

Article

Fair Trade in a Wal-Mart World: What Does Globalization Portend for the Triple Bottom Line?

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Abstract

Globalization is characterized by such business practices as aggressive outsourcing, ultra-efficient logistics, and the relentless pursuit of cheap labor. Conversely, “fair trade” is an economic and social movement that works through private enforcement mechanisms to ensure that transnational supply chains do not exploit human and social rights.¹ Accordingly, fair trade practices are very much in accord with the well-known “triple bottom line” goals of looking out for people, planet, and profits. This paper will examine the seemingly contrary aims of many business practices associated with globalization versus the triple bottom line aspirations of fair trade.

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¹ Shima Baradaran & Stephanie Barclay, *Fair Trade and Child Labor*, 43 COLUM. HUM. RTS. L. REV. 1, 39 (2011).

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Introduction

Triple bottom line. We teach it in business schools and we discuss it at conferences. Almost two decades after the phrase was first coined, however, it remains more rhetorical than real. While globalization has delivered economic gains to some, the corresponding exploitation of human and social rights has been amplified. The promise of low prices is increasingly associated with deplorably low wages and inhumane working conditions. Is there some point at which consumers would be willing to pay higher prices in exchange for just treatment of workers? This paper examines what is needed to help fair trade succeed – more effective marketing of the fair trade concept, amendments to legal loopholes, and increased willingness of consumers to demand goods free of the taint of human suffering.

I. The Triple Bottom Line

“Triple bottom line” - focusing corporate reporting requirements on people, planet, and profits - is a phrase coined by John Elkington in 1997.² When we think about triple bottom line, we focus on economic prosperity, environmental quality, and social

² John Elkington, *Cannibals with Forks: The Triple Bottom Line of 21st Century Business* 2 (1998). The provocative title is a reference to Polish poet Stanislaw Lec, who asked, “Is it progress if a cannibal uses a fork?” *Id.* at ix. Elkington - the “dean of the sustainability movement” - believes that in a world of “sustainable cannibalism,” “sustainable capitalism” “would certainly constitute real progress.” *Id.*

justice.³ But how do we evaluate these three areas? While economic prosperity is an indication of the company's profitability, there are many factors taken into consideration (e.g., liquidity, solvency, and risk).⁴ The same is true when we evaluate environmental quality and social justice. Some measures are quantitative while others are qualitative.⁵

At its narrowest, the term triple bottom line is used as a framework for measuring and reporting corporate performance against economic, social and environmental parameters. At its broadest, the term is used to capture the whole set of values, issues and processes that companies must address in order to minimize any harm resulting from their activities and to create economic, social and environmental value. This involves being clear about the company's purpose and taking into consideration the needs of all of the company's stakeholders.⁶

Admittedly, measuring a corporation's commitment to environmental responsibility and social justice is not an easy undertaking. There is no standard report structure.⁷ Nevertheless, many companies have taken on the challenge.

That the current state of [triple bottom line] is not perfect does not diminish its significance. Extending the common management maxim, if you don't measure it, you can't manage it - if you can't manage it, you can't change it. In this sense, [triple bottom

³ See John Elkington, *Triple Bottom Line: Sustainability's Accountants*, in ENVIRONMENTAL MANAGEMENT 49 (Michael V. Russo ed., 2nd ed. 2008). See also n. 4.

⁴ W. Richard Sherman, *The Triple Bottom Line: The Reporting of "Doing Well" & "Doing Good,"* 28 J. APPLIED BUS. RES. 673, 674 (2012), available at <http://journals.cluteonline.com/index.php/JABR/article/view/7051/7125>.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 675.

line] reporting is a necessary precondition for change by forcing organizations to measure and communicate many more dimensions of their impact on the world than the traditional financial reporting practices would.⁸

More companies should consider triple bottom line reporting. Presumably, this will happen when (and if) consumers demand it.

A. *Globalization and Social Justice - People, Planet, Profits*

It has been almost two decades since John Elkington created a new paradigm for measuring business success. In those last two decades, we have witnessed immense globalization:

Globalization is a process of integration and interaction that transforms local or regional phenomena into global ones. It is formed and driven by the development of international trade and investment, aided by the Internet and other communication technologies. The influence of globalization can manifest in economic, technological, social, cultural, and political aspects. Yet globalization is often used to refer to global free-market economic systems.⁹

Globalization has led Wal-Mart and others to search the world in the relentless pursuit of low prices. Low prices mean low wages, in other words, cheap labor.¹⁰ When companies like Wal-

⁸ *Id.*

⁹ Paul Yang, *Who is My Neighbor? Modern Slavery in the Global Context and Christian Response*, available at http://www.slideshare.net/daponyang/globalization-modern-slavery-christian?utm_source=slideshow03&utm_medium=ssemail&utm_campaign=share_slideshow_loggedout.

¹⁰ See Miguel Bustillo, Tom Wright & Shelly Banjo, *For Wal-Mart, Sears, Tough Questions in Bangladesh Fire*, WALL ST. J., Nov. 29, 2012, <http://www.wsj.com/news/articles/SB100014241278873237511045781484632409>

Mart pay less than \$37 USD a month for garment workers, they can easily sell their products for less than most of the competition. Other companies must outsource production as well if they want to have any hope of competing with Wal-Mart. This results in a race to the bottom, in which corporate business flows to the countries where workers are paid the least. Unfortunately, low wages are just the beginning of the race to the bottom. Companies in third world countries such as India and Bangladesh often permit workers to toil in poor working conditions in unsafe factories, but not without backlash. In November 2012, the parliament in India became paralyzed over economic reforms that would allow foreign chains such as Wal-Mart to operate in India.¹¹ Wal-Mart's public image took another hit that same month when a fire in a clothing factory in Bangladesh killed 112 people.¹² The factory made t-shirts and polo shirts for Wal-Mart and other retailers around the world. Reports indicate that the factory had no emergency exit and that workers trying to flee the building found the main exit locked.¹³

Marketing campaigns that urge consumers to single-mindedly seek the lowest price divorce a cheap product from the working conditions required to permit that low price. Goods produced in the U.S. with workers paid the minimum wage cannot be sold as cheaply as those produced in third world countries where wages are a fraction of that paid in the U.S. Moreover, U.S. companies must adhere to numerous regulations, including environmental laws, that don't exist (or are not enforced) in many third world countries. The executive director of the Center for Policy Dialogue, Bangladesh's leading independent think tank, said there is "hypocrisy" among buyers who "talk about ethical buying and ethical sourcing, but when it comes to

06892 Wal-Mart and other U.S. companies manufacture clothing lines in countries like Bangladesh, where the government set minimum wage for an entry-level garment worker is less than \$37 a month. *Id.*

¹¹ See Ross Colvin, *India parliament deadlocked on allowing stores like Wal-Mart*, MSN News, Nov. 26, 2012, <http://news.msn.com/world/india-parliament-deadlocked-on-allowing-stores-like-wal-mart>.

¹² Julhas Alam, *Fire highlights harsh lives of Bangladesh workers*, WASH. TIMES, Nov. 27, 2012, <http://www.washingtontimes.com/news/2012/nov/27/fire-highlights-harsh-lives-bangladesh-workers/?page=all>.

¹³ *Id.*

price they refuse to offer a good rate. They often go to less compliant factories for a cheaper rate. Being compliant is not cheap.”¹⁴ There is a need to create a new mindset for both corporate buyers and consumers. Fair trade, if properly publicized, implemented and reported could be a viable path to creating that mindset.

B. *Why Fair Trade?*

The goal of fair trade, with respect to transnational supply chains, is to discourage and even prevent companies from exploiting human and social rights.¹⁵ In an ideal world this means that all goods produced under fair trade standards would (1) pay farmers a fair price for their crops; (2) follow sound environmental practices; and (3) refrain from using forced or child labor.¹⁶ Presumably, consumers might then be willing to pay a premium for goods certified under fair trade standards. Accordingly, the hoped-for result is a win-win situation where farmers are paid fairly, the environment is protected, and labor and children are not exploited.

There are numerous fair trade organizations; however, there are two major certifying agencies: Fair Trade USA in the United States¹⁷ and Fairtrade International in Europe.¹⁸ These organizations offer services to certify that fair trade international standards have been met. For many companies, behind the certifications are instances of alleged violations of fair trade standards. The question at issue then becomes whether private enforcement is a workable

¹⁴ *Id.*

¹⁵ See Shima Baradaran & Stephanie Barclay, *supra* note 1.

¹⁶ *Fairtrade International*. Retrieved from

<http://www.fairtrade.net/aims-of-fairtrade-standards.html>. (September 7, 2012).

¹⁷ Effective December 31, 2011, Fair Trade USA resigned its membership in Fairtrade International and the two became separate organizations. Fair Trade USA announced a partnership with Scientific Certification Systems on September 27, 2011 to conduct audits and certify new producer groups that may now join the Fair Trade movement. See *Fair Trade USA and SCS Announce Joint Partnership to Offer High-Quality, Cost-Effective Fair Trade Certification*, FAIR TRADE USA, (Sept. 27, 2011), http://fairtradeusa.org/press-room/press_release/fair-trade-usa-and-scs-announce-joint-partnership-offer-high-quality-cost-e.

¹⁸ *Fairtrade International: What is Fairtrade?* Retrieved from <http://www.fairtrade.net/what-is-fairtrade.html> (October 7, 2012).

solution. Fair trade advocates use market incentives and private monitoring in their quest to improve the incomes, working conditions, health, and education of workers.¹⁹ Proponents of fair trade believe that fair trade can reduce poverty with transparency and equity.²⁰ Central to this perspective, of course, is a strong belief in the power of moral suasion. That is, if a spotlight is shone on the economic, environmental, and labor abuses created by amoral market forces, then the manifest unfairness of it all will compel consumers to step up, do the right thing, and pay a premium for certified fair trade products.

Fair trade organizations are essentially product certification schemes.²¹ Though the concept of fair trade has been around for decades, the modern roots of fair trade came about in the 1960s.²²

¹⁹ Some consumers are willing to pay higher prices for products that are Fair Trade certified (e.g., coffee, tea, and cocoa). See *Baradaran & Barclay*, *supra* note 15, at 49.

²⁰ See *Baradaran & Barclay*, *supra* note 1, at 40.

²¹ Natasha Dhillon-Penner, *Globalization, the WTO and Fair Trade: Is the International Trade System Working in the Interests of Coffee Farmers?* 9 *ASPER REV. INT'L BUS. & TRADE L.* 201, 218 (2009). Fair trade organizations establish standards and use labeling to signal to consumers that a product has met the required criteria and can be considered fairly traded. The fair trade standards are set with the cooperation of producers, traders and external experts. *Id.* For the fair trade model to be effective, consumers must have faith in the certification and be willing to pay a premium. If that occurs, the product certification scheme will be successful.

²² Andy Redfern & Paul Snedker, *Creating Market Opportunities for Small Enterprises: Experiences of the Fair Trade Movement*, INT'L LAB. OFF., 4 (2002), available at http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/--ifp_seed/documents/publication/wcms_117707.pdf.

Fair trade ideals were built on a post-Keynesian²³ economics approach to economies where price is directly linked to the actual production costs and where all producers are given fair and equal access to the markets.²⁴ Transparency is achieved by assisting producers in gaining access to mainstream markets and by providing customers with information about the supply chain so that they can make informed decisions.²⁵ But is it working?

We know that international fair trade sales more than tripled from 2004 to 2007.²⁶ In the United States, fair trade coffee is the fastest growing²⁷ specialty coffee industry.²⁸ In fact, fair trade is now one of the fastest growing segments of the global food market.²⁹ Despite these encouraging steps forward, the question remains: Is fair trade making a significant enough difference in the lives of

²³ The theoretical foundation of post-Keynesian economics is the principle of effective demand, in other words, that demand matters in the long as well as the short run, so that a competitive market economy has no natural or automatic tendency towards full employment. This is contrary to the views of New Keynesian economists working in the neo-classical tradition. Post-Keynesians do not accept that the theoretical basis of the market failure to provide full employment is rigid or sticky prices or wages. Philip Arestis, *Post-Keynesian Economics: Towards Coherence*, 20 Cambridge J. Econ. 111, 112 (1996).

²⁴ Redfern & Snedker, *supra* note 22.

²⁵ Douglas L. Murray & Laura T. Reynolds, *Globalization and its Antinomies: Negotiating a Fair Trade Movement*, in FAIR TRADE: THE CHALLENGES OF TRANSFORMING GLOBALIZATION 3, 5 (Laura T. Reynolds, Douglas L. Murray & John Wilkinson eds., 2007).

²⁶ Fairtrade Foundation, *Stirring Up the Tea Trade: Can We Build a Better Future for Tea Producers?* (2010), available at http://www.fairtrade.org.uk/includes/documents/cm_docs/2010/f/1_ft_tea_report_rtfworkfinal_for_web.pdf

²⁷ Fastest growing, of course, can be a highly deceptive modifier that, although it may sound encouraging, frequently signals a low baseline, e.g., a company that increases its sales of a product from two units to four can report a 100% increase in sales.

²⁸ ALEX NICHOLLS & CHARLOTTE OPAL, FAIR TRADE: MARKET-DRIVEN ETHICAL CONSUMPTION 5 (2005).

²⁹ See Murray & Reynolds, *supra* note 25, at 3-5.

workers, particularly children? And, if fair trade is having trouble gaining traction, what are the factors impeding its effectiveness?³⁰

C. *Fairtrade's New Labor Requirements*

In June 2012, Fairtrade International (“Fairtrade”) published an updated position paper on workers’ rights under Fairtrade.³¹ In an effort to move beyond the traditional corporate social responsibility paradigm of standard-setting and auditing, Fairtrade states it is committed to helping build conditions where workers have the power to improve their livelihoods in a positive, supportive environment.³² Fairtrade sees the result of these efforts as benefiting both the employee and the employer. For example, employees will be more motivated and there will be lower turnover.³³

Fairtrade also states it is committed to ensuring that workers have freedom of association and the ability to negotiate their terms of work – higher wages, benefits and better working conditions.³⁴ Management is asked in advance if they accept freedom of association and if they are willing to communicate such to their employees. This means that trade unions may communicate freely with workers.³⁵ The ultimate goal of Fairtrade is for employers to pay workers a “living wage.”³⁶ Currently, employers are required

³⁰ While anecdotal, the authors of this paper can attest that most of their students do not know what fair trade is or that the University of San Diego earned fair trade status in June 2012.

³¹ Fairtrade International, *A New Workers Rights Strategy for Fairtrade*, available at http://www.fairtrade.net/fileadmin/user_upload/content/2009/resources/2012-06-20_Workers_rights.pdf.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ A living wage is “the ability to support families, to maintain self-respect, and to have both the means and the leisure to participate in the civic life of the nation.” Mark Brenner, *Defining and Measuring a Global Living Wage: Theoretical and Conceptual Issues*, Political Economy Research Institute (Prepared for the conference *Global Labor Standards and Living Wages* at the University of Massachusetts-Amherst, April 19-20, 2002), available at www.peri.umass.edu/fileadmin/pdf/gls_conf/glw_brenner.pdf.

under the existing Fairtrade Standard for Hired Labor to pay at least the legislated minimum wage.³⁷

Buyers of fair trade products must pay the “Fairtrade Premium,” money built into the price of the product, to improve the socio-economic situation of the workers, their families and the communities.³⁸ The premium has previously been used to finance collective community projects, has never been paid to the individual workers (i.e., as wages) and is considered to be an added benefit above wages. However, based on worker feedback, Fairtrade will now permit the workers to decide how to invest the premium based on their needs. This may include paying a bonus to farmers and workers. Management will play an advisory (not voting) role in these decisions.³⁹

Fairtrade’s new workers’ rights strategy will be implemented in Africa, Asia and Latin America. Moreover, Fairtrade is committed to consulting with a wide range of stakeholders and using other tools to implement its strategy, including producer training and support, company partnerships, non-government organizations and trade union partnerships and certifications.⁴⁰

D. *Fairtrade’s Position on Child Labor*

According to its position paper, Fairtrade understands that stopping child labor is one of the issues that most concerns consumers who are seeking assurance of the ethical integrity of the products they buy.⁴¹ While recognizing that “no . . . certification scheme can guarantee that child labor does not occur in a supply

³⁷ See Fairtrade International, *supra* note 31.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ FLO-CERT is currently reviewing its audit processes and tools to verify labor practices in collaboration with Fairtrade International. Fairtrade International, *supra* note 31.

⁴¹ Fairtrade Labelling Child Labour Position, Version 2, 3, Nov. 2, 2010, available at http://www.fairtrade.net/fileadmin/user_upload/content/2009/resources/Child_Labour_position_paper.pdf.

chain,” Fairtrade nevertheless sets minimum standards for producers, which are enforced through both scheduled and unscheduled audits.⁴²

As an entry-level requirement, all producers must comply with labor rights issues in International Labour Organization (“ILO”) conventions.⁴³ ILO 38 recommends minimum age levels for entering work, as well as the number of hours of work for children over that minimum age.⁴⁴ Fairtrade regards children working below the age of fifteen as child labor.⁴⁵ Moreover, Fairtrade operators are required to abide by national legislation (unless such legislation sets standards which are below the internationally recognized standards and convention).⁴⁶ As in the United States, Fairtrade recognizes that there is some work that children below the age of eighteen can legitimately do.⁴⁷ Such work includes small home-based tasks, as well as assisting relatives with farm-based work in the field after school and on holidays.⁴⁸ Child labor is more generally defined as labor that is harmful to children and does not contribute to their well-being.⁴⁹

E. Violations of Fair Trade Standards? Victoria’s Secret, Fair Trade Cotton and Child Labor

On December 15, 2011, Bloomberg News reported that Victoria’s Secret parent company, Limited Brands, Inc., purchased cotton from a company that used child labor to pick fair trade

⁴² *Id.* at 3. Fairtrade International admits that, given the many various types of agricultural set ups, including the use of seasonal workers, it is not always possible to undertake audits or monitor hiring practices at all times. *Id.* at 8.

⁴³ *Id.* at 3-4. Child labor as defined by ILO 138 Minimum Age Convention and ILO 182 the Worst Forms of Child Labor Convention is prohibited in Fairtrade producer standards.

⁴⁴ *Id.* at 5.

⁴⁵ *Id.* at 6.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* Examples of “harmful” labor include slavery, child prostitution, illicit activities (e.g., trafficking of drugs), or any work that “is likely to harm the health, safety or morals of children.” *Id.* at 5.

cotton.⁵⁰ No allegations have been made that Victoria's Secret was aware of forced child labor.

The girl at issue in this ongoing story is said to be a 13-year-old girl named Clarisse Kambire.⁵¹ A photo in the Bloomberg article showed her picking cotton. Limited Brands claims that the girl picks vegetables, not fair trade cotton, and that she is an adult.⁵²

Bloomberg contends that after the allegations of child labor went public, representatives of the national farmer's federation, which runs the program and is certified by Fairtrade International, visited the village of Benvar where the girl lives. They claim that the representatives intimidated the producers and warned children not to speak to outsiders.⁵³ Moreover, a Bloomberg reporter, Reykia Fick, was allegedly threatened by those same representatives with arrest and physical harm while investigating the situation.⁵⁴ In a December 27, 2011 Bloomberg interview, one of the farmers reported that representatives of the growers union began arriving in the village within a few days of the article's publication and threatened to withhold payment for the year's organic and fair trade harvest.⁵⁵

According to an anonymous source, ICE Homeland Security Investigations division has begun a preliminary inquiry into the

⁵⁰ Cam Simpson, Ekow Dontoh & Jeff Bliss, *Child Labor for Victoria's Secret Cotton Examined by U.S.*, BLOOMBERG (Jan. 13, 2012, 1:04 PM), <http://www.bloomberg.com/new/print/2012-01-13/child-labor-for-fair-trade-cotton-probe>.

⁵¹ *Id.* The girl herself and five independent sources corroborated her age (including the headmaster of the school the girl briefly attended before being withdrawn by Victorien Kambire).

⁵² *Id.* The birth certificate cited as evidence for the girl's age names a deceased older sister who died more than a decade ago. Bloomberg claims it confirmed through several sources that the surviving child picks cotton for Burkina Faso's fair trade and organic program.

⁵³ *Id.* Bloomberg reportedly conducted interviews of village elders and farmers both by telephone and in person.

⁵⁴ *Id.* According to the Bloomberg article, a Fairtrade International spokeswoman was asked about the threats against producers in Benvar and the Bloomberg journalist, but she declined to comment.

⁵⁵ *Id.* The farmer was listed on his national identity card as Victorien Kamboule. Another farmer in the village and a local leader corroborated the farmer's version of events.

allegations.⁵⁶ Even if an investigation reveals that forced labor occurred, however, there are important exceptions that can protect companies against U.S. government sanctions.⁵⁷ For example, if forced labor does not give a product a competitive advantage, the merchandise can be exempted from the law.⁵⁸ (See following section titled U.S. Restrictions on Imports Made with Child Labor).

Within a week of the publication of the *Victoria's Secret* article, Fairtrade International's CEO, Rob Cameron, resigned.⁵⁹ A spokesperson stated that his departure was not related to the article.⁶⁰ On January 3, 2012, Fairtrade responded to allegations listed in the Bloomberg article,⁶¹ claiming to have found "substantial contradictions in the facts presented in the article based on information Fairtrade obtained from its field assessment."⁶² Fairtrade insists that the girl "is not participating in Fairtrade certified cotton product" but instead works "on a family-owned vegetable farm . . . for which there are no Fairtrade Standards or Fairtrade certified producers in this region."⁶³ Finally, Fairtrade claims to have seen the girl's birth certificate and that she "is not 13 years old as reported."⁶⁴

⁵⁶ *Id.* The department is responsible for enforcing §307 of the Smoot-Hawley Tariff Act, a 1930 law banning the importation of goods manufactured by forced labor, as well as a 1999 executive order and anti-human trafficking laws passed in 2005 and 2008.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Fair International Counters Allegations in Bloomberg article on Burkina Faso cotton*, FAIRTRADE INT'L (Jan. 4, 2012), http://www.fairtrade.at/nc/presse/pressemitteilung/article/fairtrade-international-counters-allegations-in-bloomberg-article-on-burkina-faso-cotton/?tx_ttnews%5BbackPid%5D=968&cHash=a25229117da254200d636031ceb072fe).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

II. U.S. Restrictions on Imports Made with Child Labor

The role of multinational enterprises and the negative social and environmental implications of large-scale foreign investment became controversial for the first time in the 1970s.⁶⁵ Then, beginning in the 1980s, Nike was criticized for sourcing its products in factories and countries where low wages, poor working conditions, and human rights problems were rampant.⁶⁶ In the 1990s, Nike continued to suffer a series of public relations nightmares resulting from reports of underpaid workers, child labor, and poor working conditions in Indonesia, Cambodia, Pakistan and China/Vietnam, respectively.⁶⁷ The 1990s also saw child labor scandals involving Kathie Lee Gifford's clothing line for Wal-Mart, the NFL, Disney, and others.⁶⁸ More recently, child labor scandals have implicated The Gap,⁶⁹ retail giant H & M,⁷⁰ Philip Morris,⁷¹ and

⁶⁵ Ans Kolk & Rob van Tulder, *Child Labor and Multinational Conduct: A Comparison of International Business and Stakeholder Costs*, 36 J. BUS. ETHICS 291, 292 (2002).

⁶⁶ Richard M. Locke, Fei Qin & Alberto Brause, *Does Monitoring Improve Labor Standards? Lessons from Nike*, 61 INDUS. & LAB. REL. REV. 3, 8 (2007).

⁶⁷ *Id.*

⁶⁸ *Children Found Sewing Clothing for Wal-Mart, Hanes & Other U.S. & European Companies*, LAB. & WORKLIFE PROGRAM HARV. L. SCH., http://www.law.harvard.edu/programs/lwp/NLC_childlabor.html, (last visited Oct. 11, 2012). The article is based on a report from the National Labor Committee ("NLC"), an independent, nonprofit human rights organization and the leading anti-sweatshop watchdog group in the U.S. The NLC has run successful campaign against Sean "P Diddy" Combs, the NFL, NBA, The Gap, Disney, Nike, and others. *Id.*

⁶⁹ Amelia Gentleman, *Gap Moves to Recover from Child Labor Scandal*, N.Y. TIMES, Nov. 15, 2007, http://www.nytimes.com/2007/11/15/business/worldbusiness/15iht-gap.1.8349422.html?_r=0. In 2007, reports revealed that some of GapKids clothes had been hand-broidered by child laborers in Delhi, India. A British newspaper published photos of children as young as ten years old working up to 16 hours a day. Official figures suggest there are 12 million children working in India, but some activists claim that number is closer to 60 million. *Id.*

⁷⁰ *Retail Giant Caught in Another Labor Scandal, Lawsuit*, Labor & Employment Law Forum, AM. U. LAB. & EMP. L. F. (Feb. 7, 2012) <http://aularborlawforum.org/2012/02/07/retail-giant-caught-in-another-labor-scandal-lawsuit>.

Hershey's.⁷² The problem of child labor is overwhelming and at times appears never-ending.

In response to the aforementioned child labor scandals, most companies now audit the factories that produce their products. These audits may be announced, unannounced, or both. However, the audits frequently do not capture the child labor that occurs in informal workshops. For example, The Gap contracted with a rural community center to do embroidery work on their GapKids line of clothing. That community center then outsourced the embroidery work to a Delhi workshop where children were employed.⁷³ According to the policy head of Save the Children, The Gap had a responsibility to check working practices along the entire supply chain, even as far back as the field where cotton is produced for the clothes.⁷⁴ Gap announced a package of measures tightening its commitment to eradicating the exploitation of children in the manufacture of goods. Gap also promised to refine its procedures to ensure items made in textile shops in India are not produced by children. Moreover, Gap gave a \$200,000 grant to improve working conditions and promised to organize an international conference to develop solutions to the problem of child labor.⁷⁵

The U.S. government has also attempted to tackle the problem of child labor. The Tariff Act of 1930, as amended in 1997,

⁷¹ 5 *Giant Companies Who Use Slave Labor*, BUS. PUNDIT <http://www.businesspundit.com/5-giant-companies-who-use-slave-labor> (last visited Oct. 10, 2012).

⁷² *Id.*

⁷³ Gentleman, *supra* note 69.

⁷⁴ *Id.* Save the Children is an independent organization designed to create lasting change in the lives of children in need in the United States and around the world. They help children and families help themselves and work with other organizations, governments, non-profits and a variety of local partners while maintaining their own independence without political agenda or religious orientation. In times of disaster, Save the Children provides food, medical care and education and remains to help communities rebuild through long-term recovery programs. It also works to resolve the ongoing struggles children face every day — poverty, hunger, illiteracy and disease. SAVE THE CHILDREN, <http://www.savethechildren.org/site/c.8rKLIXMGIpI4E/b.6146405/k.C7E9/AboutUs.htm>, (last visited Oct. 20, 2012).

⁷⁵ *Id.*

prohibits the importation of items produced through use of “forced or indentured child labor.”⁷⁶ Unfortunately, the standing requirement of the Tariff Act has restricted enforcement of this legislation. As an example, in 2005, the International Labor Rights Fund, Global Exchange, and the Fair Trade Federation brought suit against the U.S. and the Chocolate Manufacturers Association in the U.S. Court of International Trade.⁷⁷ The three plaintiff organizations alleged that U.S. Customs had refused to investigate complaints that cocoa imported to the U.S. from Cote d’Ivoire was produced by forced child labor.⁷⁸ The case was dismissed due to a technical requirement regarding standing.⁷⁹

Plaintiffs in such cases must demonstrate that they have personally suffered an actual or threatened injury as a result of the alleged illegal act by the defendant.⁸⁰ In this case, the three plaintiff organizations alleged that they suffered informational injury (i.e., that failure to investigate by the U.S. “left them without information vital to their organizational purposes”).⁸¹ Though plaintiffs properly alleged standing, a separate portion of the legislation was problematic: “. . . but in no case shall such provisions be applicable to goods, wares, articles, or merchandise so mined, produced, or manufactured *which are not mined, produced, or manufactured in such quantities in the United States as to meet the consumptive demands of the United States*” (emphasis added).⁸²

All parties agreed that the United States did not have a domestic cocoa production industry sufficient to meet domestic consumptive demand.⁸³ Based on this, the statute expressly prohibits application of any of the provisions found within it.⁸⁴ In other words,

⁷⁶ Baradaran & Barclay, *supra* note 1, at 33 (citing U.S.C.S. §1307).

⁷⁷ Int’l Labor Rights Fund v. U. S., 391 F.Supp.2d 1370, 1050 (2005).

⁷⁸ *Id.* at 1052-1053.

⁷⁹ “Standing” in the legal context involves the determination of whether a particular litigant is entitled to invoke the jurisdiction of the court in order to decide the merits of a dispute or of particular issues. *Id.* at 1053 (citations omitted).

⁸⁰ *Id.* at 1054.

⁸¹ *Id.*

⁸² *Id.* at 1055.

⁸³ *Id.*

⁸⁴ *Id.*

because of the lack of any significant domestic production of cocoa, section 307 of the statute was not applicable under these facts.⁸⁵ One solution would give teeth to the Tariff Act: a simple amendment to the legislation that strikes the exception.

In 1999, Senator Harkin proposed the Child Labor Deterrence Act, which would have prohibited the importation of goods produced with child labor and provided for both civil and criminal penalties. Unfortunately, the bill died. At this time there appears to be no political will to either resurrect Harkin's bill or amend the Tariff Act.⁸⁶

III. Is Fair Trade Working?

Even the most ardent cynics would likely admit that fair trade has improved the lives of many.⁸⁷ Nevertheless, millions still toil for little compensation with virtually no hope for any kind of lasting

⁸⁵ *Id.*

⁸⁶ Public pressure seems to be bringing about some recent changes. For instance, in February 2012 the ILRF contacted Hershey's saying it was planning to run an advertisement about Hershey's child labor issues on a jumbotron screen just outside the stadium where the Super Bowl was being played. Within a week, Hershey's announced its pledge to use only cocoa certified by the Rainforest Alliance for its line of Bliss chocolates and that they would donate \$10 million in West Africa to encourage economic incentives to reduce child labor and improve cocoa supply. Carey Polis, *Hershey's Child Labor: Chocolate Company to Source Independently Certified Cocoa by End of 2012*, HUFFINGTON POST (Feb. 1, 2012, 4:02 PM), www.huffingtonpost.com/2012/02/01/hersheys-child-labor_n_12471111.html.

⁸⁷ See Baradaran & Barclay, *supra* note 1, at 49. One study conducted on the effects of fair trade in Latin America concluded that the economic effects of fair-trade participation are unassailable. *Id.* (quoting Eric J. Arnould, *Does Fair Trade Deliver on Its Core Value Proposition? Effects on Income, Educational Attainment, and Health in Three Countries*, 28 J. PUB. POL'Y & MARKETING 186 (2009)). Another study, conducted on the production of cocoa in Ecuador, found that "benefits accruing to small producers of the cocoa scheme included cash payments, more transparent weighing and grading systems, better returns on crops due to the vertical integration of the ethical trading chain, and capacity-building benefits." *Id.* (citing Valerie Nelson, Anne Tallontire & Chris Collinson, *Assessing the Benefits of Ethical Trade Schemes for Forest Dependent People: Comparative Experience from Peru and Ecuador*, 4 Int'l Forestry Rev. 99, 99 (2002)).

change. One of the problems is that fair trade does not address the root causes of labor violations. Consumers continue to demand better and cheaper merchandise, which translates to pressure on suppliers.⁸⁸ Buyer companies often source products at the last minute, requesting unreasonably large orders in short times at cut-rate prices.⁸⁹ Many inspections are announced (a problem in and of itself), and even those that inspections that are not announced cannot resolve persistent and often “invisible” problems such as discrimination, harassment, and violations of workers’ rights to form or join trade unions.⁹⁰ Factory managers may coach workers on what to say to inspectors.⁹¹ Many agree that it is weak regulations in fair trade countries that first caused many companies to source from those countries.⁹²

Another problem, particularly in the United States, is lack of visibility. In the U.S., there are approximately 200 fair trade importing organizations, 280 specialty fair trade stores, and 40,000 supermarkets that carry fair trade products.⁹³ While the numbers may sound impressive, they translate into a per capita consumption of only 2.43 product sales per person,⁹⁴ which is quite low when compared to European countries: 21.06 in Switzerland, 11.57 in the United Kingdom, and 7.27 in Denmark.⁹⁵ In the United Kingdom, consumer awareness is 70 percent.⁹⁶ According to Paul Rice, CEO of Fair Trade USD, “Since Fair Trade launched 50 years ago, European consumer awareness about Fair Trade has grown to well

⁸⁸Elizabeth Umlas, *How Apple, Foxconn, and others can address labor abuses in overseas factories*, CHRISTIAN SCI. MONITOR (Apr. 9, 2012), <http://www.csmonitor.com/Commentary/Opinion/2012/0409/How-Apple-Foxconn-and-others-can-address-labor-abuses-in-overseas-factories>.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Baradaran & Barclay, *supra* note 1, at 60 (citing Jean-Marie Krier *Fair Trade 2007: New Facts and Figures from an Ongoing Success Story*, DUTCH ASS’N OF WORLDSHOPS 7, 12-14 (2008)_available at <http://www.european-fair-trade-association.org/efta/Doc/FT-E-2007.pdf>).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

over 80 percent. Yet in the United States, where the movement is younger, only about 34 percent of consumers are aware of Fair Trade.”⁹⁷

Finally, there is not much empirical data regarding the successes and failures of fair trade. The available studies mostly consist of case analyses based upon qualitative interviews and participant observations that typically overlook the effects of fair trade on plantation workers and fail to make comparisons with similar producers lacking access to fair trade marketing.⁹⁸ There is a dearth of publicly available research data that deals with consumer reactions to fair trade organizations. Moreover, much of what there is available focuses on subjects who identify themselves as “ethical consumers.”⁹⁹

Conclusion

The pursuit and promotion of fair trade practices is both noble and necessary. That many obstacles may tend to impede the attainment of fair trade’s worthy goals is certainly no reason to retreat from the effort. Instead, future success of fair trade turns on making an honest assessment of the challenges it faces and then coming up with strategies to overcome them. Paying a living wage to workers will increase the cost of production. The question is who should bear the cost.¹⁰⁰ Will suppliers be willing to take a smaller margin? Will retailers be willing to take a smaller profit? Or perhaps pass the increased costs on to the consumers?¹⁰¹ And finally, will

⁹⁷ Paul Rice, *Fair Trade USA: Why We Parted Ways with Fair Trade International*, TRIPLE PUNDIT (Jan. 11, 2012), <http://www.triplepundit.com/2012/01/fair-trade-all-fair-trade-usa-plans-double-impact-2015>.

⁹⁸ Terrence H. Witkowski, *Fair Trade Marketing: An Alternative System for Globalization and Development*, J. MARKETING THEORY & PRAC. 13, 25 (2005).

⁹⁹ Veronika A. Andorfer & Ulf Liebe, *Research on Fair Trade Consumption – A Review*, 106 J. BUS. ETHICS 415, 421 (2012).

¹⁰⁰ Rajesh Chhabara, *Wages – Working for a living*, INT’L LAB. RHTS. F., (June 30, 2009), <http://laborrights.org/creating-a-sweatfree-world/sweatshops/news/11949>.

¹⁰¹ *Id.*

there be enough consumers willing to pay more for an expensive, “ethical” product?¹⁰²

One very obvious problem is that fair trade itself is not sufficiently obvious. If most people do not seem to have a meaningful grasp of what is meant by fair trade and the goals fair trade seeks to attain, fair trade has a public relations problem.¹⁰³ Moreover, even if some consumers do know what fair trade is and they commend its objectives, the troubling knowing/doing distinction persists. That people know about and agree with the virtue of fair trade practices does not mean that they will modify their behavior to act in accordance with any such determination. As discussed, globalization contributes to this phenomenon in that not only have operations been outsourced to distant and unseen lands, but so have questionable economic, environmental, and labor practices – out of sight, out of mind.

Another area of concern is the oversight and auditing component of fair trade. This is coupled with the problem of consumers’ declining attention spans that attenuate the shelf life of the outrage and indignation that fair trade movement instigates and necessarily relies upon. That is, even if outrageous abuse is uncovered and publicized, the public’s outrage and indignation seemingly dissipates in the face of a desired product that goes on sale. Certainly most consumers in the United States would never tolerate a production facility in the U.S. that in any way resembled the reported working conditions of the notorious Foxconn plant in Shenzhen, China.¹⁰⁴ That such reported labor abuses take place on

¹⁰² *Id.*

¹⁰³ See Rice, *supra* note 97. Fair Trade USA appears to realize that public awareness is critical to their growth and success and is in the middle of a five-year plan to double the impact of Fair Trade by 2015 by innovating the model, strengthening farming communities and igniting consumer involvement. *Id.*

¹⁰⁴ Susan Adams, *Apple’s New Foxconn Embarrassment*, FORBES, (Sep. 12, 2012, 2:38 PM), <http://www.forbes.com/sites/susanadams/2012/09/12/apples-new-foxconn-embarrassment>. According to a story by an undercover reporter at the *Shanghai Evening Post*, workers’ living quarters smell like garbage, there are cockroaches in the dormitory closets, and the sheets distributed to new workers are dirty. The undercover reporter worked 10 hours his first day with only one break for dinner, after which supervisors exhorted the workers to put in two hours of overtime, for a wage of just \$4. More recently, Foxconn has acknowledged it uses

the other side of the world, however, seems to render such abuses far less bothersome. Again – out of sight, out of mind.

There is a dearth of research demonstrating that consumers, even if provided with full knowledge of reported labor abuses, would base their “latest technology” purchasing decisions in whole or in part the conditions under which the technology was produced. Yes, people say that will pay a premium for products made without using child labor, but when they are in the store shopping or, simply sitting in front of a computer screen while shopping on-line, they too often find themselves far more interested in finding the lowest price rather than finding out if abusive labor practices may have been used in the production process.

As stated in the introduction to this paper, the modern roots of fair trade have been around for approximately fifty years.¹⁰⁵ Fair trade is one of the fastest growing segments of the global food market.¹⁰⁶ What remains to be seen, however, is what strategies and tactics the fair trade movement can adopt to become even more effective in the next fifty years. Perhaps with the support of enough consumers and business executives, as well as the international community, fair trade and triple bottom line reporting could become the norm.

student interns but says they work at its plants by choice and can leave their jobs at any time. However, as reported by the [*New York*] *Times*, two worker advocacy groups in China said they had talked to students who reported being forced by their teachers to assemble iPhones at a Foxconn factory in Zhengzho, in north-central China. “They said they are forced to work by the teachers,” Li Qiang, founder of the Chinese advocacy organization China Labor Watch, told the *Times*. Li added that the students didn’t want to work at Foxconn, but their teachers told them that if they didn’t work, they would not graduate.

¹⁰⁵ Redfern & Snedker, *supra* note 24.

¹⁰⁶ Murray & Reynolds, *supra* note 25 at 3-5.