2-15-2017

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Recommended Citation


Available at: http://www.repository.law.indiana.edu/ijgls/vol24/iss1/10
Adrift in the Sea: The Impact of the Business Supply Chain Transparency on Trafficking and Slavery Act of 2015 on Forced Labor in the Thai Fishing Industry

KATHARINE FISCHMAN*

ABSTRACT

Hundreds of thousands of men and boys are trafficked and enslaved on long-haul fishing boats in the waters off the coast of Thailand. These captives endure physical and mental abuse, inhumane working conditions, meager sustenance, and little sleep as they are forced to catch fish used in products such as cat food. This Note will focus on whether a proposed Act—the Business Supply Chain Transparency on Trafficking and Slavery Act of 2015 (BSCT)—would impact the issue of forced labor linked to the seafood industry in Thailand, and particularly the portion of the industry that supplies fish used in American brand cat foods. This Note conducts a case study focusing on Mars, Inc., to explore whether the BSCT would be effective. This Note concludes that legislation may not significantly impact this specific human rights abuse, but that an interrelated effort should be made to bring other interested parties into the solution-making process.

INTRODUCTION

My boss used bad words toward me, beat me, forced me to do hard work, and threatened me that if I braved to run, he would shoot me. There were a lot of big waves in the sea. It was not safe. A worker died because he fell into

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the sea and my boss knew it as well, but he did not return the boat to save him.

—21-year-old victim from Prey Veng Province, Cambodia

Traditionally, the Thai fishing business provided lucrative, seasonal work for Thai men. But in 1989, Typhoon Gay wrecked that tradition when hundreds of Thai fishermen were killed and hundreds of boats were destroyed. With few Thai men willing to go back out to sea, boat owners needed workers. Labor brokers stepped in and supplied boat owners with migrant laborers from surrounding countries, including Burma and Malaysia. Today, hundreds of thousands of men and boys work in the Thai fishing industry. Many fishermen come from surrounding countries, but are then trafficked and sold to boat owners for a sum that must be paid off by the fisherman with work. These men and boys endure forced labor conditions—they must fish for years at a time in horrid conditions with no escape. They endure physical and mental abuse, inhumane working conditions, meager sustenance, and little sleep.

2. INT'L ORG. FOR MIGRATION, TRAFFICKING OF FISHERMAN IN THAILAND 7 (2011).
3. Id.
4. Id.
5. Id.
7. Exploitation of Cambodian Men at Sea, supra note 1, at 7.
8. See Ian Urbina, 'Sea Slaves': The Human Misery that Feeds Pets and Livestock, N.Y. TIMES (July 27, 2015), http://www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html [hereinafter Sea Slaves] ("It is difficult to overstate the dangers of commercial fishing. Two days spent more than 100 miles from shore on a Thai fishing ship with two dozen Cambodian boys, some as young as 15, showed the brutal rhythm of this work. Rain or shine, shifts run 18 to 20 hours. Summer temperatures top 100 degrees. The deck is an obstacle course of jagged tackle, whirring winches and tall stacks of 500-pound nets. Ocean spray and fish innards make the floor skating-rink slippery. The ship seasaws, particularly in rough seas and gale winds. Most boys work barefoot; 15-foot swells climb the sides, clipping them below the knees. Much of this occurs in pitch blackness."); see also Exploitation of Cambodian Men at Sea, supra note 1, at 1 ("An estimated thousands of Cambodian men, women, and children are trafficked annually to Thailand for the purpose of labor exploitation. Some of the worst exploited are the men and boys who are deceived onto long-haul fishing boats that fish the waters of the South China Sea, including into Malaysian waters. These boats, out to sea for up to two years or more, become virtual prisons on which the trafficking victims endure inhumane
This Note will focus on whether one proposed solution—the Business Supply Chain Transparency on Trafficking and Slavery Act of 2015 (BSCT)—would impact the issue of forced labor linked to the seafood industry in Thailand, and particularly the portion of the industry that supplies fish used in American brand cat foods. This Note will have a narrow focus: it will examine how corporations and the United States government can affect supply chain transparency broadly and specifically in the cat food industry; it will focus on transparency with respect to forced labor; and it will look at the fishing industry in Thailand, although the larger Southeast Asian fishing industry and other parts of the world are, unfortunately, replete with similar human rights abuses.

Part I examines how and why forced labor occurs in the fishing industry in Thailand and presents a picture of the horrible conditions faced by laborers. Part II analyzes the history, provisions, and probable impact of the BSCT. Part III conducts a case study and explores whether the BSCT would apply to and significantly impact a particular corporation, Mars, Inc. (Mars). Mars is one of the leading producers of cat food in the United States and is known to import fish from Thai

working conditions, and physical abuse." (internal citations omitted); see also TRAFFICKING OF FISHERMAN IN THAILAND, supra note 2, at 28 ("Sheer exhaustion and dangerous working conditions on boats with heavy equipment and nets mean many fishermen are injured while on aboard. According to the fishermen, when they fall sick or are injured, little or no medicine is available (beyond basic items like paracetamol) and the boat will not pause from fishing to seek medical treatment for them. Most captains will not allow fishermen to take breaks, and those who are unable to work are often abused verbally and physically by the captain.").


10. The governments of countries in which these abuses occur and non-governmental organizations are two examples of alternate stakeholders who would also be able to impact the issue.

11. This paper also touches on human trafficking, as many men and boys are trafficked from their home countries to long-haul fishing boats. See generally Exploitation of Cambodian Men at Sea, supra note 1. Additionally, supply chains are often replete with sex trafficking, child labor, and environmental concerns (i.e. sustainability), which are of no less importance, but are not the focus of this paper.

12. See Forced Labour, ANTI-SLAVERY, http://www.antislavery.org/english/slavery_todayslavery_today/forced_labour/ (last visited Jan. 25, 2017) ("The International Labour Organization (ILO) estimates that there are at least 20.9 million people in forced labour worldwide. The figure means that, at any given point in time, around three out of every 1,000 persons worldwide are suffering in forced labour.").
suppliers who are engaged in forced labor and human trafficking. Finally, Part IV looks at potential alternative solutions to increasing supply chain transparency and reducing forced labor in the Thai fishing industry, including different improvements to legislation, victim-driven litigation, consumer boycotts, and consumer class action lawsuits.

I. FORCED LABOR IN THE THAI FISHING INDUSTRY: HOW DID WE GET HERE?

Millions of people around the world sustain a livelihood thanks to the fishing and aquaculture industry.13 Those with a direct connection to the fishing industry comprise nearly eight percent of the world population.14 Of the world’s fishers and fish farmers, 85.5 percent live in Asia.15

Thailand is a particularly aquaculture-based country. It is one of the top fish producing nations in the world thanks to its coastline and plentiful marine fishing grounds.16 Thailand’s agricultural sector, which includes fishing and forestry, was the largest employer in 2008, accounting for 41.3 percent of total employment.17 The fishing sector accounts for nearly two million people, of which forty percent are fishermen and fish farmers and sixty percent are employed in related industries.18

However, many of the men who contribute to Thailand’s fishing economy do not do so by choice. They are often from surrounding countries, like Cambodia, Laos, and Myanmar, and find themselves tricked into months-long or years-long voyages at sea where they endure physical and mental abuse, inhumane working conditions, meager sustenance, and little sleep.19 These men leave their local village only to end up on slave boats thanks to an intricate chain of brokers in both Cambodia and Thailand who deceive their victims with

14. Food and Agric. Org. of the U.N., *The State of World Fisheries and Aquaculture: Opportunities and Challenges* 27 (2014) [hereinafter *The State of World Fisheries*] ("Fishers, aquaculturists and those supplying services and goods to them assure the livelihoods and well-being of a total of about 520 million people, 7.9 percent of the world population.").
19. *See Sea Slaves,* supra note 8; *see also Exploitation of Cambodian Men at Sea,* supra note 1, at 1; *TRAFFICKING OF FISHERMAN IN THAILAND,* supra note 2, at 28.
promises of monthly earnings once in Thailand. The laborers often do not speak the same language as their Thai captors, are unfamiliar with the ocean, and do not know how to swim.

Once aboard the boats, the men find themselves trapped and isolated. They are kept for years at a time aboard long-haul boats, vessels that stay at sea. These boats rarely, if ever, go to shore, limiting the captive men’s chances of escape. Instead, supply boats come to the long-haul boats to provide supplies, fuel, ice, and new workers. Men are often traded from boat to boat on the open sea.

Even worse, murders on the high seas are not uncommon. In a case study conducted by the United Nations Inter-Agency Project on Human Trafficking (UNIAP), of forty-nine surveyed Cambodian men and boys trafficked onto Thai long-haul fishing boats, fifty-nine percent reported witnessing a murder by the boat captain. One victim recalled that “[w]e were beat frequently by the Thai crew, on the back of the head and across the back. The captain had a gun. On shore [on Sarawak] we saw a Thai captain decapitate a Vietnamese fisherman [sic], and another Thai captain decapitate a Thai fisherman.”

The issue of forced labor in the Thai fishing industry is made even worse by the fact that these abuses occur on boats in the open ocean. Anonymity is the rule at sea. The space in which the fishermen find themselves is physically removed from potential interveners and rescuers. Enforcement of law is difficult as jurisdictional issues abound. Many long-haul ships are “ghost ships” — they are not registered and the Thai government is unaware that they exist. Further, the men trapped aboard the boats cannot rely on local government intervention: the Thai military rarely intervenes and has been accused of taking bribes or participating directly in the acquisition and sale of workers.

Forced labor does not occur only in Thailand, or even Southeast Asia, but is, in fact, a global problem. Worldwide consumer demand for

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22. Id.
23. See id.; Exploitation of Cambodian Men at Sea, supra note 1, at 5.
24. Exploitation of Cambodian Men at Sea, supra note 1, at 5.
25. Id.
26. Id.
27. Id.
29. Sea Slaves, supra note 8.
30. Id.
vast quantities of fish at a low cost directly contributes to the decision made by fish suppliers to acquire low-cost labor to increase revenues. Global fish production has grown steadily, with supply increasing at an average annual rate of 3.2 percent, and world per capita apparent fish consumption at an estimated 19.2 kilograms. The increase in supply and consumption is due to population growth, rising incomes, urbanization, and expanded distribution channels.

Americans purchase food for their cats containing fish caught by enslaved men but are often unaware of the forced labor issues surrounding the product. American cats have voracious appetites for seafood: the average pet cat in the United States eats thirty pounds of fish per year, almost twice as much as the average American. The United States is the second largest importer of seafood in the world; when it comes to Thailand, the United States is one of the biggest importers of Thai fish, with pet food as one of the fastest growing Thai exports. Migrant laborers are enslaved on the boats that catch the fish that go into pet food. The fish that are caught are sold to canneries on shore, which produce millions of pounds of seafood-based cat and dog food for top brands sold in America, like Iams, Meow Mix, and Fancy Feast.

Supply chains are neither a new concept nor are they always complicated or extensive, but the structure of modern global supply

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(last updated 2015) ("Nearly 21 million people - Three out of every 1,000 people worldwide - are victims of forced labour across the world, trapped in jobs which they were coerced or deceived into and which they cannot leave.").

32. The State of World Fisheries, supra note 14, at 3.

33. Id.

34. Sea Slaves, supra note 8; Seafood Health Facts, Seafood Choices: Overview of the U.S. Seafood Supply 1.

35. The United States is only slightly behind Japan, the world’s largest seafood importer. Food and Agric. Org. of the U.N., Fact Sheet: The International Fish Trade and World Fisheries 1 (Apr. 2010) ("With the exception of 2007, Japan has been the leading importer of fish and fishery products since [the] 1970s. In 2008, its imports were valued at USD 14.4 billion. In the same year, the second major importer was the USA with USD 14.1 . . . ").

36. Sea Slaves, supra note 8.

37. Id. These boats crawl primarily for forage fish, which are small and inexpensive. Id.

38. Id.

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chains makes lessening the severity of forced labor in the Thai fishing industry even more difficult. Although arguments abound as to whether globalization and its effects have alleviated issues of poverty around the world or contributed to larger inequality gaps, the effects of a globalized economy—lower transportation and trade costs, as well as development in information and communication technologies—allow for the formation of supply chains that "start[] at the conception of the product and end[] at its delivery." These supply chains impact forced labor and can increase confusion and obfuscation about sources of goods and materials. Major importing companies contract with suppliers, manufacturers, and distributors around the world, all of whom contract with myriad other entities. The importing company often struggles to account for the actions taken by each link in its supply chain.

The fishing industry is especially susceptible to supply chain monitoring issues. Attention has been paid to food safety and aquaculture sustainability, but much less focus has been given to supply

40. See Richard Locke et al., Virtue out of Necessity? Compliance, Commitment, and the Improvement of Labor Conditions in Global Supply Chains, 37 POL. & SOC'Y 319, 323 (2009) ("In 'buyer-driven' value chains, global brands maintain their authority over their suppliers by controlling key (high-value-added) functions such as product development, design, marketing, and brand management while outsourcing to their suppliers only low-value added, labor-intensive manufacturing activities."); Martha C. Cooper & Lisa M. Ellram, Characteristics of Supply Chain Management and the Implications for Purchasing and Logistics Strategy, 4 INT'L J. OF LOGISTICS MGMT. 13, 13 (1993) ("Supply chain management is viewed as lying between fully-vertically-integrated systems and those where each channel member operates completely independently.").

41. See generally Masahisa Fujita & Jacques-Francois Thisse, Globalization and the Evolution of the Supply Chain: Who Gains and Who Loses?, 47 INT'L ECON. REV. 811 (arguing that globalization, fragmentation, and the liberalization of trade and capital flows need not have detrimental effects on low-income people and countries, but rather might have redistributive consequences that vastly differ from those expected by anti-globalization demonstrators); Pierre-Richard Agénor, Does Globalization Hurt the Poor? (Oct. 2002) (working paper) (arguing that globalization hurts the poor at low levels, but reduces poverty beyond a certain threshold, and further suggesting that globalization has not expanded far enough); JAY R. MANDLE, GLOBALIZATION AND THE POOR (2003) (arguing that globalization offers broad benefits to the poor and that the system can be reformed to ensure growth and economic justice); ROLAND ROBERTSON, GLOBALIZATION: SOCIAL THEORY AND GLOBAL CULTURE (1992) (examining globalization from a sociological and cultural perspective).

42. See Fujita & Thisse, supra note 41, at 813.

43. See Will Scott & Chas Oldfield, The Nine Basic Rules of a Successful Supply Chain, 2 (2004) ("The Supply Chain is the process through which a company creates and distributes its products and services to the end user. It includes a number of specific elements: production planning, material sourcing, transportation management, warehouse management and demand management. These functions are tightly integrated to provide the products and services to the end user in an efficient, timely and profitable manner.").
chain traceability when it comes to forced labor in the fishing industry. But thanks to several investigative reports on the human rights abuses prevalent in the fishing industry—including a five-part series published by the New York Times in July 2015 titled “Outlaw Ocean”—many in the United States and around the world have turned their attentions toward Thailand and Southeast Asia and have started to wonder how to end these horrible practices.

American buying habits directly affect the prevalence of the issues related to and arising from forced labor in the Thai fishing industry, which are severe and include human rights abuses, human trafficking, murder, jurisdictional uncertainty, a lack of law enforcement, and a lack of supply chain transparency. Some Americans have become concerned about these abuses and want to see changes. But how will these changes come about? Some lawmakers think they have an answer.

II. REGULATING SUPPLY CHAINS: UNDERSTANDING THE BSCT

A. What Is the BSCT?

United States lawmakers have reacted to press coverage and consumer outrage over the forced labor issue in Thailand and other countries by proposing legislation that aims to increase supply chain transparency and accountability. Senator Richard Blumenthal, Democrat of Connecticut, and Representative Carolyn B. Maloney, Democrat of New York, proposed a bill in August 2015 in the Senate and House, respectively, entitled “Business Supply Chain Transparency on Trafficking and Slavery Act of 2015” (BSCT).

44. See The State of World Fisheries, supra note 14, at 9, 53, 78–81, 109–15 (focusing on the need for traceability in the food supply chain related especially to food safety and sustainability, as well as to post-harvest losses in small-scale fisheries).


47. H.R. 3226.
The BSCT was proposed, in part, in response to "Outlaw Ocean," the New York Times series exposing lawlessness on the high seas around the world. Senator Blumenthal, along with bill co-sponsor Senator Edward J. Markey, Democrat of Massachusetts, issued a press release that stated, "[A] New York Times series on lawlessness on the high seas, including egregious instances of human trafficking, have [sic] illustrated the critical need for transparency in supply chains." Further, as an additional attempt to regulate the supply chains of imported fish, Representative Maloney wrote to Kathryn Sullivan, the Under Secretary of Commerce for Oceans and Atmosphere and National Oceanic and Atmospheric Administration (NOAA) Administrator, asking that NOAA develop policy measures aimed at eliminating criminal activity within the United States' imported fish supply. This request, if enacted, could be an additional measure to supplement and strengthen the BSCT.

The BSCT would, according to its sponsors, require companies reporting more than $100 million in global receipts to report measures they are taking to eliminate human trafficking in their supply chains. Under the bill, businesses would provide this information in their annual filing to the Securities and Exchange Commission (SEC), as well as post anti-trafficking efforts on their websites, ensuring accountability to investors and consumers.

One goal of the bill is to extract, gather, and disseminate information about the connection between commercial activity and human trafficking. Specifically, the bill aims to increase supply chain transparency by requiring companies to file annual reports with the SEC disclosing if the company has "taken any measures during the year for which such reporting is required to identify and address conditions..."
of forced labor.” However, it is unclear if these requirements would have any actual effect on human trafficking and forced labor issues.

In 2011, Representative Maloney proposed a nearly identical bill titled the “Business Transparency on Trafficking and Slavery Act” (BTA). The bill was introduced but never enacted by Congress. Similar to the BSCT, the BTA required companies to include a disclosure describing measures taken to identify and address conditions of forced labor within their supply chain in an annual report to the SEC. Although the two bills have similar purposes, the BSCT differs from the BTA in several respects: the BSCT is broader than the BTA in its definition of “supply chain” as it includes “labor recruiters”; the BSCT requires specific remedial action unlike the BTA; and the BSCT includes a specific provision related to commercial sex acts with a minor, which the BTA does not have.

52. H.R. 3226 § 3(a)(1).
53. Further, it is doubtful that the BSCT will pass in either the Senate or the House. As of August 20, 2016, the website GovTrack.us gave the bill a 1% chance and 2% chance of being enacted in the Senate and the House, respectively. Although the bill itself is unlikely to become law, it is worthwhile to examine and critique the BSCT so that future legislative proposals that attempt to increase supply chain transparency may be more effective. See H.R. 3226: Business Supply Chain Transparency on Trafficking and Slavery Act of 2015, GovTrack.us, https://www.govtrack.us/congress/bills/114/hr3226# (last visited Aug. 20, 2016); S. 1968: Business Supply Chain Transparency on Trafficking and Slavery Act of 2015, GovTrack.us, https://www.govtrack.us/congress/bills/114/sl1968 (last visited Aug. 20, 2016).
56. H.R. 2759 § 2(r)(1).
57. H.R. 3226 § 3(s)(3)(D).
58. H.R. 3226 § 3(s)(1)(E) (“... to ensure that remedial action is provided to those who have been identified as victims, including support for programs designed to prevent the recurrence of those events within the industry or sector in which they have been identified”).
59. H.R. 3226 § 3(s)(1)(B) (“Whether the covered issuer maintains a policy prohibiting its employees and employees of entities associated with its supply chain from engaging in commercial sex acts with a minor.”).
B. Do the BSCT’s Vague and Ambiguous Requirements Allow Corporations to Appear Socially Responsible Without Impacting Forced Labor?

Corporations are required to include “a disclosure whether the covered issuer has taken any measures during the year for which such reporting is required . . . and a description of such measures taken.” Corporations could simply include in their SEC filings a statement that they have taken no measures at all, which would satisfy the requirements of the BSCT. However, this is unlikely to occur. Because the SEC would make these filings public, corporations would receive immense public scrutiny if they did not take any measures. The BSCT, as an information forcing measure, would offer corporations an opportunity to show the public that their business practices are socially responsible.

However, the corporations that do take measures and then describe those measures would be able to maintain or acquire a positive public image without making any substantial changes to their current practices. The BSCT requires corporations to disclose the following activities: (A) whether a policy exists to identify and eliminate the risks of forced labor in the supply chain; (B) whether a policy exists prohibiting commercial sex acts with a minor; (C) what efforts the corporation has taken to evaluate and address the risks of forced labor, which includes specifying whether a third party evaluation was conducted or not; (D) the efforts of the corporation to conduct audits into working conditions and compliance systems; (E) the efforts of the corporation to require that suppliers are in compliance with laws regarding forced labor, to maintain standards, to train upper level management, and to ensure compliance; and (F) what remedial actions are provided to victims.

The BSCT further requires companies to include “information describing to what extent, if any, the covered issuer conducts” any of the required activities listed above. The California Transparency in Supply Chains Act of 2010 (California Transparency Act), a piece of legislation enacted in California in 2012 that is similar to the BSCT, requires a similar disclosure—that companies say “to what extent” they

60. H.R. 3226 § 3(g)(1).
62. H.R. 3226 § 3(g)(1)(A)–(F).
63. H.R. 3226 § 3(g)(1).
meet certain requirements. In *The Private Sector's Pivotal Role in Combating Human Trafficking*, Jonathan Todres analyzes corporate reaction to the California Transparency Act. He remarks that such an ambiguous requirement could be interpreted to suggest, for example, that:

the company provides training programs without additional information such as whether every employee has received training or just select employees, and how often the training has been provided.... Ironically, for the company that openly declares it does nothing, it arguably has a better case for stating that it meets the 'to what extent' language of the disclosure requirement.

This same backward incentive could be seen in the BSCT since it includes similarly ambiguous language. Although a corporation that chooses to disclose that it has done nothing may face public relations problems, that corporation may be better protected under the law.

Corporations can take various approaches to disclosing required information. Todres categorizes the responses of businesses in four ways:

First, some businesses are detailing policies and measures in place, evidencing a commitment to combating human trafficking and use of slave labor in their supply chains. Second, some businesses are providing disclosure that suggests they may not have undertaken significant steps to date but are committing to particular actions to fulfill the intent of the new law. Third, still other companies are disclosing that they are taking steps, but their disclosure merely tracks the statutory language and states they are doing what the law seeks without providing any details on how they are accomplishing this. Fourth and finally, it appears that at least a few companies understand the law literally as

64. CAL. CIV. CODE § 1714.43(c); see Todres, supra note 61, at 96–98 (examining the potential implications and complications of requiring companies to disclose “to what extent” they meet certain requirements and the negative incentives this ambiguous phrase might offer to a company to declare that it does nothing).
65. See Todres, supra note 61.
66. Id. at 97.
67. Id.
only requiring disclosure, and its disclosure reports that it is undertaking none of the measures the law sets out to combat human trafficking and the use of slave labor in its supply chains.68

Although the California Transparency Act differs from the BSCT in some ways, corporate reaction to the BSCT would most likely be largely the same. While some corporations would fully commit to eradicating forced labor from their supply chains, others might deem the effort to be too costly and choose to disclose goals without actually committing to making any changes. In this respect, the BSCT is ineffective both in informing consumers about the actual forced labor implications in the products they purchase and in reducing forced labor in corporate supply chains.

C. How Does the BSCT's Lack of Incentives Impact a Corporation's Decision to Violate the BSCT?

Corporations can abide by and satisfy the provisions of the BSCT without effectuating any actual change regarding forced labor in supply chains in part because the wording of the BSCT is ambiguous, but also because there are no real enforcement mechanisms or a duty to remedy within the BSCT. Corporations that violate the BSCT face few consequences and, thus, lack an incentive to comply.

Law can be used as a carrot, stick, or both when encouraging corporations to adopt humanitarian goals into their business models.69 Many believe that incentivizing corporations—the carrot—rather than threatening them with punishment—the stick—produces better results.70 But often the carrot is illusory: companies that take aggressive ethics and compliance measures can run into more trouble than those who do not.71

68. Id. at 95 (emphasis added).
69. Id. at 91.
70. See id. ("A more promising starting point for fostering broad-based private sector participation in the fight against human trafficking might be to explore ways in which the law can be used as a carrot. That is, governments can employ the law to incentivize good practices and seek to encourage the private sector to do what it is capable of, given its unique position. In this way, law and policy can be utilized to advance anti-trafficking initiatives that address both the supply and demand sides of the problem."); but see John S. Baker, Jr., Reforming Corporations Through Threats of Federal Prosecution, 89 CORNELL L. REV. 310, 316-26 (2004).
71. Baker, supra note 70, at 317 (analyzing the “carrot and stick” approach adopted by the U.S. Sentencing Commission and the U.S. Justice department regarding corporate reform) ("Companies today that take aggressive ethics and compliance steps run high
The incentives of the BSCT are more carrot than stick. Corporations are not held accountable for failure to take actions to make their supply chains more transparent. They are only held accountable for failing to disclose anything at all. The BSCT holds corporations publicly accountable by requiring them to disclose an annual report on the company website and on the commission website. Thus, for the BSCT to work, corporations must believe that a socially responsible reputation and brand name is highly valuable. While most corporations undoubtedly value positive brand-name association, under the BSCT, companies can gain good public standing without making many changes that would reduce forced labor in their supply chains.

Perhaps it is best to avoid such binary thinking and pursue both paths simultaneously. Part IV works to develop a framework in which corporations are incentivized in both ways so that issues of forced labor are more effectively eradicated. However, before looking at alternative solutions, we will conduct a case study examining how the BSCT would impact Mars, Inc., a particularly large and impactful stakeholder in the Thai fishing industry.

III. Examining Mars, Inc.'s Supplier Code of Conduct and Company Policies: Does the BSCT Have Any Impact as Currently Proposed?

How would the BSCT impact Mars, Inc. (Mars)? Mars sold more than $16 billion worth of pet food globally in 2012, roughly a quarter of the world's market. As mentioned above, Mars imports cat food directly from Songkla Canning in Thailand. Thus, Mars could have a huge impact on the fight against forced labor. To give the company credit, Mars has been proactive in ensuring that its supply chain is transparent when it comes to environmental and aquaculture sustainability, pledging that by 2020, it will use only nonthreatened fish caught legally or raised on farms and certified by third-party auditors as not being linked to forced labor.
A. Does the BSCT Apply to Mars?

Does the BSCT actually apply to the situation at hand—forced labor in the supply chain of Mars, specifically in the Thai fishing industry, which provides fish for cat food production? An analysis of the definitions provided in the BSCT, including “covered issuer,” “supply chain,” and “forced labor,” indicates that our issue is sufficiently covered by the definitions, and thus within the reach of the BSCT.

First, the BSCT defines “covered issuer” as “an issuer that has annual worldwide global receipts in excess of $100,000,000.” Mars would easily meet this definition and thus be considered a “covered issuer.”

Next, the BSCT defines “supply chain” as “all labor recruiters, suppliers of products, component parts of products, and raw materials used by such entity in the manufacturing of such entity’s products whether or not such entity has a direct relationship with the supplier.” According to the New York Times, Mars received more than ninety thousand cartons of cat and dog food from Songkla Canning, which is supplied by boats that use slave labor. The supply boat that provided fish to a Mars-related cannery is a supplier of raw materials, and therefore a link in the Mars supply chain.

Finally, the BSCT defines “forced labor” as:

any labor practice or human trafficking activity in violation of national and international standards, including International Labor Organization Convention No. 182, the Trafficking Victims Protection Act of 2000 (Public Law 106–386), and acts that would violate the criminal provisions related to slavery and human trafficking under chapter 77 of title 18, United States Code.

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80. Sea Slaves, supra note 8 (“Over the past year, Mars received more than 90,000 cartons of cat and dog food from the cannery supplied by one of the boats where Lang Long was held captive, according to the Customs documents.”).
81. See Complaint, supra note 74 at 3–5 (alleging that Mars, Inc., should be held responsible for ensuring the absence of slave labor in their supply chain, which is organized as follows: Mars and P&G, Thai Union Frozen Products, Songkla Canning and Thai Union Manufacturing, motherships, and fishing boats).
Code, if they had been committed within the jurisdiction of the United States.  

Sophia Eckert, in her note titled The Business Transparency on Trafficking and Slavery Act: Fighting Forced Labor in Complex Global Supply Chains, spends a great deal of time analyzing the BTA's definition of forced labor.

Eckert concludes that "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." Eckert concludes that, although the definition does sufficiently apply to forced labor in corporate supply chains, corporations will not be able to effectively identify forced labor incidents due to insufficient guidance in U.S. case law. She is concerned that the lack of guidance for corporations will lead to "grave inconsistencies in corporations' forced labor disclosure reports under the BTA.

However, the BTA’s definition did not include reference to the Trafficking Victims Protection Act of 2000 (TVPA). Therefore, Eckert’s analysis of the BTA’s definition cannot be identically applied to the BSCT’s definition. Because the BSCT includes an additional reference in its definition of “forced labor,” more analysis must be conducted to determine whether the BSCT’s definition would apply. The TVPA defines forced labor as:

Whoever knowingly provides or obtains the labor or services of a person—

(1) by threats of serious harm to, or physical restraint against, that person or another person;

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82. H.R. 3226 § 3(s)(3)(B).
83. Eckert, supra note 54, at 390–94.
84. Id. at 390.
85. Id. at 396.
86. Id. at 399.
87. H.R. 2759 § 2(r)(5)(A) ("[T]he term ‘forced labor, slavery, human trafficking and the worst forms of child labor’ means child labor in violation of international standards including International Labor Organization Convention No. 182 and 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.")
(2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or

(3) by means of the abuse or threatened abuse of law or the legal process[.]

Because men in the Southeast Asian fishing industry are threatened with serious harm, are physically restrained, and are made to believe that they would suffer serious harm if they did not work, the TVPA's definition would sufficiently apply to the forced labor at issue here, and would most likely apply more generally to forced labor in corporate supply chains.

B. Would the BSCT Increase the Transparency of Mars' Supply Chains?

The definitions proposed by the BSCT sufficiently cover the issue at hand, but would the provisions of the BSCT actually lead to increased supply chain transparency for Mars? The answer seems to be no. Although Mars would have to file a separate report with the SEC per the BSCT, the standards it sets in its current Supplier Code of Conduct and in other published principles indicate that Mars would not have to change much of its supplier policy to satisfy the BSCT requirements, especially since the BSCT only requires disclosure of whether certain practices are implemented.

Mars currently has policies to identify and eliminate the risks of forced labor in its supply chain; for example, Mars uses commodity scorecards and responsible sourcing metrics when selecting its suppliers.
in order to "build responsible sourcing factors into the decision-making process, before individual suppliers are even considered." 93

Mars evaluates and addresses the risks of forced labor by using "independent country, commodity and product risk data provided by Verisk Maplecroft (a global risk advisory business) to score, rank and assess the ethical, social, and environmental risks associated with what [Mars] buy[s] and where [Mars] buy[s] it," as well as "the Supplier Ethical Data Exchange (Sedex), a secure database where suppliers can record their ability to manage ethical, social and environmental risks." 94

It is unclear whether Mars' use of independently created software would be considered an evaluation conducted by a third party. However, the BSCT does not mandate that a third party conduct an evaluation, only that corporations disclose whether a third-party evaluation occurred or not. Further, Mars employs independent auditors to visit high-risk suppliers, both direct and indirect, to evaluate working conditions and to determine whether the Mars Supplier Code of Conduct is being implemented. 95

Additionally, Mars would satisfy the BSCT's requirement to disclose the effort taken to conduct audits into working conditions and compliance systems. Mars sets out three key components of its compliance audit program: risk assessment, self-assessment, and independent auditing. 96 Mars would also satisfy the BSCT's requirement that covered issuers disclose what efforts they have taken to require their suppliers to be in compliance with forced labor law, to maintain internal accountability standards, to train upper level management, and to ensure that labor recruitment practices at all suppliers are in compliance. Mars has implemented a "centralized Responsible Sourcing dashboard" system that tracks and manages all supplier risk assessments and manages follow-ups. 97

Finally, Mars already has remedial actions in place for potential victims. Mars has implemented a confidential Ethics and Compliance Hotline through which workers and potential victims can report violations of the Supplier Code of Conduct directly to Mars in a secure manner, twenty-four hours a day, seven days a week, online or via telephone. 98 The report can be made confidentially and anonymously to

94. Id.
96. Supply Chain Transparency, supra note 93.
97. Compliance With Our Standards, supra note 95.
an independent third party, who then works directly with Mars. The reporting process is informed by the UN Guiding Principles to ensure legitimacy, accessibility, fairness, and transparency. Although the Hotline is a step in the right direction and would certainly satisfy the BSCT requirement, the Hotline may not achieve much. Those who are victims of forced labor are unlikely to know about the Hotline or might be unable to access it since a phone or internet connection is required. Those who are forced to work on long-haul boats in the middle of the South China Sea could not take advantage of the Hotline. Thus, the Hotline meets BSCT requirements, but does little to actually solve the problem of forced labor.

At this time, Mars does not seem to have any policies regarding the prohibition of commercial sex acts with a minor. However, Mars' Human Rights Policy is informed by the UN Guiding Principles, which arguably inform private sector initiatives to combat child sex trafficking and contribute to protecting children. Additionally, Mars is only required to disclose whether any policies are maintained that prohibit employees from commercial sex acts with a minor. Mars would still satisfy the BSCT by disclosing that it has no such policies in place, by disclosing that it follows the UN Guiding Principles, or by disclosing that it is working to update its policies.

Overall, Mars' current policies and Supplier Code of Conduct conform to the requirements of the BSCT. Mars would have to change very little, or perhaps nothing, to meet all of the standards, all while maintaining or growing a positive and socially responsible image. If the BSCT has little to no effect on one of the largest American importers of fish supplied by forced labor, how will the Act have any real impact? How will the men and boys trapped aboard boats for years at a time find any relief? Part IV will examine potential alternative solutions that incentivize corporations in a multitude of ways to eradicate forced labor in their supply chains.

99. Compliance With Our Standards, supra note 95.
102. H.R. 3226 § 3(3)(1)(B).
IV. ALTERNATIVES: ARE THERE BETTER SOLUTIONS TO SOLVE THIS PROBLEM?

A. Can We Improve Legislation to Make the BSCT More Impactful?

Examining other legislation with the same or a similar aim may elucidate ways to strengthen the BSCT. Recently, the United Kingdom enacted the Modern Slavery Act of 2015, which aims to expose details of supply chains to public scrutiny. The Modern Slavery Act also clarifies offenses for "slavery, servitude and forced or compulsory labour" and "human trafficking." Penalties for committing either offense are severe and range from twelve months imprisonment to a life sentence. Further, violations could result in asset confiscation, reparation orders, or property forfeiture or detention.

Although strengthened definitions and punishments related to forced labor and human trafficking will empower victims and work to minimize incidences of these horrible practices, these measures have no direct implications for large corporations whose supply chains exacerbate these practices. Corporations and corporate directors would not be guilty of the offenses of forced labor or human trafficking since they would never directly violate those provisions.

However, the Modern Slavery Act targets corporations by including a separate provision entitled “Transparency in supply chains etc.,” which is very similar to the BSCT. Commercial organizations “must prepare a slavery and human trafficking statement for each financial year.” The Modern Slavery Act applies even more broadly than does the BSCT: any business operating in the United Kingdom, regardless of place of incorporation, is included.

104. Modern Slavery Act, 2015, c. 30, § 1 (Eng.).
105. Id. at § 2.
106. Id. at § 5.
107. Id. at § 7.
108. Id. at §§ 8, 9, 10.
109. Id. at §§ 11, 12.
110. Id. at § 54.
111. Id. at § 54(1).
112. E. Christopher Johnson Jr., Business Lawyers Are in a Unique Position to Help Their Clients Identify Supply-Chain Risks Involving Labor Trafficking and Child Labor, 70 BUS. LAW. 1083, 1115; Gentleman, supra note 103 ("About 17,000 UK businesses will have to publish these statements before the end of their financial year. Officials hope organisations campaigning against modern slavery will monitor the statements and name companies that are not taking any action.").
Similar to the BSCT, the Modern Slavery Act only requires disclosure of whether an organization has taken steps to ensure that their supply chains are free of slavery and human trafficking. The Modern Slavery Act provides that “[t]he duties imposed on commercial organisations by this section are enforceable by the Secretary of State bringing civil proceedings in the High Court for an injunction[.]”113 However, the duties are easily met. A corporation must publish the following on an annual basis:

(a) a statement of the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place—

(i) in any of its supply chains, and

(ii) in any part of its own business, or

(b) a statement that the organisation has taken no such steps.114

Although there are potential repercussions if a corporation violates the Modern Slavery Act—for example, corporations may face backlash from consumers—violations are unlikely to occur as the requirements are easily satisfied.115 Simply disclosing that a company “has taken no such steps” would satisfy the requirements. But taking no steps does nothing to solve the problem of forced labor. Thus, companies can satisfy the Modern Slavery Act while doing nothing differently.

Although companies that “are unable to convincingly outline the steps they are taking to prevent modern slavery in their operations... might risk hostile media attention and the potential for high street boycotts,” this risk can be mitigated if companies outline potential future policies, even though they may never be actualized.116 Companies are incentivized to take steps in order to cast themselves as socially responsible, but they would face no legal repercussions for choosing to do nothing.

Thus, even though the Modern Slavery Act is a step in the right direction and casts a wider net than does the BSCT—it applies to more companies and more finely elucidates repercussions—it is similarly

113. Modern Slavery Act, 2015, c. 30, § 54(11) (Eng.).
114. Id. at § 54(4).
115. See supra Part II.B.
116. See Gentleman, supra note 112; see supra Part II.B.
ineffective. There is little to glean from the Modern Slavery Act that could make the BSCT more effective in reducing forced labor in the Thai fishing industry.

B. Can Victims Bring Legal Action Against Corporations?

Empowering public interest groups to represent victims through legal action could more effectively remedy the situation. The goals of interest groups are more closely aligned with the needs of victims than are the goals of large corporations. Interest groups will not face a conflict of interest when pursuing legal action, unlike corporations who would face a conflict of interest when working to make their supply chains more transparent.

However, interest groups advocating for foreign persons may face significant legal hurdles as they would be operating extraterritorially, could potentially be violating international laws, and could face jurisdictional issues. The Alien Tort Statute (ATS) enables foreign citizens to bring suit in the United States for violations of certain international laws.117 However, in Sosa v. Alvarez-Machain, the Supreme Court made it difficult, but not impossible, to successfully bring a claim under the ATS.118 The Court held that “the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.”119 But in Kiobel v. Royal Dutch Petroleum Co., the Court effectively shut the door when it found that a presumption against extraterritoriality applies to ATS claims.120 Therefore, it is even more difficult for foreign victims to hold corporations accountable via the ATS because there may be few


119. 542 U.S. at 729.

situations where victims will be able to sue foreign corporations for extraterritorial human rights violations in federal court.\textsuperscript{121}

Victims may potentially bring a breach of contract claim against corporations for failure to comply with their stated codes of conduct, but this type of claim also may not be feasible. In \textit{Doe I v. Wal-Mart Stores Inc.}, a case brought in the United States Court of Appeals for the Ninth Circuit in 2009, the Court ruled that Plaintiffs—employees of Wal-Mart foreign suppliers—were not third-party beneficiaries, and thus Wal-Mart owed the foreign employees no duty to monitor suppliers or to protect Plaintiffs from working conditions.\textsuperscript{122} Therefore, these claims may be difficult, though not impossible, to make.

Although filing an ATS suit or a suit for breach of contract may be difficult, pursuing legal action gives victims a voice. They are more empowered and better able to advocate fully for their position, rather than hope in vain that corporations will look out for their best interests.

\textbf{C. Will Boycotts or Consumer Class Action Lawsuits Force Corporations to Change?}

In addition to legislation and lawsuits brought by victims, boycotts and legal action by consumers can also affect corporate behavior. Empowering consumers, rather than trying to incentivize corporations to change, may be a more effective and quick way to bring about change.

Consumer boycotts can be highly effective tools to force corporate change. However, the efficacy of boycotts may depend on the “awareness of consumers; the values of potential consumer participants; the consistency of boycott goals with participant attitudes; the cost of participation; social pressure; and the credibility of boycott leadership” as well as the maintenance or enhancement of self-esteem.\textsuperscript{123} Enacting an impactful boycott for a lower-end product like cat food may be challenging because consumer awareness of forced labor issues is likely low, social pressure is likely low, and no prominent leadership has

\textsuperscript{121} Skinner, supra note 120, at 163.
\textsuperscript{122} Doe I v. Wal-Mart Stores Inc., 572 F.3d 677, 682 (9th Cir. 2009) (“Because, as we view the supply contracts, Wal-Mart made no promise to monitor the suppliers, no such promise flows to Plaintiffs as third-party beneficiaries. . . . We therefore conclude that Plaintiffs have not stated a claim against Wal-Mart as third-party beneficiaries of any contractual duty owed by Wal-Mart, and we affirm the district court’s dismissal of the third-party beneficiary contract claim.”).
emerged. However, a successful consumer boycott could have a significant impact on Mars and other cat food companies.

Class action lawsuits initiated by consumers can also be impactful. A consumer class action may be more effective in incentivizing corporations to examine their supply chains for human rights violations. Potentially large amounts of money are at stake, and press coverage of these lawsuits is unfavorable.124

For example, a class action suit was filed on September 10, 2015, in federal court by two California citizens against Mars, Inc.; Mars Petcare US, Inc.; Iams Company; and Proctor & Gamble.125 Plaintiffs alleged that Defendants' failure to disclose that "much of the fish in its pet food is the product of slave labor . . . is shameful" and that "[h]ad Plaintiffs and Class Members known the truth, they would not have purchased Defendants' pet food or paid as much for them."126 Plaintiffs asserted that Defendants' conduct violated several California code provisions, and they requested both injunctive relief and restitution.127

Plaintiffs requested that Defendants be enjoined from "continuing the unfair and deceptive marketing and sale of its Iams," which, if awarded, could lead to the decreased importation of fish from Thailand.128 Therefore, Mars may decide to self-regulate its supply chains, which could lead to a reduction in the incidence of forced labor.

However, this is all dependent on the outcome of the consumer class action lawsuit. There is no guarantee that Plaintiffs will win, be awarded damages or injunctive relief, or settle out of court.129 Adding to

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124. See Consumers and Lawmakers, supra note 46 ("Last week, a group of consumers filed a class-action lawsuit in California against Mars, accusing the company, among the biggest producers of seafood-based pet food in the world, of failing to disclose its dependence on forced labor.").
125. See Complaint, supra note 75.
126. Id. at 6.
127. Id. at 7 ("Defendants' conduct described herein violates the (i) California's Business & Professions Code §§ 17200, et seq. (the Unfair Competition Law or "UCL"); (ii) California Civil Code §§ 1750, et seq. (the Consumers Legal Remedies Act or "CLRA"); and (iii) California's Business & Professions Code §§ 17500, et seq. (the False Advertising Law or "FAL"). Plaintiffs brings this action on behalf of a California class for restitution and injunctive relief, and any other relief deemed appropriate by the court to which this case is assigned.").
128. Id. at 32.
129. Although the District Court granted Mars's Motion to Dismiss, Plaintiffs have appealed to the Ninth Circuit. Plaintiffs (now Appellants) submitted their opening briefs on August 3, 2016. See Docket, Wirth v. Mars, No. 16-55280 (9th Cir. Feb. 25, 2016).
the unpredictability of litigation is the amount of time that large consumer class actions take.\textsuperscript{130}

In addition, the interests of Plaintiffs may not always align with the interests of victims of forced labor. Plaintiffs are not filing suit on behalf of victims, but rather on behalf of themselves as consumers. What is best for the consumer may not be best for the workers who supply the product. Although Plaintiffs' complaint primarily concerns the "shameful" slave labor practices that produce the fish used in Mars' pet food, Plaintiffs would likely be incentivized to put their priorities above what would most benefit the victims. This misalignment of interests may prevent consumer class actions from being the most effective remedy, but still, they may incentivize corporations to examine their supply chains more quickly than would legislation like the BSCT.

CONCLUSION

Although the BSCT may not have an immediate positive impact on the transparency of supply chains linked to forced labor in the Thai fishing industry, the BSCT may nonetheless have some long-term benefits and be worth pursuing. Requiring disclosures incentivizes corporations to build a positive image as being socially conscious and responsible and forces corporations to share information about their supply chains. Some companies will scrutinize their supply chains and better monitor their suppliers for violations in response to disclosure requirements. However, this process is a slow one that relies heavily on the incentives of market competition.

Lawmakers hope that the BSCT will create market competition to improve how businesses identify and address forced labor issues in their supply chains.\textsuperscript{131} While corporations might be incentivized via market competition to make improvements, competition limits companies when it comes to global human rights. A corporation's goals do not always align with the goals of human rights advocates. Corporations must be competitive, which often means prioritizing profits and shareholders above all else, including social responsibility.

\textsuperscript{130} About Class Actions, SRKW Law, http://www.srkw-law.com/about-class-actions.html (last updated 2011) ("While every case is different, it is not unusual for a class action to take 2-4 years from the filing of the complaint to a final resolution.").

The BSCT is an attempt to narrow the gap between traditional corporate goals and human rights goals by implicating market competition. The BSCT frames social responsibility and human rights in a more recognizable and corporate-friendly way by asserting that the public perception of corporations who address human rights issues will increase, which means higher valuations and profits. But a corporation might face a conflict of interest when working to increase supply chain transparency: Whose needs must it put first, those of victims or of its shareholders?

While this attempt to reframe human rights goals is admirable, social responsibility masked as market competition may not solve this specific problem quickly enough. The BSCT may work on a larger scale by shifting corporate thinking toward social responsibility through mandated supply chain transparency and market competition, but it does nothing to help the men and boys who are enslaved for years at a time on long-haul ships in the middle of the South China Sea. Requiring disclosure of whether measures are being taken to eliminate forced labor in supply chains does very little to make supply chains more transparent, at least in the short term.

We are currently faced with a pressing issue: potentially hundreds of thousands of migrant laborers who work as fishermen on boats operating from Thailand face years of abuse and oppression with no escape. Although no solution will be rapid, there are additional ways to bring other interested parties into the solution-making process. The state can work to empower victims, and consumers can use their buying power and legal power to incentivize corporate change.

The men and boys trapped on long-haul boats in the South China Sea face egregious abuse and working conditions. Although the BSCT is a well-intentioned step, it will have no practical effect at alleviating the human rights abuses encountered by these workers. Large corporations, like Mars, whose supply chains are infected with forced labor must do very little to satisfy the BSCT. Rather than focusing solely on legislation as the solution and incentivizing corporations through increased market competition, an interrelated effort should be made: the state should empower victims and focus on groups whose interests better align with the needs of victims, and consumers should pressure corporations to change through boycotts and class action lawsuits.

132. SOLIDARITY CENTER, supra note 6, at 4.