, *Robot Camel-Jockeys Take to the Track*, NEWSCIENTIST (Jul. 21, 2005), <http://www.newscientist.com/article/dn7705-robot-cameljockeys-take-to-the-track.html> (reporting that a Swiss company developed the robot jockey); see also *Robot Jockeys to Ride Gulf Camels*, BBC, Apr. 10, 2005, http://news.bbc.co.uk/2/hi/middle_east/4430851.stm.

¹¹¹ See Todres, *supra* note 105, at 91 (discussing that incentivizing instead of punishing corporations to promote human rights is "[a] more promising starting point for fostering broad-based private sector participation").

¹¹² *Id.*

¹¹³ California Transparency in Supply Chains Act of 2010, ch. 556, 2010 Cal. Stat. 2641 (2010) (codified at CAL. CIV. CODE § 1714.43).

¹¹⁴ See Todres, *supra* note 105, at 95 (describing the various different disclosure reports that corporations released in response to the California statute).

¹¹⁵ *Id.*

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Under section 1589, the forced labor analysis has primarily focused on cases of immigrant workers where the threatened harm, which coerced the workers into remaining in the employment, consisted of threats of deportation or retention of travel documents.¹¹⁶ Courts have consistently held that threats of deportation constitute abuse of the legal process under section 1589(a) and have held that situations in which such threats were present constitute forced labor.¹¹⁷ Workers in forced labor situations in corporate supply chains, however, are commonly not migrant or immigrant workers.¹¹⁸ Instead, they are pushed into forced labor situation through, for example, debt bondage¹¹⁹ or other financial harm.¹²⁰ Thus, forced labor analyses in the context of supply chains will most likely not focus on immigration threats, but rather on economic threats, which keep the worker in the employment.

Even the two cases that have tackled the question whether financial harm as it occurs in supply chains can give rise to a forced labor claim under U.S. law, namely *Mairi Nunag-Tanedo v. E. Baton Rouge Parish Sch. Bd.* and *United States v. Dann*,¹²¹ have given substantial weight to the victims' status as immigrants and threats of deportation against them in holding that financial harm is covered by section 1589.¹²²

¹¹⁶ See e.g. *United States v. Calimlim*, 538 F.3d 706 (7th Cir. 2008) (finding forced labor where an employer coerced an illegal worker from the Philippines into remaining in the employment as a domestic worker by threatening to withhold money intended to be sent to the worker's family and threatening to report her to the immigration authorities); *United States v. Dann*, 652 F.3d 1160 (9th Cir. 2011) (finding forced labor where the employer led the domestic worker, who was an immigrant, to believe that ending the employment would result in financial, reputational, and immigration harms, as well as harm to defendant's children); *United States v. Sabhnani*, 599 F.3d 215 (2d Cir. 2010) (inducing two women from Indonesia to work as domestic housekeepers by threatening severe physical and mental harm); *United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004), *vacated on other grounds*, 545 U.S. 1101 (2005) (finding forced labor where workers from Jamaica were mistreated during their employment on a tree farm in New Hampshire and forced to stay through threats of non-physical serious harm such as the taking of their passports).

¹¹⁷ See e.g. *United States v. Garcia*, No. 02-CR-110S-01, 2003 U.S. Dist. LEXIS 22088, at * 23 (W.D.N.Y. Dec. 2, 2003) (stating that threats of deportation "clearly fall[s] within the concept and definition of 'abuse of legal process' since the alleged objective for [such conduct] was to intimidate and coerce [Plaintiffs] into 'forced labor'"); *Calimlim*, 538 F.3d at 712 ("Irma Martinez did not have an exit option: because the threats in her case involved her immigration status, she could not freely work for another employer in order to escape the threatened harm."); *Mairi Nunag-Tanedo v. E. Baton Rouge Parish Sch. Bd.*, 790 F. Supp. 2d 1134, 1146 (C.D. Cal. 2011) (noting that precedent clearly established that threats of deportation are covered by section 1589).

¹¹⁸ See Int'l Labour Office, *ILO Estimate*, *supra* note 3, Figure 6 (estimating that the majority of workers in forced labor situations for economic purposes have not left their local areas whereas only 18.5% of workers moved across borders between 2002 and 2011).

¹¹⁹ Debt bondage or bonded labor is defined as "the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of these services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined." Int'l Labour Org. [ILO] Director-General, *The Cost of Coercion: Global Report Under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work: Report of the Director-General*, Report I(B) 8 (2009) [hereinafter ILO Director-General, *Report 2009*], available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meeting_document/wcms_106230.pdf (internal quotations omitted).

¹²⁰ See ILO Director-General, *Report 2009*, *supra* note 119, at 6.

¹²¹ *United States v. Dann*, 652 F.3d 1160 (9th Cir. 2011); *Mairi Nunag-Tanedo v. E. Baton Rouge Parish Sch. Bd.*, 790 F. Supp. 2d 1134 (C.D. Cal. 2011).

¹²² *Dann*, 652 F.3d at 1171; *Mairi Nunag-Tanedo*, 790 F. Supp. 2d at 1146.

In *Mairi Nunag-Tanedo*, U.S. recruiters solicited teachers in the Philippines to teach in the United States.¹²³ The recruiters employed a fraudulent scheme that induced the Philippine teachers to pay a recruitment fee without knowing that a second, substantially larger fee would be required from them before traveling to the U.S.¹²⁴ The teachers believed that they had to pay the second fee in order to be able to repay the debt they incurred by paying the first fee with the money they would earn in the United States.¹²⁵ Although these facts resemble a bonded labor situation as it could occur in a modern supply chain,¹²⁶ in *Mairi Nunag-Tanedo*, the recruiters kept the teachers in the employment not solely based on the debt, but in addition, through threats of deportation and other legal proceedings whenever the teachers tried to leave the employment or complained about the working conditions.¹²⁷

The Court in *Mairi Nunag-Tanedo* affirmed that financial harm such as the large debt that the teachers incurred constitutes “serious harm” under section 1589.¹²⁸ The Court, however, heavily relied upon the accompanying threats of immigration consequences by the recruiters in finding forced labor in the case.¹²⁹ The Court concluded that the “allegations [of immigration consequences] along with Plaintiff’s previously discussed fraud allegations” constituted forced labor.¹³⁰

In the second case dealing with financial harm, *United States v. Dann*, an employer brought a domestic worker from Peru to the United States, took her visa, withheld her wage, and threatened with deportation if the immigrant worker tried to leave.¹³¹ Again, the withholding of wages as in *Dann* is a common form of financial harm in supply chains.¹³² However, like the *Mairi Nunag-Tanedo* Court, the *Dann* Court focused on the worker’s immigrant status in finding that withholding the worker’s wages constituted serious harm under section 1589. The Court opined that denying pay to a person who is “an immigrant without access to a bank account and not a dollar to her name” was sufficiently serious to fall within the definition of forced labor under section 1589.¹³³

Only two U.S. cases have discussed forced indebtedness and other financial harm in the context of forced labor. It has been pointed out that, generally, “[t]here is still much ambiguity over the extent to which threats and coercion may be used as grounds for finding forced labor.”¹³⁴ Thus, U.S. law overall lacks clear guidance for corporations to evaluate forced labor in their supply chains. Furthermore, the two cases that do discuss financial harm as it occurs in supply chains both rely on threats of deportation or immigrant status in considering financial harm in their forced labor analysis under section 1589. Forced labor in

¹²³ *Mairi Nunag-Tanedo*, 790 F. Supp. 2d at 1138.

¹²⁴ *Id.* at 1138, 1144.

¹²⁵ *Id.* at 1139.

¹²⁶ See definition of bonded labor cited *supra* note 119.

¹²⁷ *Mairi Nunag-Tanedo*, 790 F. Supp. 2d at 1144.

¹²⁸ *Id.* at 1146.

¹²⁹ *Id.* at 1146.

¹³⁰ *Id.* at 1146.

¹³¹ *United States v. Dann*, 652 F.3d 1160, 1162 (9th Cir. 2011).

¹³² See e.g. ILO Director-General, *Report 2009*, *supra* note 119, at 15 (naming the withholding of wages as one of the principal means to keep workers in forced labor in the Republic of Moldova).

¹³³ *Dann*, 652 F.3d at 1171.

¹³⁴ Jeffrey W. Tye, *Case Summary: Ninth Circuit Rules Against Scientology Ministers’ Forced Labor Claims in Headley v. Church of Scientology International*, 43 GOLDEN GATE U.L. REV. 135, 137 (2013).

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supply chains, however, does not primarily involve immigrant workers.¹³⁵ Therefore, even the U.S. cases that remotely apply to forced labor in corporate supply chains will be of little help to corporations. In fact, U.S. courts' focus on workers' immigration status could provide a means for corporations to evade liability for forced labor offenses in their supply chains when they do not affect immigrant workers. Thus, the lack of adequate case law under the U.S. definition could, at the very least, lead to grave inconsistencies in corporations' forced labor disclosure reports under the BTA.

C. Defect III: The Indefinite Language Inhibits Transparency and Proper Monitoring

The third defect in the BTA as proposed is the occasional absence of definite language in the disclosure obligations. Successful disclosure laws are those that do not "impose[] any undue risk that companies will misconstrue their obligations under the law."¹³⁶ The BTA, however, requires only a minimal degree of specificity and detail in two of its provisions as will be shown in this section. The BTA does not require the disclosure of names of corporate suppliers which use forced labor or the specific acts constituting forced labor that were discovered by the corporation and does not require that the third party undertaking the supply chain investigation is wholly independent from the corporation.

1. Identification of Suppliers or Violations Is Not Required

As highlighted in Part II.A, *supra*, the BTA requires that corporations describe the "greatest risks" identified within the supply chain.¹³⁷ This language is open-ended and legislatively isolated and creates the potential for disclosure reports that provide little to no information about specific human rights violations. This could inhibit the BTA's goal of creating transparency and could decrease the likelihood that consumers and society at large hold corporations accountable for their corporate practices.

California's experience with the California Transparency Act has shown that a mandatory forced labor disclosure law that is vague in its wording gives too much autonomy to corporations in deciding what information they release in their reports.¹³⁸ The California Transparency Act, for example, requires that a corporation "shall, at a minimum, disclose to what extent, if any, ... [it] [e]ngages in verification of product supply chains to evaluate and address risks of human trafficking and slavery."¹³⁹ The corporate responses to this provision have varied greatly.¹⁴⁰ Corporations' disclosure reports have ranged from detailed descriptions of measures taken to improve compliance with international labor standards to

¹³⁵ See source cited *supra* note 118.

¹³⁶ Jason Levy, *Slavery Disclosure Laws: For Financial Reparations or for "Telling the Truth?"* 2009 COLUM. BUS. L. REV. 468, 512 (2009) (citing a San Francisco disclosure law as an example for a well-drafted disclosure law).

¹³⁷ Business Transparency on Trafficking and Slavery Act, H.R. 2759, 112th Cong. § (2)(r)(1)(C) (2011).

¹³⁸ See Todres, *supra* note 105, at 95-96 (laying out that corporations have responded to the California Act with disclosure reports that varied in specificity and detail).

¹³⁹ California Transparency in Supply Chains Act of 2010, ch. 556, sec. 3, §§ 17.13(c)-(c)(1), 2010 Cal. Stat. 2641, 2642 (2010) (codified at CAL. CIV. CODE § 1714.43). (c)(1).

¹⁴⁰ Todres, *supra* note 105, at 95.

reports that merely imitated the language of the statute in its disclosure.¹⁴¹ A few corporations have interpreted the requirement of the California Act as a bare minimum disclosure requirement and have only reported that they did not take any measures at all.¹⁴² The corporate responses to the California Act show that vague language in a forced labor disclosure law can create great inconsistencies in the details and usefulness of the information provided through the disclosure reports.¹⁴³ Ultimately, such laws might disadvantage corporations that expose themselves to public scrutiny by a good faith robust effort to disclose forced labor information in their supply chains *vis-à-vis* competitive corporations that merely report not taking any measures thereby using the law to insulate them from public scrutiny. This disadvantage could potentially discourage corporations from releasing detailed and substantive information and, thus, might exhaust the disclosure law's purpose of creating transparency.

Substantive and detailed factual information about human rights violations in the reports under the BTA will also be key to creating accountability by alerting consumers, investors, non-governmental organizations ("NGOs")¹⁴⁴, and the larger community to certain undesirable corporate behavior. The following example of Apple's efforts to increase transparency and accountability supports this contention. Apple has published reports identifying risks in its supply chain on the company's website since 2007.¹⁴⁵ The reports provided fairly general, non-specific information about human rights violations uncovered in its supply chain and did not reveal any identifying information about the facilities where forced labor was found or specific details on the violations.¹⁴⁶ Apple did discuss forced labor in its supply chain in the disclosure reports, but this information went widely unnoticed until news agencies published detailed factual information about the labor conditions in the facilities of Apple's suppliers.¹⁴⁷ After an outcry from consumers in 2012, Apple made a list

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Non-governmental organizations are defined as "not-for-profit group[s], principally independent from government, which [are] organized on a local, national or international level to address issues in support of the public good." *Non-Governmental Organizations*, U.N. RULE OF LAW, http://www.unrol.org/article.aspx?article_id=23 (last visited Feb. 16, 2013).

¹⁴⁵ APPLE INC., APPLE SUPPLIER RESPONSIBILITY: 2012 PROGRESS REPORT (2012) [hereinafter APPLE INC., PROGRESS REPORT 2012], available at http://images.apple.com/supplierresponsibility/pdf/Apple_SR_2012_Progress_Report.pdf; APPLE INC., APPLE SUPPLIER RESPONSIBILITY: 2011 PROGRESS REPORT (2011), available at http://images.apple.com/supplierresponsibility/pdf/Apple_SR_2011_Progress_Report.pdf; APPLE INC., SUPPLIER RESPONSIBILITY: 2010 PROGRESS REPORT (2010), available at http://images.apple.com/supplierresponsibility/pdf/Apple_SR_2010_Progress_Report.pdf; APPLE INC., SUPPLIER RESPONSIBILITY: 2009 PROGRESS REPORT (2009), available at http://images.apple.com/supplierresponsibility/pdf/Apple_SR_2009_Progress_Report.pdf; APPLE INC., DRIVING CHANGE: 2008 SUPPLIER RESPONSIBILITY PROGRESS REPORT (2008), available at http://images.apple.com/supplierresponsibility/pdf/Apple_SR_2008_Progress_Report.pdf; APPLE INC., FINAL ASSEMBLY SUPPLIER AUDIT REPORT (2007), available at http://images.apple.com/supplierresponsibility/pdf/Apple_SR_2007_Progress_Report.pdf.

¹⁴⁶ See e.g. APPLE INC., PROGRESS REPORT 2012, *supra* note 145, at 9 (highlighting, for example, that involuntary labor was found in two facilities and since the companies were repeat offenders, Apple terminated business with one supplier and corrected "the practices of the other supplier").

¹⁴⁷ Gethin Chamberlain, *Apple Factories Accused of Exploiting Chinese Workers*, THE GUARDIAN (Apr. 30, 2011, 4:31 PM), <http://www.guardian.co.uk/technology/2011/apr/30/apple-chinese-factory-workers-suicides-humiliation> (highlighting forced labor conditions at Apple factories after several employees committed suicide).

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of all of its suppliers available on its website as “a gesture of transparency”¹⁴⁸ and asked an outside organization to conduct independent audits at its facilities.¹⁴⁹ This development shows the effectiveness of substantive and detailed factual information in creating accountability and changing corporate behavior through public pressure.

Apple’s vague reports would also have constituted sufficient disclosure under the BTA. They identify the greatest risks in Apple’s supply chain,¹⁵⁰ highlight that local third parties were used to support their audits in facilities,¹⁵¹ describe Apple’s policies,¹⁵² and identify which measures Apple is taking to remedy the violations.¹⁵³ Nevertheless, they remain too general to derive useful information from them.

A disclosure under the BTA’s language as drafted could hypothetically be as general as ‘forced labor was found in three facilities’ to fulfill the reporting requirement of the greatest risks identified in a corporation’s supply chain.¹⁵⁴ As shown above, permitting such vaguely phrased corporate disclosures under the BTA could inhibit the effectiveness of the BTA by reducing transparency – an explicit goal of the BTA¹⁵⁵ – and decreasing the chances that NGOs, the media, consumers, and investors get involved in holding corporations accountable for their human rights violations.

2. Complete Independence of Verification by Third Parties Is Not Required

The BTA requires that corporations disclose whether they hired third parties to autonomously verify the information gathered through internal monitoring.¹⁵⁶ However, the BTA does not specify that these third parties need to be wholly independent from the corporation’s influence in their verification.¹⁵⁷ As will be shown in this section, ensuring that third parties are truly independent in verifying the data gathered through monitoring activities is crucial to achieving reliable disclosure reports. The BTA lacks language requiring third parties to be independent, which might decrease the reliability of disclosure reports and could

¹⁴⁸ Owen Thomas, *An Amazing Worldwide Map Of Apple’s Suppliers*, BUSINESS INSIDER, (Feb. 18, 2013, 2:30 PM), <http://www.businessinsider.com/worldwide-map-apple-suppliers-2013-2#ixzz2QymWB0EM>.

¹⁴⁹ Charles Duhigg & Nick Wingfield, *Apple Asks Outside Group to Inspect Factories*, N.Y. TIMES BITS BLOG, (Feb. 13, 2012, 7:20 PM), <http://bits.blogs.nytimes.com/2012/02/13/apple-announces-independent-factory-inspections/> (reporting that after public anger over labor conditions at Apple facilities, Apple published a list of its suppliers on its website).

¹⁵⁰ See e.g. APPLE INC., PROGRESS REPORT 2012, *supra* note 145, at 9-10 (highlighting that Apple seeks to prevent excessive work hours, hiring underage workers, and ending slavery of migrant workers).

¹⁵¹ *Id.* at 5.

¹⁵² See e.g. *id.* at 3 (describing Apple’s Supplier Code of Conduct).

¹⁵³ See e.g. *id.* at 9 (highlighting that Apple, for example, terminated business with facilities that repeatedly used forced labor).

¹⁵⁴ Business Transparency on Trafficking and Slavery Act, H.R. 2759, 112th Cong. § (2)(r)(1)(C) (2011) (“describe the greatest risks identified within the supply chain, and the measures taken toward eliminating those risks”).

¹⁵⁵ Press Release, Hon. Carolyn Maloney, *supra* note 1 (“[I]n providing this transparency, we’re also empowering consumers with information that could impact their purchasing decisions”).

¹⁵⁶ H.R. 2759 § 2(r)(1)(C)(ii).

¹⁵⁷ *Id.*

further provide a “misleading seal of approval,” where verification of monitoring was not undertaken effectively.¹⁵⁸

In general, monitoring and verification by third parties such as industry associations, employers’ organizations, or professional inspection and auditing firms promote corporate compliance.¹⁵⁹ However, the apparent benefit corporations derive from being found compliant with labor standards would seem to make it challenging for any entity affiliated with the corporation to remain unbiased and critical in their evaluation. In 2012, for example, labor groups expressed concern about Apple’s third party auditor, the Washington-based Fair Labor Association, cautioning that the organization was not sufficiently independent from Apple.¹⁶⁰ Subsequently, news reports revealed discrepancies in the portrayal of human rights violations in the Fair Labor Association’s auditing report and the situation at the Apple supplier Foxconn’s plants. Although the report highlighted that working conditions at Apple’s suppliers’ plants in China were improving,¹⁶¹ news reports uncovered that child labor at Apple’s supplier Foxconn remained a prevailing problem.¹⁶² In order to avoid a discrepancy like this, it is crucial that third parties are not only separate entities, but also independent from the corporation.

In addition, conducting unbiased and objective inquiries into corporate supply chains may require persistence and an increased effort in order to receive accurate, reliable information on labor conditions in facilities. Workers are most likely unwilling to discuss labor conditions openly especially in more formal situations.¹⁶³ Third parties might also encounter resistance to demanding access to parts of the investigated facility beyond those where access is granted voluntarily.¹⁶⁴ Thus, if the third party conducting the verification of data gathered through monitoring has an incentive to reach favorable results over objectively reliable information, they will most likely not do their utmost to conduct an independent and thorough investigation beyond the information and access they are given freely.¹⁶⁵

¹⁵⁸ Patrick Macklem, *Corporate Accountability Under International Law: The Misguided Quest for Universal Jurisdiction*, 7 INT’L L.F. DU DROIT INT’L 281, 286 (2005).

¹⁵⁹ See *id.* at 285 (basing the importance of third party monitoring on the fact that “[t]he incentive on a firm to implement a code is far weaker than the incentive to promulgate one, and the incentive to educate its workers and other affected parties about its code is far weaker than the incentive to publicize its presence to its customers and consumers”).

¹⁶⁰ Duhigg & Wingfield, *supra* note 149.

¹⁶¹ Clare Jim & Poornima Gupta, *Apple, Foxconn Improve China Plants, But More to Do: Audit*, REUTERS (Aug. 22, 2012, 10:28 AM), <http://www.reuters.com/article/2012/08/22/us-apple-foxconn-idUSBRE87K11C20120822>.

¹⁶² Don Reisinger, *Foxconn Admits to Child Labor Law Breach with Underage Intern Hires*, CNET (Oct. 16, 2012, 4:35 AM), http://news.cnet.com/8301-1001_3-57533056-92/foxconn-admits-to-child-labor-law-breach-with-underage-intern-hires/.

¹⁶³ See e.g. VERITÉ, RESEARCH ON INDICATORS OF FORCED LABOR IN THE SUPPLY CHAIN OF SHRIMP IN BANGLADESH 76 (2012) [hereinafter VERITÉ, FORCED LABOR IN THE SUPPLY CHAIN OF SHRIMP IN BANGLADESH], available at http://www.verite.org/sites/default/files/images/Research%20on%20Indicators%20of%20Forced%20Labor%20in%20the%20Bangladesh%20Shrimp%20Sector__9.16.pdf (highlighting the researchers’ challenges in conducting interviews to expose forced labor in supply chains in Bangladesh’s shrimp sector).

¹⁶⁴ See *id.* (highlighting the researchers’ challenges in gaining full access to production facilities in supply chains in Bangladesh’s shrimp sector).

¹⁶⁵ An example of a flawed auditing report of this nature is provided by the Fair Labor Association’s report of Apple’s supplier facilities. See *supra* pp. 28-29 and notes 160-162.

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The need for independence of third party verification of supply chains in the context of forced labor is aggravated by the fact that forced labor often occurs in supply chain segments that are inherently challenging to monitor.¹⁶⁶ Those segments include informal or short-term employment in any industry as well as employment in the agricultural sector.¹⁶⁷ In China, for example, a significant number of factory workers in facilities of electronics suppliers like Foxconn are hired on the basis of short term contracts through labor agencies.¹⁶⁸ Employing agency workers allows companies to circumvent minimum labor and employment standards in China that would otherwise pertain to the companies' employees.¹⁶⁹ Thus, agency workers are most susceptible to finding themselves in work environments with forced labor and are often treated as "second-class workers."¹⁷⁰ Similarly, forced labor is often an integral reality of the agricultural sector in developing countries such as Bolivia, which greatly affects the supply chains of Bolivian producers of perishable goods like peanuts.¹⁷¹ In the light of these factors, the BTA's lack of a requirement that third-party verification must be undertaken by independent parties could greatly decrease the accuracy of corporations' disclosure reports and constitutes a clear deficiency in the language of the BTA.

D. Defect IV: The Near Impossibility of Reconciling the Act's Mandates with Foreign Labor Practices, the Concept of National Sovereignty, and Corporate Business Interests

As highlighted in Part II.A, *supra*, the BTA requires an inquiry into the labor practices of every supplier and sub-supplier involved in the making of the corporation's product.¹⁷² In theory, imposing the responsibility for forced labor-free environments at every step of production on the corporation seems justified considering the benefit that corporations derive from cheap labor conditions. However, placing the burden of overseeing the entire supply chain solely on corporations makes it close to impossible for corporations to achieve positive disclosure reports. Corporations generally cannot control every activity within its supply chain. Moreover, it is nearly impossible to reconcile the Act's mandate with foreign labor practices, the concept of national sovereignty, and corporate business interests.

Corporations have benefitted greatly from globalization and, with it, exploitative labor conditions in developing countries.¹⁷³ The notion of the social contract would thus support the conclusion that they should also be imparted with a moral obligation to remedy

¹⁶⁶ See Macklem, *supra* note 158, at 285-286 (discussing the difficulty of effective monitoring).

¹⁶⁷ *Id.*

¹⁶⁸ CHINA LABOR WATCH, BEYOND FOXCONN: DEPLORABLE WORKING CONDITIONS CHARACTERIZE APPLE'S ENTIRE SUPPLY CHAIN 8 (2012) [hereinafter CHINA LABOR WATCH], available at <http://www.chinalabowatch.org/pdf/2012627-5.pdf>

¹⁶⁹ See *id.* at 15-18 ("To summarize, the effects of labor dispatching on workers include unequal compensation, reduced wages, incomplete access to social welfare programs, increased difficulty exercising labor rights, higher costs for job searchers, and slower career development.").

¹⁷⁰ *Id.* at 10-11.

¹⁷¹ See e.g. VERITÉ, SUPPLY CHAIN OF BRAZIL-NUTS, CATTLE, CORN, AND PEANUTS IN BOLIVIA, *supra* note 19 (describing indicators of forced labor in the supply chains of perishable goods such as peanuts in Bolivia).

¹⁷² Business Transparency on Trafficking and Slavery Act, H.R. 2759, 112th Cong. § (2)(r)(5)(D) (2011).

¹⁷³ David J.Doorey, *In Defense of Transnational Domestic Labor Regulations*, 43 VAND. J. TRANSNAT'L L. 953, 955 (2010).

these conditions as a consequence of this ongoing benefit.¹⁷⁴ The concept of the social contract suggests that the privilege of living in a free society and enjoying its benefits is conditioned upon the duty to contribute to society and to ensure that everyone is equally free.¹⁷⁵ Under this theory, corporations have the obligation to ensure that every worker involved in producing the goods they reap the benefits from is equally free.¹⁷⁶ In addition, by including the entire supply chain, the BTA complies with the Abolition of Forced Labour Convention's requirement that member states take effective measures to secure the abolition of forced labor "in all its forms within the shortest possible period."¹⁷⁷ The United States is a signatory to the Convention,¹⁷⁸ and as such, has the obligation to attempt to end forced labor in supply chains to the best of its ability. The BTA conforms to this duty by making U.S. corporations responsible for every layer of their supply chains.

The BTA's mandate to scrutinize the entire supply chain, however, is virtually irreconcilable with the reality of corporate business practice. The BTA assumes that corporations can control all contracts with their supplier's contractors and all activities in their supply chains. This is not always the case in modern supply chains where supplier activities are "hidden under multiple layers of contracting."¹⁷⁹ It can often prove challenging, to say the least, for corporations to exert control over activities at its suppliers' facilities especially if the corporation does not demand the majority of the output at said facilities.¹⁸⁰ Even when corporations like Apple make efforts to implement monitoring effectively, it remains close to impossible for them to retain oversight and control over every detail of their supply chain.¹⁸¹

In addition, corporations' efforts to end forced labor in supply chains will often be difficult to implement and maintain in outsourcing countries with substandard labor practices, such as China, where the economic pressure is high and labor laws are enforced inconsistently.¹⁸² Inexpensive, quick labor has been China's main recipe for economic growth over the last few decades.¹⁸³ Local manufacturers in China are under extreme pressure to produce in large quantities while maintaining low product prices.¹⁸⁴ To fulfill these

¹⁷⁴ Todres, *supra* note 105, at 90.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Abolition of Forced Labour Convention, *supra* note 43, at 56.

¹⁷⁸ NORMLEX Information System on International Labour Standards: Ratification for United States, ILO.ORG, http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102871 (last visited Apr. 21, 2013).

¹⁷⁹ Li-Wen Lin, *Corporate Social Accountability Standards in the Global Supply Chain: Resistance, Reconsideration, and Resolution in China*, 15 CARDOZO J. INT'L & COMP. L. 321, 329 (2007).

¹⁸⁰ See Robert J. Rosoff, *Beyond Codes of Conduct - Addressing Labor Rights Problems in China*, CHINA BUS. REV. (Mar. 2004), <http://www.chinabusinessreview.com/public/0403/rosoff.html> (discussing that one way for corporations to heighten labor standards in facilities in China is to own the facilities or share costs of higher standards through controlling a large percentage of the production at the facility).

¹⁸¹ Patrick Mey & John Boudreau, *Apple Allows Independent Monitoring of Asian Suppliers' Factories*, MERCURYNEWS.COM, http://www.mercurynews.com/business/ci_19736282 (last updated Jan. 16, 2012, 9:39 AM).

¹⁸² Dana C. Nicholas, *China's Labor Enforcement Crisis: International Intervention and Corporate Social Responsibility*, 11 SCHOLAR 155, 157 (2008-2009); Mey & Boudreau, *supra* note 181.

¹⁸³ Nicholas, *supra* note 182, at 158-159.

¹⁸⁴ *Id.* at 157.

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expectations, manufacturers “sometimes even egregiously violate laws, gaining profits at the expense of workers’ health and lives.”¹⁸⁵

These violations are facilitated by a lack of regulatory enforcement of labor laws in China. Although China’s labor laws, in theory, comply with international standards, in practice compliance is not satisfied. First, China’s labor laws are insufficiently enforced.¹⁸⁶ Regulatory agencies often do not have the resources to monitor companies’ compliance with the laws,¹⁸⁷ and as a consequence, companies that disregard labor regulations or produce false documentation often go undetected.¹⁸⁸ Thus, local companies in China that find themselves under pressure to produce cheaply and wish to reduce the costs of labor below the required national standard are able to do so without significant obstacles.

Second, loopholes in China’s labor laws also increase the potential for exploitative practices and forced labor at Chinese production facilities. A common legal loophole affecting corporate supply chains in China is hiring temporary workers instead of regular employees.¹⁸⁹ These workers are hired through labor agencies and, as such, are not subject to more stringent labor laws. Therefore, companies can still operate within the legal boundaries if they hire agency workers under substandard conditions.¹⁹⁰ Many companies, including Apple’s suppliers, have found these loopholes and frequently employ temporary agency workers instead of hiring employees.¹⁹¹

Chinese workers, on the other hand, have little opportunity to voice their grievance over coercive labor practices like temporary hiring. China only has one labor union, the All-China Federation of Trade Unions (“ACFTU”), and the law prohibits the formation of additional unions.¹⁹² Consequently, no counterweight exists to keep labor practices in China in conformity with the minimum of international labor and human rights standards.¹⁹³

As a result of the economic pressure, the inconsistent enforcement of China’s labor laws, the loopholes in Chinese labor laws, and the lack of workers’ unions, labor conditions in China fall below internationally mandated standards.¹⁹⁴ In China, violations of labor rights happen at virtually every production facility.¹⁹⁵ A report published by China Labor Watch highlights that Chinese laborers work excessive overtime up to one hundred eighty hours per month during peak production seasons although the legal limit lies at thirty-six hours of overtime per month.¹⁹⁶ Workers see themselves forced to accept overtime because their wages are unconscionably low.¹⁹⁷ Often, they even condone exploitative work environments. It was reported, for example, that “48 percent [of Foxconn workers in China] said their hours

¹⁸⁵ Lin, *supra* note 179, at 324.

¹⁸⁶ Nicholas, *supra* note 182, at 159, 167.

¹⁸⁷ *Id.* at 173.

¹⁸⁸ *Id.*

¹⁸⁹ CHINA LABOR WATCH, *supra* note 168, at 15-18.

¹⁹⁰ *Id.*

¹⁹¹ *Revisions to China’s Labour Contract Law Focus on Abuse of Employment Agency System, Revisions*, CHINA LABOR BULLETIN (28 June, 2012), <http://www.clb.org.hk/en/node/110086>.

¹⁹² Nicholas, *supra* note 182, at 167.

¹⁹³ *Id.*

¹⁹⁴ Rosoff, *supra* note 180.

¹⁹⁵ *Id.*

¹⁹⁶ CHINA LABOR WATCH, *supra* note 168, at 6-7.

¹⁹⁷ *Id.* at 7.

were reasonable and another 34 percent said they actually wanted even more hours.”¹⁹⁸ As a result, many Chinese companies argue that “Western codes [simply] did not meet the local conditions in China.”¹⁹⁹ In consideration of these factors, corporations who attempt to end all forced labor in every activity in their supply chains risk potentially destroying favorable and harmonic business relationships between themselves, their suppliers, and local factories.

It must also be taken into consideration that an attempt to influence foreign labor standards might be regarded as an impermissible infringement on national sovereignty.²⁰⁰ The concept of national sovereignty is one of the most longstanding concepts of customary international law²⁰¹ and amongst its pillars is the notion that states have exclusive jurisdiction over their territories.²⁰² Thus, changing domestic labor practices should solely be the domain of national governments.²⁰³ Breaking this rule might increase political turmoil if the outsourcing country begins to experience detrimental effects on its economy caused by its limited ability to produce cheaply.

The BTA’s requirement to engage the entire supply chains also substantially interferes with corporations’ business interests. Corporations cannot afford to lose their production locations in countries like China where avoiding forced labor is nearly impossible.²⁰⁴ The manufacturing conditions and expertise for the development of progressive products, especially for the technological industry, are ideal in countries like China and far surpass production conditions and expertise in the United States.²⁰⁵ As one high-ranking Apple official stated, “[t]he entire supply chain is in China now ... You need a thousand rubber gaskets? That’s the factory next door. You need a million screws? That factory is a block away. You need that screw made a little bit different? It will take three hours.”²⁰⁶ The irreconcilability between the necessity of operating business in countries like China and the BTA’s mandate to supervise the entire supply chain consequently leaves corporations caught between a rock and a hard place.

As this section has shown, in theory, there is great justification for imposing the responsibility for human rights violation committed at any point in the production of goods on corporations. From a practical perspective, however, it is nearly impossible for corporations to achieve positive outcomes in their disclosure reports under the BTA if corporations are held responsible for their entire supply chains. Corporations generally cannot control every activity within their supply chains and it is near impossible to reconcile the Act’s mandate with foreign labor practices, the concept of national sovereignty, and corporate business

¹⁹⁸ Keith Bradsher, *Two Sides to Labor in China*, N.Y. TIMES (Mar. 30, 2012), http://www.nytimes.com/2012/03/31/business/global/labor-shortage-complicates-changes-in-chinas-factories.html?pagewanted=all&_r=0.

¹⁹⁹ Kirk O. Hanson, Exec. Dir. of the Markkula Ctr. for Applied Ethics at Santa Clara Univ., Talk at the “Rule of Law and International Business Ethics” Conference in Beijing, Oct. 22, 2011, *Beyond Compliance: Globalization Demands More Effective Programs*, <http://www.scu.edu/ethics/practicing/focusareas/business/beyond-compliance.html> (last visited Jan. 21, 2013).

²⁰⁰ Doorey, *supra* note 173, at 966.

²⁰¹ See Jianming Shen, *National Sovereignty and Human Rights in a Positive Law Context*, 26 BROOK. J. INT’L L. 417, 420 (2000) (“State sovereignty is the very foundation upon which international law exists”).

²⁰² *Id.*

²⁰³ Doorey, *supra* note 173, at 966.

²⁰⁴ Duhigg & Bradsher, *supra* note 32.

²⁰⁵ *Id.*

²⁰⁶ *Id.* (quoting a high-ranking Apple official).

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interests. Holding corporations accountable for overseeing their entire supply chains constitutes a deficiency in the BTA that could encourage corporation to manipulate their disclosure reports and could exhaust the purpose of the Act.

IV. RECOMMENDATIONS TO CURE THE POTENTIAL DEFECTS IN THE BUSINESS TRANSPARENCY ACT AS PROPOSED TO DATE

The BTA has the potential of playing a pivotal role in ending forced labor in corporate supply chains worldwide. The previous section has shown that the BTA, however, has some defects that could decrease its effectiveness. In order to prevent possible loopholes in the BTA, this section will make recommendations how these defects could be cured. First, the note will recommend that, for the sake of increasing informed consumer and investor decisions, the BTA should be amended to require corporations to disclose whether they collaborated with NGOs to increase public exposure of their disclosure reports or whether they financially supported NGOs that focus on forced labor. Second, the definition of forced labor under section 1589 of the United States Code should be replaced with the international law definition to ensure that corporations are provided with sufficient guidance to effectively address forced labor in their supply chains. Third, the language of the Act should be amended to increase specificity of its provisions with the goal of promoting transparency, accountability, and reliability of the information in the disclosure reports. Fourth, the Business Transparency Act should only oblige corporations to scrutinize its direct suppliers, but additionally mandate the disclosure of names of all suppliers and business relationship between them to make the BTA compatible with the reality of foreign labor practices, the notion of national sovereignty, and corporate business interests.

A. *Recommendation 1: The BTA Should Include a Disclosure Requirement Describing the Corporation's Collaboration with NGOs*

As highlighted above, disclosure in itself might not be enough to substantially improve the labor situation in outsourcing countries.²⁰⁷ The proponents of the BTA recognized that transparency and informed consumer decisions, which exert pressure on corporations to be socially responsible, are vital to the effectiveness of the BTA.²⁰⁸ However, the Act does not go far enough in promoting transparency and ensuring that the information in corporations' disclosure reports reach consumers. NGOs have proven vital in the fight for labor rights within the U.S.²⁰⁹ Their efforts could also help promote transparency and the dissemination of information provided under the BTA with the goal of influencing purchasing decisions of U.S. consumers. To effectively engage NGOs in the mandate of the BTA, this note recommends to amend the BTA to include a disclosure requirement that highlights whether and to what extent corporations collaborated with NGOs in disseminating information about forced labor in their supply chains to consumers and whether corporations

²⁰⁷ See *supra* Part III.A.

²⁰⁸ See Press Release, Hon. Carolyn Maloney, *supra* note 1 (“[I]n providing this transparency, we’re also empowering consumers with information that could impact their purchasing decisions”).

²⁰⁹ Free the Slaves & Human Rights Ctr. of the Univ. of Cal., Berkeley, *Hidden Slaves: Forced Labor in the United States*, 23 BERKELEY J. INT’L L. 47, 57 (2005).

financially supported NGOs that focus on forced labor, such as Verité or the International Labor Rights Forum,²¹⁰ in their efforts to uncover human rights violations in supply chains.

It is vital for the efficacy of the BTA that the corporate disclosure reports reach consumers since consumers are in a good position to influence corporate behavior.²¹¹ Consumer loyalty creates a “reliable flow of income” for corporations.²¹² Brand perception is essential for increasing consumer loyalty, and hence, the economic success of corporations,²¹³ as it helps maintain and attract customers.²¹⁴ In this context, the level of social responsibility associated with a brand greatly influences its public image.²¹⁵ Socially responsible corporate practices and corporate transparency contribute greatly to a positive brand perception.²¹⁶ Negative publicity about corporate behavior, on the other hand, can create a poor brand image, which often correlates with decreasing stock value.²¹⁷ Since corporations strive to protect their shareholders’ investments, consumer choices based on social practices associated with a brand can influence a corporation’s stock value and, as a consequence, corporate decision-making tremendously.²¹⁸ It has been suggested that “the stronger the threat to corporate reputation from ... complicity in labor abuses, the greater the incentive ... to better manage their suppliers’ labor practices.”²¹⁹ Thus, if the information under the BTA is disseminated effectively to investors and consumers, investors and consumers can use the information to exert pressure on corporations to change socially undesirable practices. The potential economic detriment of losing customers and investors will provide corporations a powerful incentive to prevent and address forced labor in their supply chains to the best of their ability in order to decrease potential investment risks and protect shareholder value²²⁰ as well as maintain the integrity of their brands.²²¹

²¹⁰ Verité and the International Labor Rights Forum are non-governmental organizations that are committed to the promotion of labor rights and ending forced labor. See *About Us*, VERITÉ.ORG, <http://www.verite.org/About-Us> (last visited Apr. 24, 2013) (“We take aim at serious problems: child labor, slavery, systemic discrimination against women, dangerous working conditions, and unpaid work”); *About ILRF*, ILRF.COM, <http://www.laborrights.org/about-ilrf> (last visited Apr. 24, 2013) (“ILRF is an advocacy organization dedicated to achieving just and humane treatment for workers worldwide”).

²¹¹ David Heigh, *Getting the Best From Brands*, 8 INT’L TAX REV. 30, 30 (1997).

²¹² *Id.* at 30.

²¹³ Marc Fischer et al., *How Important Are Brands? A Cross-Category, Cross-Country Study*, 47 J. MARKETING RES. 823, 823 (2010).

²¹⁴ Heigh, *supra* note 211, at 30.

²¹⁵ Elena Malykina, *Social Responsibility Boosts Brand Perception*, ADWEEK.COM (Mar. 31, 2010, 12:00 AM), <http://www.adweek.com/news/advertising-branding/social-responsibility-boosts-brand-perception-101965>.

²¹⁶ *Id.*

²¹⁷ Nicholas, *supra* note 182, at 193.

²¹⁸ Letter from the U.S. Forum for Sustainable and Responsible Inv. (U.S. SIF) and the Interfaith Ctr. on Corporate Responsibility On Behalf of 80 Institutional Investors and Investment Companies to John Boehner, Speaker, U.S. House of Representatives, and Eric Cantor, Majority Leader, U.S. House of Representatives, Re: Business Transparency on Trafficking and Slavery Act (HR 2759) (Jan. 26, 2012), *available at* http://ussif.org/resources/factsheets_resources/documents/LettertoRepublicanLeadershipreTraffickingandSlavery.pdf.

²¹⁹ Doorey, *supra* note 173, at 999.

²²⁰ Letter from U.S. SIF and the Interfaith Ctr. on Corporate Responsibility to John Boehner and Eric Cantor, *supra* note 218.

²²¹ See Malykina, *supra* note 215 (highlighting that brand value is closely tied to consumer perception).

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In order to reach consumers and enable them to make informed product choices that will affect corporations' stock value, NGOs, the media, and consumer protection groups are crucial in raising the stakes for corporations. NGOs have been the main driving force in the protection of labor rights to date²²² and have proven crucial in exposing and combating forced labor within the United States.²²³ They possess the potential to be similarly instrumental in the global struggle with forced labor by promoting transparency and educating consumers and investors about corporate activities.²²⁴ However, NGOs suffer from chronic lack of funding.²²⁵ Thus, securing adequate funding for NGOs that focus on international labor rights or human rights would be a critical step towards increasing accountability under the BTA.²²⁶

The BTA itself could greatly contribute to strengthening the involvement of NGOs concerned with promoting international labor rights, such as Verité or the International Labor Rights Forum.²²⁷ This could be done by requiring corporations to disclose whether they collaborated with NGOs in providing information about their social compliance to consumers or whether they financially supported NGOs that focus on ending forced labor internationally. NGOs could spare costs and efforts of investigating forced labor conditions in corporations' supply chains by themselves if corporations agreed to collaborate with NGOs by providing access to information about their supply chains. Further, NGOs could assist corporations through offering their expertise in international labor law as part of this collaboration. Finally, financial support could enable NGOs to allocate financial resources to help promote transparency as well as consumer and investor participation under the BTA.

If corporations are successfully encouraged to make serious strides against forced labor in their supply chains as a consequence of the BTA, their activities have the potential to directly benefit the host countries and regions where human rights violations frequently occur. Corporations' efforts to improve labor conditions can greatly enhance the enforcement of local health and safety standards as well as union participation where such labor standards have been neglected by local governments.²²⁸ Studies also suggest that improving labor conditions in factories abroad will increase the attractiveness of suppliers in the region as investment opportunities.²²⁹ Thus, increasing consumer pressure through requiring the

²²² Shareen Hertel, *Human Rights and the Global Economy: Bringing Labor Rights Back In*, 24 MD. J. INT'L L. 283, 294 (2009).

²²³ Free the Slaves & Human Rights Ctr., *supra* note 209, at 57.

²²⁴ Jennifer S. Nam, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims* (Note) 107 COLUM. L. REV. 1655, 1693 (2007).

²²⁵ MECHAI VIRAVAIDYA & JONATHAN HAYSEN, UNAIDS & THE POPULATION AND COMMUNITY DEVELOPMENT ASSOCIATION [PDA], STRATEGIES TO STRENGTHEN CAPACITY IN RESOURCE MOBILIZATION THROUGH BUSINESS ACTIVITIES 1 (2001), available at http://data.unaids.org/publications/irc-pub06/jc579-strategies_ngo_en.pdf.

²²⁶ *Id.*

²²⁷ See *supra* text accompanying note 210.

²²⁸ Doorey, *supra* note 173, at 981.

²²⁹ Emp't, Labour and Soc. Affairs Comm. & Trade Comm. of the Org. for Eco. Co-Operation & Dev. [OECD], *Joint Report on Trade, Employment, and Labor Standards*, in OECD, TRADE, EMPLOYMENT, AND LABOUR STANDARDS: A STUDY OF CORE WORKERS' RIGHTS AND INTERNATIONAL TRADE 12-13 (1996) ("Practitioners of [socially responsible investing] hope that by steering capital towards what are deemed to be socially responsible firms and away from those deemed to be socially irresponsible, they can wield a positive influence").

disclosure of NGO involvement or financial support of relevant NGOs would not only benefit individual workers' rights, but the entire outsourcing region in general.

B. Recommendation II: The BTA Should Adopt the ILO's Definition of Forced Labor

It was discussed previously that the U.S. definition of forced labor under section 1589, which currently governs the BTA, does not provide corporations with sufficient guidance in evaluating forced labor in their supply chains.²³⁰ U.S. case law has, for example, not addressed forced labor based on financial harm outside of the context of immigrant workers and generally remains ambiguous as to what non-physical harm can constitute forced labor.²³¹ This note recommends that the BTA adopt the definition of forced labor developed by the International Labour Organisation ("ILO")²³² instead of the current U.S. definition because it provides more guidance to corporations in addressing forced labor in their supply chains. The ILO definition explicitly includes forced labor situations common in corporate supply chains such as bonded labor and other financial harm²³³ and it has already been applied to forced labor analyses of complex, global supply chains in various publications.²³⁴

The ILO, which is the specialized U.N. agency that is responsible for addressing labor rights,²³⁵ has been influential in shaping international standards to prohibit forced labor.²³⁶ It is in the unique position of being able to incorporate business concerns, workers' concerns, and government needs in their labor rights conventions and declarations since it is the only U.N. agency comprised of government, employer, and worker representatives.²³⁷

²³⁰ See Part III.B.

²³¹ See Part III.B.

²³² The International Labour Organisation is the U.N. agency that is responsible for developing and monitoring international labor standards. *About the ILO*. ILO.ORG, <http://www.ilo.org/global/about-the-ilo/lang-en/index.htm> (last visited Feb. 7, 2013). Its research, publications, and all other activities are undertaken by the International Labour Office, which is the permanent secretariat of the ILO. *International Labour Office*, ILO.ORG, <http://www.ilo.org/global/about-the-ilo/who-we-are/international-labour-office/lang-en/index.htm> (last visited Feb. 7, 2013).

²³³ ILO Director-General, *A Global Alliance Against Forced Labour: Global Report Under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work 2005: Report of the Director-General*, Report I(B) 5-6 (2005) [hereinafter ILO Director-General, *Report 2005*], available at <http://www.ilo.org/public/english/standards/reilmilc/ilc93/pdf/rep-i-b.pdf>.

²³⁴ See e.g. VERITÉ, FORCED LABOR IN THE SUPPLY CHAINS OF BRAZIL-NUTS, CATTLE, CORN, AND PEANUTS IN BOLIVIA, *supra* note 19, at 23 ("[T]he ILO definition of forced labor was used as the basis for developing all paths and methods of inquiry"); ANTI-SLAVERY INTERNATIONAL, SLAVERY ON THE HIGH STREET: FORCED LABOUR IN THE MANUFACTURE OF GARMENTS FOR INTERNATIONAL BRANDS 8 (2012) [hereinafter ANTI-SLAVERY INTERNATIONAL, SLAVERY ON THE HIGH STREET], available at http://www.antislavery.org/includes/documents/cm_docs/2012/s/1_slavery_on_the_high_street_june_2012_final.pdf (discussing forced labor in the context of the garment industry in India based on ILO's Forced Labour Convention and the indicators developed by the ILO).

²³⁵ *Mission and Objectives*, ILO.ORG, <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang-en/index.htm> (last visited Feb. 7, 2013).

²³⁶ See *NORMLEX: Information System on International Labour Standards*, ILO.ORG., <https://www.ilo.org/dyn/normlex/en/f?p=1000:1:0:NO::> (last visited Jan. 29, 2013) (highlighting that the ILO constitutes of 185 member states, all of which have committed themselves to promoting the ILO's goals through their membership).

²³⁷ *Structure*, ILO.ORG, <http://www.ilo.org/global/about-the-ilo/who-we-are/lang-en/index.htm> (last visited Feb. 7, 2013).

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The ILO has formulated standards for the protection of workers from exploitation and forced labor on an international scale. It has promulgated 189 labor related Conventions, five Protocols, and 202 Recommendations to date.²³⁸

The two ILO Conventions pertaining to forced labor, namely the Convention Concerning Forced or Compulsory Labour²³⁹ and the Convention Concerning the Abolition of Forced Labour,²⁴⁰ are the two most widely ratified international labor conventions worldwide.²⁴¹ ILO Convention No. 29 defines forced labor as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”²⁴² This definition of forced labor is considered the internationally accepted definition of forced labor.²⁴³

In 2005, the ILO additionally issued guidelines for applying this definition in practice.²⁴⁴ The guidelines formulate twenty-two specific indicators of forced labor,²⁴⁵ which have frequently been used by NGOs to evaluate forced labor situations in global supply chains.²⁴⁶ These indicators are grouped together according to whether they fall within the element of menace of penalty or of lack of consent.²⁴⁷ The ILO describes lack of consent as the way into forced labor and menace of penalty as the means to keep someone in forced labor.²⁴⁸

The ILO recognizes that workers often enter situations that lead to forced labor on their free will.²⁴⁹ There is a moment, however, when the worker’s consent becomes irrelevant and this is when forced labor begins.²⁵⁰ Thus, as is the case under U.S. law, the ILO cautioned that “[f]orced labour cannot be equated simply with low wages or poor working conditions. Nor does it cover situations of pure economic necessity, as when a worker feels unable to leave a job because of the real or perceived absence of employment alternatives.”²⁵¹ Instead, the coerciveness of the situation must be brought about by the employer.²⁵² The inability to walk away from the employment can be caused by physical, legal, or psychological coercion.²⁵³ In contrast to U.S. law, however, the ILO cites specific indicators of coercion, which include induced indebtedness, external restraints such as guarded

²³⁸ NORMLEX: *Information System on International Labour Standards*, *supra* note 236.

²³⁹ Forced Labour Convention, *supra* note 43.

²⁴⁰ Abolition of Forced Labour Convention, *supra* note 43.

²⁴¹ Int’l Labour Office, *Eradication of Forced Labour: General Survey Concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105)*, Report IIIB (Pt. 1B), at xi (2007), available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_089199.pdf.

²⁴² Forced Labour Convention, *supra* note 43, at 58.

²⁴³ VERITÉ, FORCED LABOR IN THE SUPPLY CHAIN OF SHRIMP IN BANGLADESH, *supra* note 163, at 24.

²⁴⁴ ILO Director-General, *Report 2005*, *supra* note 233; ILO Director-General, *Report 2009*, *supra* note 119.

²⁴⁵ ILO Director-General, *Report 2005*, *supra* note 233, at 6.

²⁴⁶ See sources cited *supra* note 234.

²⁴⁷ ILO Director-General, *Report 2005*, *supra* note 233, at 6.

²⁴⁸ *Id.*

²⁴⁹ ILO Director-General, *Report 2009*, *supra* note 119, at 6. Nevertheless, the employer’s deceit and trickery is often an element to induce the worker to enter the employment. *Id.* at 6.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 5.

²⁵² ILO Director-General, *Report 2005*, *supra* note 233, at 6.

²⁵³ *Id.*

premises, deception about the type and form of work, psychological compulsion, withholding of wages, and confiscation of valuables or documents such as immigration papers.²⁵⁴

“Menace of penalty” under the ILO’s interpretation is what retains workers in their forced labor situations.²⁵⁵ It manifests itself in the form of physical threats or psychological pressure.²⁵⁶ The ILO’s detailed list of penalties includes, for example, physical violence, detainment, exclusion from future employment, isolation from the community, denunciation to immigration authorities or the police, or financial penalties.²⁵⁷ The threat of economic sanctions usually appears in the form of debt bondage, the employer’s refusal to pay wages, or threats of dismissal if workers refuse to do excessive overtime.²⁵⁸ In the realm of forced labor for economic purposes by private actors as it occurs in supply chains, the ILO highlights that debt bondage, forced domestic work, or forced labor in the agricultural sector or in remote areas are the most common forms of forced labor.²⁵⁹

Considering that the ILO has carved out a multitude of indicators of forced labor in economic activities of private actors in its definition, the ILO’s definition provides a more uniform and comprehensible standard for corporations to uncover forced labor in their supply chains than the U.S. definition, which lacks a specific list of indicators and has only marginally dealt with forced labor for economic purposes outside of the context of immigrant workers.

Furthermore, corporations have a variety of publications on the ILO’s forced labor indicators in corporate supply chains available to them for their own supply chain analysis.²⁶⁰ The ILO has, for example, issued a handbook for employers and businesses in collaboration with the International Organization of Employers, which is designed to specifically address forced labor in modern supply chains.²⁶¹ Independent NGOs such as Verité and Anti-Slavery International have also used the ILO’s definition and indicators for uncovering and reporting on forced labor in supply chains in various sectors.²⁶² The ILO’s definition of forced labor in the context of opaque, modern supply chains provides a high level of guidance. Therefore, the ILO’s definition will most likely lead to a more uniform interpretation of forced labor in modern supply chains than the rather vague and less probed U.S. definition and will make it easier for corporations to address forced labor than the U.S. standard under section 1589.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 5-6.

²⁵⁹ *Id.* at 10.

²⁶⁰ See sources cited *supra* note 234.

²⁶¹ See Int’l Labour Office, *A Handbook for Employers & Business*, *supra* note 30, at 5 (“This handbook aims to help business actors at different levels address the issue [of forced labor], providing practical tools and guidance material to enable them to identify and prevent forced labour, and take remedial action where necessary, within their sphere of influence”).

²⁶² See sources cited *supra* note 234.

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C. Recommendation III: Increase the Specificity of the BTA's Wording

It has been pointed out earlier that the BTA's language is too vague and unspecific to be effective in two provisions of the Act.²⁶³ The BTA does not require any factual information on forced labor violations in corporate supply chains.²⁶⁴ It also does not require that verification of data gathered through supply chain monitoring is conducted by independent third parties.²⁶⁵ Precise and detailed language of a slavery disclosure law is essential to preventing its uneven application and ensures that actual instances of forced labor and slavery are uncovered.²⁶⁶ Thus, this note recommends that the BTA include the mandatory disclosure of information on suppliers that use forced labor and the specific acts that constitute forced labor in a corporation's supply chain.²⁶⁷ Requiring the disclosure of this information would greatly increase the uniformity of disclosure reports, would add to their transparency, and would create accountability by alerting consumers, investors, NGOs, and civil society to undesirable corporate behavior. Further, it is recommended that the BTA specify that supply chain verification should be undertaken by independent third parties. Independence in third-party verification is essential for the reliability of data included in the disclosure reports, in particular considering that effective monitoring of opaque, complex supply chains is inherently difficult.

D. Recommendation IV: The Forced Labor Inquiry Obliging Corporations Should End with the Direct Supplier but the Disclosure Should Include Names and Relationships of All Other Suppliers

As described above, the BTA requires disclosure of acts of forced labor committed at any point in the course of the production of goods from the raw material to the finished product.²⁶⁸ However, is practically impossible for corporations to maintain a supply chain that is entirely free from forced labor violations since corporations cannot exert complete control over all activities in their supply chains.²⁶⁹ Further, this mandate of the BTA is irreconcilable with foreign labor practices, the notion of national sovereignty and corporate business interests.²⁷⁰ Instead of requiring an inquiry into the entire supply chain, this note recommends that the corporations' inquiry into their supply chain as mandated by the BTA end with the suppliers that are in the corporation's direct control. In addition, however, the BTA should obligate corporations to compile a list of names of all suppliers, sub-suppliers, and contractors involved in the production of their goods and highlight their relationship to each other in order to enable interested actors in civil society such as NGOs to conduct independent inquiries into the suppliers' activities.

²⁶³ See *supra* Part III.C.

²⁶⁴ See *supra* Part III.C.1.

²⁶⁵ See *supra* Part III.C.2.

²⁶⁶ See Levy, *supra* note 136, at 508-509 (describing the effects of vague slavery disclosure laws).

²⁶⁷ The requirement could be phrased as "the description of the greatest risks in the supply chain shall include factual information about working conditions identified as forced labor and the names of facilities where these conditions were encountered."

²⁶⁸ See Part II.A.

²⁶⁹ See Part III.D.

²⁷⁰ See Part III.D.

As pointed out, requiring scrutiny of the entire supply chain, as is the case under the BTA, is practically not feasible. However, mandating only data of forced labor in corporations' direct suppliers' facilities cannot provide a viable solution either. The California Transparency Act, for example, requires only the disclosure of human rights violations of companies' direct suppliers.²⁷¹ This solution unfortunately only scratches the surface of the issue of forced labor, and considering the complexity of supply chains, is too under-inclusive to effectuate needed global changes to forced labor conditions.²⁷² Corporations could potentially avoid disclosure under the California Transparency Act by outsourcing work that involves forced labor to subcontractors of suppliers and thus appear socially responsible. Therefore, ending the inquiry at the direct supplier's facility cannot serve as a feasible answer under the BTA.

A possible solution under the BTA could be to find a middle ground between the federal BTA proposal and the California Act that takes into consideration "the tradeoffs between quality of disclosures and costs to businesses."²⁷³ Under this proposal, the corporation's active inquiry would end with the direct supplier. In addition, however, corporations would be required to disclose and publish names of all suppliers in their supply chains as well as all business relationships between them. Such a modification "could alter the power dynamic between the [multinational corporation], its suppliers, and the many private activists engaged in monitoring and reporting on supply chain labor practices"²⁷⁴ by allocating part of the responsibility for identifying and exposing forced labor conditions to NGOs, who, in turn, benefit from a decreased financial burden by using the already available disclosed information on supply chain relationships.²⁷⁵ This burden shift has the potential of permanently influencing conditions on the ground without adversely affecting the amicability of business relationships between foreign corporations and local businesses.

The publication of supplier lists aimed at showing transparency has already gained increasing popularity amongst major corporations like Apple and H&M.²⁷⁶ Corporations have published such lists despite initial confidentiality concerns.²⁷⁷ Thus, there seem to be no obstacles to requiring such lists as part of the BTA.

Overall, the feasibility of disclosing forced labor violations under the Act could be greatly improved if corporations were only required to investigate into all direct suppliers, but in addition had to disclose the names and business relationships of all other actors in their supply chains. This solution could provide consumers, investors, and interested NGOs with the necessary information to aid corporations with their inquiries while still obligating

²⁷¹ California Transparency in Supply Chains Act of 2010, ch. 556, sec. 3, § 1714.43 (a)(1), 2010 Cal. Stat. 2641 (2010) (codified at CAL. CIV. CODE § 1714.43).

²⁷² See *Elimination of Forced Labor*, ILO.ORG, <http://www.ilo.org/washington/areas/elimination-of-forced-labor/lang-en/index.htm> (last visited Apr. 20, 2013) ("In many sectors, enterprises outsource a range of production and service-related activities which results in complex international supply chains").

²⁷³ Levy, *supra* note 136, at 514.

²⁷⁴ Doorey, *supra* note 173, at 958.

²⁷⁵ *Id.*

²⁷⁶ Jana Kasperkevic, *H&M Makes Their Suppliers List Public*, INC.COM (Apr. 2, 2013), <http://www.inc.com/jana-kasperkevic/hm-corporate-social-responsibility-supplier-list-transparency-sustainability.html>; Duhigg & Wingfield, *supra* note 149.

²⁷⁷ See Erica Gies, *Is This Apple's Nike Moment?*, FORBES.COM (Jan. 20, 2012), <http://www.forbes.com/sites/ericagies/2012/01/20/is-this-apples-nike-moment/> (reporting that Apple stated initial concerns about confidentiality regarding its supplier's list, but then decided to publish a list of their suppliers regardless).

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corporations to take responsibility for forced labor offenses in their direct control. Moreover, by limiting corporations' investigatory roles, yet expanding their disclosure requirements, the BTA would more accurately reflect the realities of corporate practice and foreign labor standards than it does currently.

CONCLUSION

Forced labor affects millions of persons working in corporate supply chains around the world at any given moment.²⁷⁸ Experience with supply chain research has shown that "[t]he hidden nature of forced labor... presents [a] formidable challenge[]" to uncovering forced labor and substantially inhibits its eradication.²⁷⁹ The U.S. federal Business Transparency Act seeks to increase the transparency of corporate supply chains by obliging corporations to disclose their efforts to bring light to human rights violations and to ameliorate them.

Although the Act has great potential to play a pivotal role in ending forced labor in economic activities and help remove forced labor from goods in the American market, some improvements are recommended in several respects. First, the Act should be amended to require the disclosure of whether corporations collaborate with NGOs in the publication of information regarding their supply chains or whether they financially support NGOs that focus on forced labor with the purpose of increasing transparency and changing corporate behavior through informed consumer and investor decisions. Second, the definition of forced labor in the BTA, which references section 1589 of the United States Code should be replaced with the ILO's definition to ensure that the most common forms of forced labor in corporate supply chains, such as debt bondage, are unequivocally covered by the BTA and to provide corporations sufficient guidelines to address forced labor in their supply chains. Third, the language of the BTA should be changed to include the names of suppliers and factual information about specific violations and should specify that third parties who verify data gathered about supply chain activity must be independent from the corporation. Fourth, the Business Transparency Act should only oblige corporations to scrutinize its direct suppliers, but additionally mandate the disclosure of names of its suppliers and business relationship between them to make the BTA compatible with the reality of foreign labor practices, the notion of national sovereignty, and corporate business interests.

U.S. consumers increasingly demand information about human rights violations in the production of U.S. goods²⁸⁰ and the recommendations proposed in this note could make the Business Transparency Act more effective in providing such information and potentially removing forced labor from American products if the Act were to be passed into law. Increasingly, the international community is insisting on transparency in international corporate activity and respect for fundamental human rights. The proposed BTA with the recommended changes in this note will provide for a needed measure to ending forced labor

²⁷⁸ See *supra* Part I.A.

²⁷⁹ VERITÉ, RESEARCH ON INDICATORS OF FORCED LABOR: SUCCESSES, CHALLENGES, AND REFLECTIONS ON FUTURE ENGAGEMENT 9 (2012), available at http://www.verite.org/sites/default/files/images/Lessons%20Learned%20During%20Research%20on%20Indicators%20of%20Forced%20Labor%20in%20the%20Production%20of%20Goods__9.14.pdf.

²⁸⁰ Business Transparency on Trafficking and Slavery Act, H.R. 2759, 112th Cong. § 1(b)(2) (2011).

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and bringing transparency to global supply chains to the benefit of workers, consumers, investors, governments, and corporations.