
Corporate Liability for Human Rights Violations Human Rights Violations in the Cocoa Supply Chain and the Responsibilities of the Swiss Chocolate Industry

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ABSTRACT

RECENTLY, THE ASSOCIATION OF SWISS CHOCOLATE MANUFACTURERS, A COOPERATIVE OF THE COUNTRY'S 18 INDUSTRIAL CHOCOLATE COMPANIES, FACED CRITICISM ABOUT THE ORIGIN OF ITS IMPORTED COCOA RAW MATERIAL, CHOCOLATE'S KEY INGREDIENT. THE PROBLEM IS THAT SWITZERLAND'S INDUSTRIAL CHOCOLATE COMPANIES IMPORT MORE THAN FIFTY PERCENT OF THE COUNTRY'S TOTAL BEAN REQUIREMENT FROM WEST AFRICA, A REGION KNOWN FOR PROHIBITED CHILD LABOUR IN COCOA GROWING. CURRENTLY, TRANSNATIONAL CORPORATIONS CANNOT BE HELD LIABLE FOR HUMAN RIGHTS VIOLATIONS. VOLUNTARY INITIATIVES SUCH AS THE COCOA INDUSTRY PROTOCOL THAT MAINLY FOCUS ON THE ABOLITION OF CHILD LABOUR AND LEAVE OTHER PROBLEM AREAS UNATTENDED, ARE UNLIKELY TO BE SUCCESSFUL IN THE LONG TERM. THIS PAPER CONCLUDES THAT: FIRST, THERE SHOULD BE A LEGALLY BINDING FRAMEWORK THAT ENSURES THAT HUMAN RIGHTS ARE OBSERVED IN THE SUPPLY CHAINS OF CORPORATIONS; AND SECOND, THAT SWITZERLAND'S INDUSTRIAL CHOCOLATE COMPANIES SHOULD TAKE INTO CONSIDERATION THE ROOT CAUSES OF CHILD LABOUR – NAMELY THE POVERTY OF THE SMALL-SCALE FARMERS IN WEST AFRICA – AND INVEST IN LOCAL INFRASTRUCTURE, HEALTH, AND EDUCATION TO PRODUCE ETHICALLY FAIR AND SUSTAINABLE CHOCOLATE.

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I. Introduction

During the last few years, the Association of Swiss Chocolate Manufacturers ('Chocosuisse'), a cooperative of the country's 18 industrial chocolate companies, repeatedly faced criticism about the origin of its cocoa raw material, chocolate's key ingredient. The problem is, that Switzerland imports cocoa beans (i.e. 64 percent¹ of its total bean requirement in 2008, and 57.6 percent² of its total bean requirement in 2009) from West Africa, a region with a tenuous human rights situation.

While the Swiss Chocolate Industry generated a turnover of more than 1.6 billion Swiss Francs³ last year, many of the West African farmers, who harvested about 70 percent of the global cocoa production⁴, were left with little of the world market price in terms of securing an appropriate standard of living for themselves and a school education for their children.⁵ As

¹ Association of Swiss Chocolate Manufacturers ('Chocosuisse'), *The Swiss Chocolate Industry and the Ethical Aspects of Cocoa Production in West Africa* (Press release, 2009) [hereinafter Association of Swiss Chocolate Manufacturers, *Ethical Aspects*], English version available at http://www.chocosuisse.ch/web/chocosuisse/en/documentation/press_release.html.

² Association of Swiss Chocolate Manufacturers ('Chocosuisse'), *Cocoa Bean Production in West Africa: Berne Declaration Criticise Swiss Chocolate Manufacturers* (Press release, 2010) [hereinafter Association of Swiss Chocolate Manufacturers, *Cocoa Bean Production*], English version available at http://www.chocosuisse.ch/web/chocosuisse/en/documentation/press_release.html.

³ Association of Swiss Chocolate Manufacturers ('Chocosuisse'), *The Swiss Chocolate Industry in 2012* (Press release, 2013), English version available at http://www.chocosuisse.ch/web/chocosuisse/en/documentation/press_release.html.

⁴ About 70 percent of the world's cocoa beans grow in West Africa, 57 percent alone are harvested on plantations in Ivory Coast and Ghana, the world's two biggest producers. International Cocoa Organisation ('ICCO'), *Production of Cocoa Beans* (Quarterly Bulletin of Cocoa Statistics, Vol. 39, No. 1, Cocoa Year 2012/13, 2013) [hereinafter International Cocoa Organization, *Production of Cocoa Beans*], available at http://www.icco.org/about-us/international-cocoa-agreements/cat_view/30-related-documents/46-statistics-production.html.

⁵ In Ivory Coast, cocoa producers are among the most heavily taxed group of growers worldwide. Farmers there only receive about 35-40 cents of every dollar's worth of beans sold, while producers in other regions can keep as much as 75-90 cents per dollar. Matthew Green, *Ivory Coast's Cocoa Industry Stares Hard at a Bleak Future*, Financial Times Deutschland, Feb. 12, 2009, English version available at <http://www.ftd.de/karriere/business-english/:business-english-ivory-coast-s-cocoa-industry-stares-hard-at-a-bleak-future/472453.html>. Consequently, a family in Ivory Coast would have to earn an average of ten times more to reach the poverty line of two dollars per person a day. Friedel Hütz-Adams & Antonie

a consequence, the small-scale farmers⁶, who are at the bottom of a complex supply chain⁷, could not afford to employ paid workers and had, and still have, to rely on unpaid workers, mostly children – a situation that made international headlines⁸ and lead to outrage a few years ago.

In addition, farmers often do not possess the technical and financial capability to raise productivity, even though increasing yields at a farm level is seen as a necessity in order to meet the increasing global demand for cocoa.⁹ As consumer markets in Europe, the United States, and Asia are growing, it is expected that the global chocolate consumption will increase significantly during the next couple of years.¹⁰ At the same time, forecasts indicate that due to ageing cocoa farms and farmers and a depletion of available arable land, yields will at best remain stable.¹¹ As a result, market experts and the industry as a whole fear, that there will be a cocoa shortage of 1 million tonnes by 2020, unless action is taken.¹²

Subsequently, companies in the global cocoa and chocolate industry – including Swiss corporations Nestlé and Barry Callebaut – signed a voluntary, non-binding, and non-

Fauntain, *Cocoa Barometer 2012* 1, 6 (2012), available at http://www.cocoabarometer.org/Cocoa_Barometer/Download_files/Cocoa%20Barometer%202012%20Final.pdf.

⁶ Cocoa is usually grown on small, family-run farms, rather than on large commercial plantations, as it is the most successful possibility to achieve a reasonable cost-income-ratio. Jan Capelle, *Towards a Sustainable Cocoa Chain* 1, 4 (Oxfam International Research Report, 2008), available at <http://www.oxfam.org/sites/www.oxfam.org/files/towards-a-sustainable-cocoa-chain-0901.pdf>.

⁷ The small-scale farmers pass the beans to local middlemen, who pass them to local exporters and then international traders, who eventually sell them to the major international cocoa brands. The global market price for cocoa beans is determined at the international cocoa exchanges in London and New York, where prices vary daily, depending on the expected supply and demand. International Cocoa Initiative ('ICI'), *Cocoa: From Trees to Treats* (Factsheet, 2012) [hereinafter ICI], available at http://www.cocoainitiative.org/images/stories/pdf/ICI_Leaflets_presentations/ICI_Information_Kit_-_April_2012_-_Cocoa_-_From_trees_to_treats.pdf.

⁸ See, e.g., Humphrey Hawksley, *Mali's Children in Chocolate Slavery*, BBC News, April 12, 2001, <http://news.bbc.co.uk/2/hi/africa/1272522.stm> (last visited Dec. 6, 2013); Humphrey Hawksley, *Ivory Coast accuses Chocolate Companies*, BBC News, May 4, 2001, <http://news.bbc.co.uk/2/hi/africa/1311982.stm> (last visited Dec. 6, 2013).

⁹ Hütz-Adams & Fauntain, *supra* note 5, at 4; accord. Capelle, *supra* note 6, at 4.

¹⁰ International Cocoa Organisation (ICCO), *Annual Report 2010/2011* 1, 5 (2012), available at http://www.icco.org/about-us/international-cocoa-agreements/cat_view/1-annual-report.html.

¹¹ Hütz-Adams & Fauntain, *supra* note 5, at 4.

¹² See, e.g., *id.* at 4; accord. Steven Retzlaff, *Kakao droht knapp zu werden*, Neue Zürcher Zeitung, Sept. 12, 2012, <http://www.nzz.ch/aktuell/startseite/kakao-droht-knapp-zu-werden-1.17594991> (last visited July 12, 2013).

legislative ‘Cocoa Industry Protocol’¹³ to eliminate both prohibited child labour and forced labour in cocoa growing and establish a certification system by 2005.¹⁴ Yet, in a recently conducted survey, the Swiss nongovernmental organisation Berne Declaration accused the Swiss-based cocoa processors and chocolate producers of not doing enough to ensure the cocoa they buy is not tainted by prohibited child labour.¹⁵

The problem is that although voluntary initiatives may be useful to a certain extent, most of them provide no penalties for non-compliance, and corporations cannot be compelled to be completely transparent about their labour practices.¹⁶ In fact, except for two, all Swiss chocolate companies could not or would not divulge details on how they buy their cocoa raw materials to pinpoint the conditions under which the beans were produced.¹⁷ In the West African cocoa market, cluttered by cutthroat competition¹⁸, politics¹⁹, and war²⁰, the

¹³ Protocol for the Growing and Processing of Cocoa Beans and Their Derivative Products In a Manner that Complies with ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, Chocolate Manufacturers Association, Sept. 19, 2001 [hereinafter Cocoa Industry Protocol], available at http://www.cocoainitiative.org/images/stories/pdf/Harkin_Engel/Harkin_Engel_Protocol.pdf.

¹⁴ *Id.* at (6).

¹⁵ Erklärung von Bern (‘EvB’), *Firmenengagement für Menschenrechte im Kakaoanbau: Schweizer Kakaoverarbeiter und Schokoladehersteller im Vergleich* 1, 4 (2013) [hereinafter Erklärung von Bern, *Menschenrechte im Kakaoanbau*], available at http://www.evb.ch/cm_data/LA_20130228_def.pdf.

¹⁶ See, e.g., Sol Picciotto, *Introduction: What Rules for the World Economy?*, in REGULATING INTERNATIONAL BUSINESS: BEYOND LIBERALISATION 1, 16 (Sol Picciotto & Ruth Mayne eds., 1999) “Usually [nonbinding codes] envisage only some kind of general review procedure, and they normally exclude the possibility of complaints about the behaviour of specific [corporations].” *Id.* at 16-17. “Few [voluntary initiatives] include meaningful monitoring mechanisms or disclosure requirements designed to enhance compliance.”; accord. Isabella D. Bunn, *Global Advocacy for Corporate Accountability: Transatlantic Perspectives from the NGO Community*, 19 AM. U. INT’L L. REV. 1265, 1291 (2004) “[Voluntary codes] do not generally include complaint procedures, nor any base for legal claims or redress, and thus provide little scope for individuals to be compensated for corporate violations that cause harm.”

¹⁷ Erklärung von Bern, *Menschenrechte im Kakaoanbau*, *supra* note 15, at 3.

¹⁸ One of the problems is, that the cocoa trade and processing market is dominated by a few powerful corporations: The ‘Big Five’ of traders (Cargill, ADM, Barry Callebaut, Olam and Armajaro) and the ‘Big Five’ of chocolate manufacturers (Mondelēz, Nestlé, Mars, Hershey and Ferrero). This situation results in a huge power imbalance between these corporations and the small-scale farmers who cultivate cocoa, making price negotiations for the latter almost impossible. *Id.*

¹⁹ The poverty of the small-scale farmers is not only a result from their lack of market power, but also because of the structural problems in the cocoa growing countries, which are often politically unstable. Swiss NGO Berne Declaration alleges that, “income from the cocoa business flows into the hands of corrupt government members who secure their power and lifestyles with high taxes on the export of cocoa, instead of investing in infrastructure improvements”. *Id.*

traceability of the cocoa raw materials can be extremely difficult. However, a transparent supply chain would be a first and an important prerequisite to observe human rights in the supply chains of companies and their associations in the cocoa industry.

The following paper argues that proposed solutions should be removed from the hands of the industry leaders and situated within the regulatory framework of the states in order to be effective. However, up until this day, there is no legally binding framework that holds transnational corporations²¹ accountable for human rights violations.

The paper is divided into three parts: The first will focus on child labour and its prohibition under international, regional, and national West African laws. It will discuss the failure of West Africa's cocoa producing countries to protect their individuals and outline why there should be a legally binding framework that holds transnational corporations accountable for human rights violations in their supply chains. The second part will document other possible remedies that could limit human rights abuses in the child labour arena by differentiating between international and national instruments, as well as voluntary initiatives. The paper will then explain why, more than a decade after the signature of the Cocoa Industry Protocol, the situation has not satisfactorily improved. The third part will discuss the responsibilities of Switzerland's home state and the Swiss chocolate industry respectively, while examining why Switzerland, which is home to two of the world's largest chocolate companies, is not taking a more active role to regulate corporate behaviour. To conclude, this paper will outlay possible solutions for a way towards cocoa from ethical sources.

²⁰ A report by NGO Global Witness exposed in 2007, how money from the international cocoa trade had financed both rebels and government loyalists in the Ivory Coast's civil war from 2002-2003, saying that cocoa in Ivory Coast is "the same as timber or diamonds were in Liberia". Global Witness, *Hot Chocolate: How Cocoa Fuelled the Conflict in Côté d'Ivoire* 1, 3 (Report, 2007) available at <http://www.globalwitness.org/sites/default/files/pdfs/cotedivoire.pdf>.

²¹ A transnational corporation ("TNC") is "an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively". *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. ESCOR, 55th Sess. 22nd Mtg., Agenda Item 4 at § 20, U.N. Doc E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003), available at <http://www.unhchr.ch/huridocda/huridoca.nsf/%28Symbol%29/E.CN.4.Sub.2.2003.12.Rev.2.En>.

II. Legal Framework: The Prohibition of Child Labour

A. International and Regional Conventions

With the ratification of the U.N. Convention on the Rights of the Child ('CRC')²², the West African cocoa producing countries²³ committed²⁴ to *protect* children below the age of 18 years²⁵ from economic exploitation and from performing any work that is likely to be hazardous²⁶ or to interfere with the children's education, or to be "harmful to the children's health or physical, mental, spiritual, moral, or social development"²⁷. To that end, the states had to provide for (a) a minimum age for admission to employment, (b) regulate the hours and conditions of employment, and (c) ensure the effective enforcement of such provisions by providing for appropriate penalties or other sanctions, all while "having regard to the relevant provisions of other international instruments"²⁸. This is primarily a reference to the two principal International Labour Organisation ('ILO')²⁹ conventions³⁰ dealing with child labour³¹ – both ratified by the four major cocoa producing countries in West Africa.³²

²² Convention on the Rights of the Child ('CRC'), Nov. 20, 1989, 3 U.N.T.S. 1577 [hereinafter CRC].

²³ This paper will look mainly at Ivory Coast and Ghana, which together produce 57 percent of the world's cocoa, as well as Cameroon and Nigeria that each grows 5.2 percent of the world's beans. International Cocoa Organization, *Production of Cocoa Beans*, *supra* note 4.

²⁴ Ghana ratified in 1990, Ivory Coast and Nigeria both ratified in 1991, and Cameroon ratified in 1993. See United Nations Treaty Collection, Chapter IV Human Rights, Convention on the Rights of the Child, Status of Ratification, Reservations and Declarations, *available at* <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11.en.pdf>.

²⁵ Art. 1 CRC defines the child as very human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.

²⁶ For an indication as to what work is hazardous see ILO Recommendation No. 190 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, Jun. 17, 1999, R190, at art. 3 (c).

²⁷ CRC, *supra* note 22, at art. 32 para. 1.

²⁸ *Id.* at para. 2.

²⁹ The International Labour Organisation ('ILO'), founded in 1919 by the United Nations, is a 'tripartite' agency of the United Nations composed of governments, employers, and workers. The ILO's focus has not been limited to the ratification of its fundamental conventions but has also emphasised the provision of technical assistance to member states to test various approaches to reduce child labour. Following the adoption by the U.N. General Assembly in 1989 of the CRC, the International Programme on the Elimination of Child Labour ('IPEC') was launched by the ILO in 1992 and developed specific initiatives working with governments,

The regional pendant to the CRC is the African Charter on the Rights of the Welfare of the Child (‘African Children’s Charter’)³³. As well as reinforcing the provisions at the international level, the African Children’s Charter provides for the widespread dissemination of information on the dangers of prohibited child labour, and obliges states to facilitate and organise educational campaigns.³⁴ The African Children’s Charter has been ratified by all four mentioned West African cocoa producing countries.³⁵

B. National Laws and West Africa’s Failure to Protect

Taken together, the international and regional conventions provide a framework for determining what is acceptable work for children under the age of 18 years. In addition, the cocoa producing countries in West Africa have their own national legislations that incorporate

employers, workers, and non-governmental organisations to reduce child labour. *See generally* International Labour Organisation, About the International Programme on the Elimination of Child Labour (‘IPEC’), <http://www.ilo.org/ipecc/programme/lang--en/index.htm> (last visited Jul. 18, 2013).

³⁰ ILO conventions are legally binding treaties that may be ratified by member states and to which member states are then monitored for compliance. Countries that have ratified ILO conventions are required to submit biennial reports to the ILO on their efforts to implement them. International Labour Organisation, Committee of Experts on the Application of Conventions and Recommendations, <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm> (last visited Jul. 18, 2013).

³¹ ILO Convention No. 138 concerning Minimum Age for Admission to Employment, Jun. 26, 1973, C138 [hereinafter ILO Minimum Age Convention]; *see additionally* ILO Recommendation No. 146 concerning Minimum Age for Admission to Employment, Jun. 26, 1973, R146; *and* ILO Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, Jun. 17, 1999, C182 [hereinafter ILO Worst Forms of Child Labour Convention].

³² The ILO Minimum Age Convention by Cameroon in 2001, Nigeria in 2002, Ivory Coast in 2003, and Ghana in 2011. However, Ivory Coast and Cameroon, being both member states “whose economy and educational facilities are insufficiently developed”, availed themselves of Article 2 paragraph 4 of the ILO Minimum Age Convention and specified both a minimum age of 14 years, while both Ghana and Nigeria set the minimum age at 15 years. *See* International Labour Organisation, List of Ratifications of International Labour Conventions, Minimum Age Convention, <http://webfusion.ilo.org/public/db/standards/normes/appl/appl-byConv.cfm?hdroff=1&conv=C138&Lang=EN>. The ILO Worst Forms of Child Labour Convention was ratified in 2000 by Ghana, in 2002 by both Cameroon and Nigeria, and in 2003 by Ivory Coast. *See* International Labour Organisation, List of Ratifications of International Labour Conventions, Worst Forms of Child Labour Convention, <http://webfusion.ilo.org/public/db/standards/normes/appl/appl-byConv.cfm?hdroff=1&conv=C182&Lang=EN>.

³³ *See* African Charter on the Rights and Welfare of the Child (‘African Children’s Charter’), Jul. 11, 1990, OAU Doc. CAB/LEG/24.9/49 (1990) [hereinafter African Children’s Charter].

³⁴ *Id.* at art. 15 para. 2(d).

³⁵ Cameroon ratified in 1997, Nigeria in 2001, Ivory Coast in 2004 and Ghana in 2005. *See* African Children’s Charter Ratifications Table, <http://pages.au.int/acerwc/pages/acerwc-ratifications-table>.

international standards.³⁶ As private actors [or corporations] usually violate these prohibitions, the most important obligation of the mentioned West African cocoa producing states would be the *duty to protect* their individuals.³⁷ However, recent studies reveal that the ratifying states fail at protecting their individuals and are thus in violation of international [and regional] human rights law.

It is important to note, that human rights law does not *per se* prohibit child labour in the cocoa sector – it only restricts it. However, the prevalence of children working in cocoa related activities in Ivory Coast and Ghana has not only been confirmed³⁸; findings³⁹ suggest that children younger than the minimum age for admission to employment also perform prohibited child labour such as hazardous work⁴⁰, and work that interferes with their education⁴¹. In addition, reports showed evidence of individual cases of children exposed to forced labour and child trafficking⁴² – so called worst forms of child labour – that are absolutely prohibited,

³⁶ For the national legislation of each cocoa producing country in West Africa respectively, as well as documents, programmes and plans that have an impact on the fight against child labour at national level, see International Labour Organisation, Countries Dashboard, <http://www.ilo.org/ipecc/Regionsandcountries/lang--en/index.htm>.

³⁷ See, e.g., WALTER KÄLIN & JÖRG KÜNZLI, THE LAW OF INTERNATIONAL HUMAN RIGHTS PROTECTION 422 (2009).

³⁸ A study found that 819'921 children in Ivory Coast and more than 997'357 children in Ghana, worked on cocoa-related activities. Payson Centre for International Development and Technology Transfer, *Oversight of Public and Private Initiatives to Eliminate the Worst Forms of Child Labour in the Cocoa Sector in Côte d'Ivoire and Ghana* 1, 7 (Tulane University, 2011) [hereinafter Tulane University], available at <http://www.childlabor-payson.org/Tulane%20Final%20Report.pdf>.

³⁹ International Institute of Tropical Agriculture ('IITA'), *Child Labour in the Cocoa Sector of West Africa: A Synthesis of Findings in Cameroon, Côte d'Ivoire, Ghana, and Nigeria* 16 (2002) [hereinafter IITA], available at http://www.cocoainitiative.org/images/stories/pdf/Documents_and_Reports/IITA_-_2002_-_Child_Labor_in_the_Cocoa_Sector_of_West_Africa.pdf.

⁴⁰ In West Africa's cocoa sector the most documented problems have to do with the spraying of pesticides and fertilisers and the use of inappropriate farming tools such machetes during the harvesting and opening of the cocoa beans. Further problems have to do with children carrying heavy loads and working for long hours. International Programme on the Elimination of Child Labour ('IPEC'), *Safety and Health Fact Sheet, Hazardous Child Labour in Agriculture: Cocoa* (Factsheet, 2004), available at http://www.ilo.org/public/english/standards/ipecc/publ/download/factsheets/fs_cocoa_0304.pdf

⁴¹ IITA, *supra* note 39, at 21-22.

⁴² Estimatedly 29 percent of the child workers surveyed in Ivory Coast, were not free to leave their place of employment. About 12'000 children on plantations in Ivory Coast were estimated to have no family ties in the area, suggesting that they had been trafficked. Many children came from impoverished countries like Burkina Faso, Mali and Togo. *Id.* at 12-15.

by the CRC⁴³ and its Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography⁴⁴, as well as the ILO Worst Forms of Child Labour Convention⁴⁵.

The failure of West Africa's cocoa producing countries to protect their individuals leads to the conclusion that there should be a legally binding framework that allows the observation of human rights in the supply chains of transnational corporations. Furthermore, considering that developing nations and some economists argue that the prevalence of child labour reflects a stage of a nation's economic development,⁴⁶ and that some scholars say that the cocoa producing countries in West Africa cannot be expected to establish labour standards equivalent to those in the developed world.⁴⁷ However, as the law stands today, transnational corporations cannot be held liable for human rights violations.

C. No Corporate Liability for Human Rights Violations

Although international human rights laws and covenants create universal rights held by all, the obligations they create are solely for sovereign states.⁴⁸ However, there is currently a tendency among some sectors of the international community to claim that also transnational

⁴³ Thus, the general prohibition of harmful child labour contained in Article 32 CRC is made more specific in Article 33, which prohibits "the use of children in the illicit production and trafficking of [narcotic drugs and psychotropic] substances", Article 34, which requires states parties to protect children "from all forms of sexual exploitation and sexual abuse", including prostitution and pornography, and Article 35, which obliges states to take measures to prevent "the sale of or traffic in children".

⁴⁴ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography, May 25, 2000, 227 U.N.T.S. 2171, U.N. Doc. A/RES/54/263. Nigeria is however, the only of the mentioned cocoa producing countries in West Africa, which in 2010 also ratified the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography. Ivory Coast accessed in 2011, Cameroon, and Ghana, both signed, in 2001 and 2003 respectively, but never ratified. United Nations Treaty Collection, Chapter IV Human Rights, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography, Status of Ratification, Reservations and Declarations, *available at* <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11-c.en.pdf>.

⁴⁵ ILO Worst Forms of Child Labour Convention, *supra* note 31, at art. 3.

⁴⁶ See SARA DILLON, INTERNATIONAL CHILDREN'S RIGHTS 196 (2010).

⁴⁷ "These standards have been established only recently in the developed world and were definitely not in existence when these nations were at a stage of development comparable to that of developing nations today." *Id.* at 96.

⁴⁸ "The centrality of the state is one of the defining features of international law and the human rights system builds upon this by seeking to bind states through a network of treaty obligations to which, in the vast majority of cases, only states can become parties." PHILIPP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 1461 (2013).

corporations should be subject to human rights obligations.⁴⁹ This because transnational corporations have become important non-state players in the field of human rights.⁵⁰ In addition, as they were able to accumulate vast sums of resources and power that, particularly in developing countries, may occasionally exceed that of the host state.⁵¹ Debate continues as to whether transnational corporations, are beyond the effective control of national governments.⁵²

“Business enterprises move resources, especially capital, rapidly around the globe, and its only with some difficulty and time lag that national governments know what transnational corporations are doing.”⁵³ What is more, transnational corporations, because of their enormous economic power, normally have considerable influence in national political systems,⁵⁴ e.g. by challenging unfavourable domestic policies.

In principle, several national governments would have the authority to effectively control and regulate the policies and activities of transnational corporations – the government of nationality of the parent corporation, the government of its principal headquarters, and the governments in which its activities take place.⁵⁵ In practice, however, governments are sometimes unable to regulate the activities of these corporations. This because, as seen with

⁴⁹ See, e.g., CHRISTIAN TOMUSCHAT, HUMAN RIGHTS 107 (2nd ed. 2008); accord. Michael K. Addo, *Human Rights and Transnational Corporations – an Introduction*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 3, 4 (Michael K. Addo ed., 1999); Jack Donnelly, *Social Construction of International Human Rights*, in HUMAN RIGHTS IN GLOBAL POLITICS 71, 95 (Tim Dunne & Nicholas J. Wheeler eds., 1999); DAVID P. FORSYTHE, HUMAN RIGHTS IN INTERNATIONAL RELATIONS 277 (3rd ed. 2012); Scott Pegg, *An Emerging Market for the New Millennium: Transnational Corporations and Human Rights*, in TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 1, 16 (Jedrzej G. Frynas & Scott Pegg eds., 2003).

⁵⁰ Various factors have contributed to this development. They include inter alia (1) the privatisation of functions previously performed by governments and (2) that the structure of regulation remains state-concerned, while the effects of globalisation have diminished state authority. ALSTON & GOODMAN, *supra* note 48, at 1461.

⁵¹ TOMUSCHAT, *supra* note 49, at 107.

⁵² Some may argue, that transnational corporations are not, in general, beyond the reach of the sovereign state, yet, it is probably difficult for a state to effectively regulate its corporations for a variety of reasons. See FORSYTHE, *supra* note 49, at 278; accord. Mary Midgley, *Towards an Ethic of Global Responsibility*, in HUMAN RIGHTS IN GLOBAL POLITICS 160, 172 (Tim Dunne & Nicholas J. Wheeler eds., 1999).

⁵³ FORSYTHE, *supra* note 49, at 278.

⁵⁴ *Id.*

⁵⁵ LOUIS HENKIN ET. AL., HUMAN RIGHTS 213 (2nd ed. 2009).

the cocoa producing countries in West Africa for example, passing legislation may be not as successful in developing states, as it is in developed states.

Nevertheless, if national laws fail to remove prohibited child labour in West Africa's cocoa producing countries and international human rights law is not binding on corporations, how can the discussed human rights violations in West Africa's cocoa sector be reduced? While the idea that transnational corporations have duties beyond profit making has gained acceptance⁵⁶, it remains hotly contested what this signifies and how these transnational corporations can best be brought into a human rights framework.⁵⁷

III. Other Instruments and Initiatives – An Overview

In the cocoa supply chain, corporations are increasingly coming under public pressure to act ethically and responsibly, thus making the cocoa economy more sustainable⁵⁸. In theory, this would be possible, because currently only a handful of companies dominate the international cocoa trade. Those companies could therefore incorporate environmental, human rights, and social considerations into their business activities, including their contacts with suppliers, offering sustainable chocolate products to the mass market. However, as non-profit human rights groups, along with the media and particularly consumer organisations and movements, make demands for a more sustainable cocoa economy, pressure on public authorities, especially states, increased as well. The result is a plethora of adopted norms and policies on corporate social responsibility that include human rights.

The following sections will document some of the most important instruments and initiatives by addressing the application of internationally recognised labour standards to transnational

⁵⁶ But see FORSYTHE, *supra* note 49, at 287. "The most fundamental *raison d'être* of the transnational corporation is precisely economic self-interest, not to be a human rights actor. At least that has been the historical situation."

⁵⁷ Incorporated into this larger debate are also such technical questions as whether or not parent corporations can be held liable for the actions of their subsidiaries, whether or not corporations as entities can be held responsible for human rights outside the actions of their individual employees, and what kinds of corporations should be held responsible for which kinds of human rights.

⁵⁸ A sustainable cocoa economy is "where each person investing time or money into the supply chain would be able to earn a decent income for themselves and their family, work in good conditions, and in a manner which did not harm the environment". Capelle, *supra* note 6, at 4.

corporations through both international and national legislation. The last section will then provide an overview of the debate regarding the use of voluntary initiatives in place of legally binding state regulation and discuss why the legally non-binding Cocoa Industry Protocol could not meet its expectations.

A. International Instruments

On the international level, efforts to set standards for transnational corporations began in the 1970s. However, some authors argue that the United Nation's efforts “have proven ineffective”⁵⁹ and that “on the level of positive law, little if anything has materialised”⁶⁰. Probably the most important question driving this debate is whether the observation of human rights in the supply chains of corporations can be best advanced through legally binding instruments or voluntary initiatives.⁶¹

In 2003, the U.N. adopted the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.⁶² The Norms were thought to be a first step towards a legally binding instrument⁶³ and specifically stated that “transnational

⁵⁹ See Kemi Mustapha, *Taste of Child Labour Not So Sweet: A Critique of Regulatory Approaches to Combating Child Labour Abuses by the U.S. Chocolate Industry*, 87 WASH. U. L. REV. 1163, 1170 (2009-2010).

⁶⁰ TOMUSCHAT, *supra* note 49, at 107.

⁶¹ For example, arguments as to whether the U.N. Code of Conduct on Transnational Corporations (‘Code of Conduct’) should be legally binding or voluntary, hindered negotiations, with developing nations advocating the latter. Peter Muchlinski, *A Brief History of Business Regulation*, in REGULATING BUSINESS: BEYOND LIBERALISATION 47, 54 (Sol Picciotto & Ruth Mayne eds., 1999). Although a draft was completed in 1983, “developed countries sought to circumvent the process by pursuing a separate initiative through the rich country’s club – the Organisation for Economic Co-operation and Development (‘OECD’)”. ALSTON & GOODMAN, *supra* note 48, at 1467. The OECD has consistently emphasised that compliance with their ‘Guidelines for Multinational Enterprises’ which are mainly recommendations, is voluntary. For the 2011 edition, see <http://www.oecd.org/daf/inv/mne/48004323>. pdf (last visited Sep. 29, 2013). Similarly, the ‘Global Compact’ which then U.N. Secretary General Kofi Annan initiated in 1999, is not a legally binding instrument and its success is debatable. See <http://www.unglobalcompact.org/AboutTheGC/index.html> (last visited Sep. 29, 2013).

⁶² U.N. Econ. & Soc. Council (‘ECOSOC’), Sub-Comm’n on the Promotion & Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter U.N. Norms].

⁶³ U.N. Econ. & Soc. Council (‘ECOSOC’), Sub-Comm’n on the Promotion & Prot. of Human Rights, Working Group on the Working Methods and Activities of Transnational Corporations, *The Realisation of*

corporations and other business enterprises shall respect the rights of children to be protected from economic exploitation”⁶⁴. However, in 2004, the U.N. Commission on Human Rights noted that the draft of the U.N. Norms contained “useful elements and ideas”, but had “no legal standing”.⁶⁵

In 2005, the U.N. Secretary General appointed John Ruggie, who was openly critical⁶⁶ of the U.N. Norms, as a ‘Special Representative of the Secretary-General for Business and Human Rights’⁶⁷. He proposed a framework that was organised around three principles: (1) the state duty to *protect* against human rights abuses by third parties, including businesses; (2) the corporate responsibility to *respect* human rights; and (3) the need for greater access to *remedy* for victims of abuses.⁶⁸ Ruggie submitted his final report in 2011.⁶⁹ It consisted almost entirely of a set of Guiding Principles that sought to prevent and address human rights questions in the context of business activities but without creating new international legally binding obligations. Predictably, responses to the Guiding Principles have been mixed.⁷⁰

Economic, Social and Cultural Rights: The Question of Transnational Corporations, para. 33, U.N. Doc. E/CN.4/Sub.2/2000/12 (Aug. 28, 2000).

⁶⁴ *Id.* at D. 6.

⁶⁵ U.N. Commission on Human Rights, U.N. Doc. E/2004/116 (Apr. 20, 2004), available at http://ap.ohchr.org/documents/E/CHR/decisions/E-CN_4-DEC-2004-116.doc.

⁶⁶ See Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, *Human Rights Impacts Assessments – Resolving Key Methodological Questions*, A/HRC/4/74 (Feb. 5, 2007), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/106/14/PDF/G0710614.pdf?OpenElement>.

⁶⁷ U.N. Commission on Human Rights, *Human Rights Resolution 2005/69: Human Rights and Transnational Corporations and Other Business Enterprises*, E/CN.4/RES/2005/69 (Apr. 20, 2005), available at <http://www.refworld.org/docid/45377c80c.html>.

⁶⁸ John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, ‘Protect, Respect and Remedy: a Framework for Business and Human Rights’, A/HRC/8/5 (Apr. 7, 2008) [hereinafter Ruggie, *Framework*], available at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>.

⁶⁹ John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ at 15, A/HRC/17/31 (Mar. 31, 2011), available at <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>.

⁷⁰ While business interests were generally very favourable and, governments were also, for the most part, satisfied with the outcome, human rights groups were supportive, but also critical. For an extensive discussion see ALSTON & GOODMAN, *supra* note 48, at 1489-1495.

B. National Instruments

Aside from the U.N.'s attempts to set standards for transnational corporations, one of the most controversial issues concerns the extraterritorial obligations of home states when the host states are – as seen in the case of West Africa's cocoa producing countries – unable to require a corporation to respect human rights through their national legislations.⁷¹ There are, however, other approaches to extraterritorial responsibility, such as the proposal for a World Court of Human Rights⁷², as well as the use of the 'Alien Tort Claims Act' as a form of U.S. civil litigation for foreign torts, which deserves to be mentioned briefly due to *Kiobel v. Royal Dutch Petroleum*⁷³, a very recent decision by the U.S. Supreme Court.

Under the Alien Tort Claims Act⁷⁴, foreign nationals could sue in U.S. federal courts for harm suffered outside the United States in breach of customary international law.⁷⁵ Even though the Supreme Court restricted the scope of application of the Act in 2004⁷⁶, it had never heard a case regarding whether federal courts may, under the Act, recognise violations of the law of nations occurring within the territory of a sovereign *other* than the United States. This

⁷¹ See *infra* part IV.

⁷² The proposal for a World Court of Human Rights envisages that transnational corporations “might be invited and encouraged to accept the jurisdiction” of the court. See generally ALSTON & GOODMAN, *supra* note 48, at 759.

⁷³ See *Kiobel v. Royal Dutch Petroleum Co.*, 133 U.S. 1659 (2013).

⁷⁴ 28 U.S.C. § 1350 stipulates: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States” [hereinafter *Act*].

⁷⁵ However, the Act had only been utilised two times throughout its history until 1980, when it was, for the first time applied to a human rights case. Gary Clyde Hufbauer & Nicholas K. Mitrookostas, *International Implications of the Alien Tort Statute*, 16 ST. THOMAS L. REV. 607, 609 (2004). In *Filartiga v. Peña-Irala*, the U.S. Court of Appeals for the Second Circuit found that torture constituted a violation of customary international law, allowing Filartiga to sue against a Paraguayan official for compensatory damages for torturing Filartiga's son in Paraguay. *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir.1980).

⁷⁶ The Supreme Court decided that the provision should be read in a narrow sense, providing jurisdiction only in traditional law of nations cases, i.e. for alleged violations of international law norms that are “specific, universal, and obligatory”. See *Sosa v. Alvarez-Machain et al.*, 542 U.S. 692 (2004). When the Alien Tort Claims Act was passed in 1789, “three principal offences against the law of nations” had been identified: violation of safe conduct, infringement of the rights of ambassadors, and piracy. See *id.* at 723, 724.

changed with *Kiobel*⁷⁷. In its decision issued in April 2013, the Supreme Court decided, that the Act does not create jurisdiction for a claim regarding conduct occurring in the territory of a foreign sovereign.⁷⁸ The Court held that “there is no indication that the Alien Tort Claims act was passed to make the United States an uniquely hospitable forum for the enforcement of international norms”.⁷⁹

In this matter, nationals residing in the United States had filed suits in federal courts under the Alien Tort Claims Act, alleging that certain Dutch, British, and Nigerian corporations aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria. The question of whether corporations, as opposed to natural persons, could be held liable under the Act had, however, caused a circuit split.⁸⁰ Until then, the Act had increasingly been used as an international tool for holding the perpetrators of the worst cases of human rights violations accountable when, for multiple reasons, legal mechanisms in the foreign nationals’ home countries were not utilised.⁸¹ Inter alia, cases had been filed against *Chevron*⁸² for alleged complicity in human rights violations in Nigeria, *Coca-Cola*⁸³ over allegations of harassment, torture and murder of trade union leaders in Colombia, *Del Monte*⁸⁴ for torture, unlawful detention, and violation of fundamental labour rights in Guatemala, and

⁷⁷ *Kiobel v. Royal Dutch Petroleum Co.*, *supra* note 73.

⁷⁸ It held that “the presumption against extraterritoriality applies to claims under the Alien Tort Claims Act, and nothing in the statute rebuts that presumption”. *Kiobel v. Royal Dutch Petroleum Co.*, *supra* note 73. I.e. “when a statute gives no clear indication of an extraterritorial application, it has none”. *Morrison v. National Australia Bank Ltd.*, 561 U.S. __ (2010) (slip op., at 6). Citing other cases, the Supreme Court said, “the presumption serves to protect against unintended clashes between our laws and those of other nations which could result in international discord”. See *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991).

⁷⁹ *Kiobel v. Royal Dutch Petroleum Co.*, *supra* note 73.

⁸⁰ In 2010 the U.S. Second Circuit Court of Appeals held in *Kiobel v. Royal Dutch Petroleum Co.* that “customary international law has steadfastly rejected the notion of corporate liability for international crimes” and thus that “insofar as plaintiffs bring claims under the Alien Tort Claims Act against corporations, plaintiffs fail to allege violations of the law of nations, and plaintiffs’ claims fall outside the limited jurisdiction provided by the Alien Tort Claims Act”. 621 F.3d 111 (2d Cir. 2010). However, in 2011, the U.S. Seventh Circuit Court of Appeals see *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1021 (7th Cir. 2011), the U.S. Ninth Circuit Court of Appeals see *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011), and the U.S. D.C. Circuit Court of Appeals see *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011) all ruled that corporate liability is possible under the statute.

⁸¹ An important feature of the Act contributing to its increased use was the fact that it does not have an exhaustion of domestic remedies requirement, meaning it could and did serve as the first point of recourse for foreign nationals anywhere in the world seeking legal redress. See Haley St. Dennis, *The Alien Tort Claims Act and Trans-Boundary Corporate Environmental Abuse: A Case Study of the Gulf Oil Spill*, 6 Yale J. Int’l Aff. 90, 91 (2011).

⁸² See *Bowoto v. Chevron*, 621 F.3d 1116 (9th Cir. 2010).

⁸³ See *Sinaltrainal v. Coca-Cola*, 578 F.3d 1252 (11th Cir. 2009).

⁸⁴ See *Aldana v. Del Monte Fresh Produce N.A., Inc.* 578 F.3d 1283 (11th Cir. 2009).

*Unocal*⁸⁵ over allegations of forced labour in the construction of the Yadana gas pipeline in Myanmar.

However, in *Kiobel* the Supreme Court, although it did not explicitly address the question whether corporations could be held liable for human rights violations under the Alien Tort Claims Act, held that “mere corporate presence” of a corporation in the U.S. is not sufficient to establish jurisdiction, and plaintiffs seeking relief for violations of the law of nations occurring outside the United States must allege facts that “touch and concern” the United States with “sufficient force” to displace the presumption against extraterritorial application.⁸⁶ “If Congress were to determine otherwise, a statute more specific than the Alien Tort Claims Act would be required.”⁸⁷

As it will undoubtedly limit liability in cases that lack a sufficient nexus with the United States, *Kiobel* has been criticised by human rights proponents.⁸⁸ The question as to whether similar suits could be filed in Europe remains open.⁸⁹

C. Voluntary Initiatives

As seen in the previous sections, past attempts to impose international human rights obligations directly on corporations were not successful. Similarly, other approaches to extraterritorial responsibility, have, at least since *Kiobel*, been limited. Hence, the mentioned debate whether the observation of human rights in the supply chains of corporations could be better advanced through voluntary initiatives rather than legally binding instruments is more relevant than ever. However, the following sections illustrate that although voluntary

⁸⁵ See *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002).

⁸⁶ *Kiobel v. Royal Dutch Petroleum Co.*, *supra* note 73 referring to *Morrison v. National Australia Bank Ltd.*, *supra* note 78.

⁸⁷ *Id.*

⁸⁸ See Katie Shay, *The Wrong Decision for Human Rights*, THE HUFFINGTON POST, April 18, 2013, http://www.huffingtonpost.com/katie-shay/kiobel-vs-shell_b_3113133.html (last visited Sep. 29, 2013).

⁸⁹ See generally KÄLIN & KÜNZLI, *supra* note 37, at 84.

initiatives may be useful to a certain extent, most of them provide no penalties for non-compliance. This is also one of the reasons why, more than a decade after the signature of the Cocoa Industry Protocol, the situation in West Africa's cocoa sector has not satisfactorily improved.

1. Corporate Codes of Conduct

As seen, non-profit human rights groups, along with the media and particularly consumer organisations and movements played an important role in bringing human rights violations in the cocoa supply chain to the public's attention.⁹⁰ In turn, public pressure to act ethically and responsibly led many corporations to adopt voluntary 'codes of conduct'⁹¹ to police their own activities.⁹² However, because the corporation sets out its own code and means of monitoring it, the corporation can be arbitrary and inconsistent in its formulation and enforcement of its own code.⁹³

Thus, it is a legitimate question if certification schemes⁹⁴ may be an alternative to current strategies to combat the human rights problems in West Africa's cocoa sector. "After all, one might add, if it is common practice to certify that tuna are not caught with nets that endanger

⁹⁰ The unwillingness or inability of governments to develop binding international rules setting standards for transnational organisations also enhanced the role of NGO's in calling attention to commercial abuse or injustice. Ruth Mayne, *Regulating TNCs: The Role of Voluntary and Governmental Approaches*, in *REGULATING INTERNATIONAL BUSINESS: BEYOND LIBERALISATION* 235, 240 (Sol Picciotto & Ruth Mayne eds., 1999).

⁹¹ Corporate codes of conduct are public statements made by a corporation that they will respect national labour legislation and international labour standards with respect to both their own activities and the activities of their suppliers. Neil Kearney, *Corporate Codes of Conduct: The Privatised Application of Labour Standards*, in *REGULATING INTERNATIONAL BUSINESS: BEYOND LIBERALISATION* 205, 208 (Sol Picciotto & Ruth Mayne eds., 1999). Corporate codes of conduct are "written statements of principles a corporation will follow regarding working conditions". *Id.* at 209. One of the earliest examples were the Sullivan Principles for multinational corporations conducting business in apartheid South Africa. See HENKIN ET. AL., *supra* note 55, at 214.

⁹² See DILLON, *supra* note 46, at 257. There have been several modern attempts to regulate labour through codes of conduct. These include inter alia the following: the Sullivan Principles for South Africa, the Rugmark Foundation for rug making industry in South Asia, and the Sialkot initiative in the soccer ball industry in Pakistan. In addition to that, e.g. clothing retailers such as the Gap, Levi Strauss and Nike established their own codes of conduct. See generally *id.* at 262-265.

⁹³ *Id.* at 266. Further, some authors argue that reliance on consumer power rather than the policing power of the state to enforce compliance means that the corporation can manipulate the codes for purposes of public relations. See *id.*, at 265-66.

⁹⁴ Certification schemes are programs established by an organization or group requiring adherence to a set of principles by participating transnational corporations. See generally, Amanda Berlan, *Making or Marketing a Difference? An Anthropological Examination of the Marketing of Fair Trade Cocoa from Ghana*, in *HIDDEN HANDS IN THE MARKET: ETHNOGRAPHIES OF FAIR TRADE, ETHICAL CONSUMPTION, AND CORPORATE SOCIAL RESPONSIBILITY* 171-194 (Geert de Neve et al. eds., 2008).

dolphins, why not certify that consumer products are not made with processes that violate human rights?”⁹⁵ However, with the Cocoa Industry Protocol, the chocolate industry has only partly developed and not enforced a reliable and credible certification system for imported cocoa beans and cocoa products.

2. The Cocoa Industry Protocol and its Failure

As media reports about the human rights issues in West Africa’s cocoa sector surfaced, the public threatened with boycotts and called for other punitive measures.⁹⁶ In an attempt to avoid government regulation and intense media scrutiny, the companies in the global cocoa and chocolate supply chain met with different industry groups, including NGO’s, labour organisations, government officials, and politicians, to propose solutions to the human rights situation in West Africa’s cocoa sector, especially to the child labour problem.⁹⁷ In 2001 they reached an agreement which is commonly referred to as the ‘Cocoa Industry Protocol’ (*sometimes also referred to as the ‘Harkin-Engel Protocol’*)⁹⁸: a voluntary, non-binding, and non-legislative document that outlines six steps for the chocolate industry to take in order to eliminate the worst forms of child labour in its supply chain in compliance with ILO Convention No. 182.⁹⁹

While the president of the American Chocolate Manufacturers Association (‘CMA’) and the president of the World Cocoa Foundation were the only signatories of the Protocol, eight chief executives of major chocolate brands and cocoa processors expressed their ‘personal support’ – including those of Swiss corporations Nestlé and Barry Callebaut. However,

⁹⁵ FORSYTHE, *supra* note 49, at 289.

⁹⁶ Mustapha, *supra* note 59, at 1167; See also generally International Labour Organisation [ILO], *The International Cocoa Initiative* (Fact sheet, 2010) [hereinafter International Labour Organization, Cocoa Initiative] available at <http://www.ilo.org/ipecinfo/product/viewProduct.do?productId=14357>.

⁹⁷ *Id.*

⁹⁸ Cocoa Industry Protocol, *supra* note 13.

⁹⁹ It set inter alia a timeline for the creation of a foundation to “oversee and sustain efforts to eliminate the worst forms of child labour” by 2002 and foresaw the establishment of industry-wide standards consistent with applicable federal law by July 2005, that certify, “that cocoa beans and their derivate products have been grown and/or processed without any of the worst forms of child labour”. *Id.* at (5)-(6).

despite these statements, the chocolate industry failed to accomplish the sixth step of the Protocol by not establishing industry-wide certification standards for cocoa beans by July 1, 2005.¹⁰⁰ Swiss NGO Berne Declaration points out that, more than a decade after the signature of the Protocol, cocoa is still produced under conditions that do not meet “Switzerland's commitment to human rights and its humanitarian tradition”.¹⁰¹ “Little if nothing has happened.”¹⁰²

Firstly, the cocoa raw material supply chain is still not transparent to ensure that Swiss chocolate is not tainted by child labour.¹⁰³ “Except for two, all Swiss chocolate companies could not or would not divulge details on how they buy their cocoa raw materials and pinpoint the conditions under which the beans were produced.”¹⁰⁴ Secondly, Berne Declaration critically explains that although the Swiss based cocoa processors and chocolate producers have initiated few pilot projects¹⁰⁵, they still do not do enough to ensure that the cocoa they buy comes from ethical sources.¹⁰⁶

3. Other Certification Schemes, e.g. Fair Trade Labelling

The chocolate industry's failure to establish industry-wide certification standards for cocoa beans, even though the deadline has been renegotiated and extended several times, raised questions about the effectiveness of such voluntary, i.e. legally non-binding initiatives. Nevertheless, it is illustrated that for example fair trade labelling may be an alternative to current strategies to eliminate child labour in cocoa growing.¹⁰⁷

¹⁰⁰ See generally Mustapha, *supra* note 59, at 1183. The industry then renegotiated an extended deadline for July 1, 2008 to certify only 50 percent of farms ‘child labour free’, rather than 100 percent of farms. This deadline was after that, again, extended until the end of 2010. See further Tulane University, *supra* note 38, at 8. “To date, industry has only partly developed and not enforced industry-wide standards upholding ILO Convention No. 182 in the cocoa sectors of Ivory Coast and Ghana.” In addition to that, “industry’s and other funding of the International Cocoa Initiative ICI and other initiatives has not been sufficient in light of its commitment to eliminate the worst forms of child labour in the cocoa sectors of Ivory Coast and Ghana as per Article 1 of the protocol”. *Id.*

¹⁰¹ Erklärung von Bern von Bern, *Menschenrechte im Kakaoanbau*, *supra* note 15, at 1.

¹⁰² *Id.* at 4.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 5.

¹⁰⁵ See *infra* Part IV.B.

¹⁰⁶ Erklärung von Bern von Bern, *Menschenrechte im Kakaoanbau*, *supra* note 15, at 3.

¹⁰⁷ See, e.g., Shima Baradaran & Stephanie Barclay, *Fair Trade and Child Labor*, 43 COLUM. HUM. RTS. L. REV. 1, 1 (2011-2012).

Even though not legally binding either, fair trade labelling may “effectively punish” noncomplying fair trade companies, as it relies on market incentives and private monitoring.¹⁰⁸ Being voluntary and private, fair trade labelling, according to them, avoids “the political problems with international monitoring which rarely end in enforcement or penalties”.¹⁰⁹ In addition, unlike prosecutions that “focus on a small number of the resulting problems of child labour, fair trade focuses on improving incomes, working conditions, health, and education of a large number of workers”.¹¹⁰

That certification can be an effective instrument in supplementing other efforts to achieve long-term sustainability in the cocoa sector is widely recognised.¹¹¹ However, “despite massive efforts to increase the understanding of the issues involved in certification, fundamental differences still exist between farmers and certifiers”¹¹². There is also great uncertainty as to whether certification provides a clear benefit to cocoa farmers.¹¹³ Hence, the use of certification schemes or fair trade labelling to combat child labour has also been criticised.¹¹⁴ In June 2013, ICCO organised an international workshop for stakeholders

¹⁰⁸ Independent monitoring bodies regularly inspect certified companies regarding compliance with ILO labour standards. *See further id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *See generally* International Cocoa Organisation (‘ICCO’), *International Certification Workshop Announcement* [hereinafter International Cocoa Organisation, *Workshop Announcement*], available at <http://www.icco.org/about-us/icco-news/220-icco-announces-international-workshop-on-cocoa-certification-in-june.html> (last visited Sept. 29, 2013).

¹¹² *Id.*

¹¹³ In 2012, the International Cocoa Organisation (‘ICCO’) commissioned a study on the costs, advantages and disadvantages of cocoa certification. It demonstrated that after a few years, co-operatives and their farmers may benefit financially from certification, with most of the increased farmer revenue originating from higher yields. However, there are certain disadvantages, including the inability of smallholder farmers to afford the high costs of certification in the first years of the scheme and the difficulties faced by some farmers in forming groups that help in raising cash for initial investment and in establishing and maintaining the mandatory internal control systems. *See* KPMG, *Cocoa Certification: Study on the Costs, Advantages and Disadvantages of Cocoa Certification commissioned by the International Cocoa Organisation (ICCO)* 1, 6 (2012), available at http://www.icco.org/about-us/international-cocoa-agreements/cat_view/30-related-documents/37-fair-trade-organic-cocoa.html (last visited Sept. 29, 2013).

¹¹⁴ For criticisms of Fair Trade and responses, *see* Baradaran & Barclay, *supra* note 107, at 47-50; *accord.* Berlan, *supra* note 94.

involved in cocoa certification, with the objective to “adopt a consensual approach”, and “find ways to improve upon existing certification schemes”.¹¹⁵

IV. Extraterritoriality: National Mechanisms in Switzerland

As discussed, there is no legally binding U.N. framework that ensures that human rights are observed in the supply chains of corporations. In addition, other solutions such as concepts of universal jurisdiction inspired by the use of the ‘Alien Tort Claims Act’ or voluntary initiatives such as the Cocoa Industry Protocol are not very successful instruments to eliminate human rights abuses in West Africa’s cocoa sector. Progress is slow and limited. Similarly, national laws in West Africa have failed to remove child labour in the countries concerned. Furthermore,, questions about the liability of transnational corporations under international law, the use of voluntary initiatives in place of legally binding state regulation, and ways to improve existing certification schemes have remained unanswered.

However, there is one last possible remedy that derives from the obligation of home states and will be discussed in the following part. As mentioned before, in principle, several national governments would have the authority to effectively control and regulate the policies and activities of transnational corporations – the government of nationality of the parent corporation, the government of its principal headquarters, and the governments in which its activities take place. Yet, the extraterritorial obligations of home states, when the host states are unwilling or unable to require a corporation to respect human rights, is a very controversial issue.

A. Switzerland's Home State Duty to Protect

Generally, treaties concerning the protection of human and labour rights impose a wide range of obligations on states to respect and/or ensure respect for (depending on the formulation of each treaty), including to prevent, prohibit, and bring to an end to third party abuse of rights.¹¹⁶

¹¹⁵ International Cocoa Organisation, *Workshop Announcement*, *supra* note 111.

¹¹⁶ See generally KÄLIN & KÜNZLI, *supra* note 37, at 96-120.

In addition to that, some provisions in certain treaties have been considered as imposing obligations of *extraterritorial* reach.¹¹⁷ The CRC for example, makes specific reference to the importance of international cooperation, requiring state parties to undertake measures “to the maximum extent of their available resources and where needed, within the framework of international co-operation”.¹¹⁸

The Swiss Constitution provides that “the Confederation and the Cantons shall respect international law”¹¹⁹, and that the country’s foreign policy contributes inter alia to “the promotion of the protection of human rights”¹²⁰. However, even though Switzerland ratified the CRC¹²¹, its Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography¹²², as well as the two principal ILO conventions dealing with child labour¹²³, it is impossible to bring claims against Switzerland under any U.N. treaty or ILO supervisory body for violating its home state *duty to protect* against children’s rights violations in West Africa’s cocoa sector. This because the obligations these conventions create are solely for sovereign states and not transnational corporations violating human rights in their supply chains.

In principle however, Switzerland would [as the government of the nationality of the parent corporation or the government of its principal headquarters] have the authority to effectively

¹¹⁷See generally, e.g., Judith Bueno de Mesquita, Paul Hunt & Rajat Khosla, *The Human Rights Responsibility of International Assistance and Cooperation in Health*, in UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS 104, 110 (Mark Gibney & Sigrun Skogly eds., 2010).

¹¹⁸CRC, *supra* note 22, at art. 4.

¹¹⁹Bundesverfassung der Schweizerischen Eidgenossenschaft [BV], [Constitution] Apr. 18, 1999, SR 101, Art. 5 para. 4 (Switz.). English version available at <http://www.admin.ch/ch/e/rs/1/101.en.pdf>.

¹²⁰*Id.* at Art. 54 para. 2.

¹²¹Switzerland ratified the CRC in 1997. See United Nations Treaty Collection, Chapter IV Human Rights, Convention on the Rights of the Child, Status of Ratification, Reservations and Declarations, *supra* note 24.

¹²²Switzerland ratified the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography in 2006, see United Nations Treaty Collection, Chapter IV Human Rights, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography, Status of Ratification, Reservations and Declarations, *supra* note 44.

¹²³Switzerland ratified the ILO Minimum Age Convention in 1999, see International Labour Organisation, List of Ratifications of International Labour Conventions, Minimum Age Convention, *supra* note 32; and the ILO Worst Forms of Child Labour Convention in 2000, see International Labour Organisation, List of Ratifications of International Labour Conventions, Worst Forms of Child Labour Convention, *id.*

control and regulate the policies and activities of ‘its’ transnational corporations. Yet, this is not the approach that Switzerland has taken so far.¹²⁴

One of the problems is that international law has not historically encouraged states to try to protect extraterritorial jurisdiction in economic matters.¹²⁵ Moreover, if the state did so, it risked to restrict ‘its’ corporations in global competition so that the state received fewer economic benefits.¹²⁶ In fact, Switzerland “prefers voluntary standards which are supported and upheld by businesses”, commerce minister Johann Schneider-Ammann told a news conference following a cabinet meeting in March 2013.¹²⁷ The cabinet refused to legislate on the commodity sector, despite a legislative proposal aimed at reinforcing existing standards and supporting international efforts to increase transparency.¹²⁸ He said, “it is important to ensure that the framework in Switzerland is not less attractive than elsewhere”.¹²⁹ Switzerland houses 18 industrial chocolate companies, two of them being the largest chocolate manufacturers in the world.¹³⁰

This statement fuels the concerns about transnational corporations having, due to their enormous economic power, considerable influence in national political systems, and thus being beyond the effective control of national governments.

¹²⁴ A study by the International Commission of Jurists (‘ICJ’) on Switzerland’s implementation of its duty to protect against corporate human rights abuse assessed that “Switzerland does not have a unified, integrated and public policy on human rights, business and corporate social responsibility”. International Commission of Jurists (ICJ), *Switzerland’s Home State Duty to Protect against Corporate Abuse, Analysis of Legislation and needed Reforms in Switzerland to Strengthen Corporate Accountability regarding Human Rights and Environmental Abuses* 15 (2010) [hereinafter ICJ, *Study*], English version available at http://www.amnesty.ch/de/themen/wirtschaft-menschenrechte/state_duty_to_protect_accord. Hütz-Adams & Fautain, *supra* note 5, at 16. The study took into account John Ruggie’s Protect, Respect and Remedy Framework and was mainly based on its first pillar, namely the state duty to *protect* against human rights abuses by third parties, including businesses. See Ruggie, *Framework*, *supra* note 68. Switzerland has politically and financially supported John Ruggie’s process within the U.N. Human Rights Council and has joined the consensus in favour of the adoption of Ruggie’s reports. See generally ICJ, *Study*, at 9, 14-15.

¹²⁵ FORSYTHE, *supra* note 49, at 278.

¹²⁶ *Id.*

¹²⁷ Urs Geiser, *Cabinet refuses to Legislate on Commodity Sector*, International Service of the Swiss Broadcasting Corporation, Mar. 27, 2013, English version available at http://www.swissinfo.ch/eng/swiss_news/Cabinet_refuses_to_legislate_on_commodity_sector.html?cid=35337284 (last visited Dec. 10, 2013).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Switzerland is inter alia home to Barry Callebaut and Nestlé, the world’s biggest chocolate manufacturers, as well as premium chocolate producer Lindt & Sprüngli. For a comprehensive list of member companies of Chocosuisse, the Association of Swiss Chocolate Manufacturers see Association of Swiss Chocolate Manufacturers (Chocosuisse), Member List, http://www.chocosuisse.ch/web/chocosuisse/en/organization/member_list.html (last visited Dec. 10, 2013).

Swiss corporate law (*i.e.* the ‘Swiss Code of Obligations’)¹³¹ does not specifically impose an obligation on directors to consider the company’s (human rights-) impacts on the individuals and communities affected by its operations within or outside Switzerland.¹³² Nor does the Swiss Code of Obligations require directors to ensure that subsidiaries, suppliers or other business partners take into account human rights considerations.¹³³ The possibility that a company could be held liable for such impacts is, in principle, limited, as its suppliers are different legal entities.¹³⁴ However, Swiss courts have developed some exceptions to this principle under specific circumstances¹³⁵: for example, if the supplier has no decisional power of its own and the influence of another company is decisive, this other company may be held liable for the activities of the supplier.¹³⁶ Yet, a simple influence on the decisions of the supplier is not sufficient; the board of the dominant company must have acted as if it were itself the board of the supplier.¹³⁷

That said, in the cocoa industry, such an influence on the decisions of the supplier may be difficult to prove, as generally the brands buy industrial chocolate blocks that they process into final products, rather than buying the cocoa from the farmer.¹³⁸ There are factories in Switzerland that purchase considerable amounts of raw cocoa beans, but even premium

¹³¹ Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht) [OR] [The Code of Obligations] Mar. 30, 1911, SR 220 (Switz.), English version *available at* <http://www.admin.ch/ch/e/rs/2/220.en.pdf>.

¹³² ICJ, *Study*, *supra* note 124, at 20. Directors may however decide to consider the impacts on human rights of the company’s activity, by applying the ‘Swiss Code of Best Practice’, a code of best practice adopted by a group of experts tasked by the Swiss Federation of Enterprises to provide a tool for corporate-self regulation, *see* Economiesuisse, *Swiss Code of Best Practice for Corporate Governance* (2008), English version *available at* http://www.economiesuisse.ch/de/PDF%20Download%20Files/poispap_swiss-code_corp-govern_20080221_en.pdf; or the OECD Guidelines for Multinational Enterprises, *see supra* note 61.

¹³³ ICJ, *Study*, *supra* note 124, at 21.

¹³⁴ *Id.* at 21, 27.

¹³⁵ *See generally id.* at 28.

¹³⁶ *See generally* Bundesgericht [BGer] [Federal Court], 128 Entscheidungen des Schweizerischen Bundesgerichts [BGE] II 122 (Switz.).

¹³⁷ *See* ICJ, *Study*, *supra* note 124, at 28.

¹³⁸ *See, e.g.,* Andrea Franc, *From Fair Cocoa to Unfair Chocolate: The Swiss Cocoa Trade and Chocolate Industry in the 20th Century* 1, 8 (University of Basel, Working Paper, 2012), *available at* <http://ebha-bhsj-paris.sciencesconf.org/3951>.

chocolate producer Lindt & Sprüngli buys cocoa butter from intermediaries in addition to the beans.¹³⁹ Thus, the possibility that a Swiss chocolate manufacturer could be held liable for human rights violations in its supply chain is unlikely under Swiss law. Furthermore, as noted earlier, the small-scale farmers in West Africa are at the start of a complex supply chain that makes it extremely difficult to pinpoint the conditions under which the beans were produced.

In Switzerland, there are no specific legal provisions that require companies to disclose information about their operations outside the country or of its subsidiaries or business partners.¹⁴⁰ However, companies may, on a voluntary basis, follow the OECD Guidelines¹⁴¹ recommendation or any other corporate code, to provide information on business conduct including information on the social, ethical, and environmental policies of the enterprise. It could be argued that such duties are part of the social responsibility of the enterprise, more so, given the fact that Switzerland does not have a unified, integrated and public policy on corporate social responsibility.¹⁴²

B. Responsibilities of the Swiss-based Chocolate Manufacturers

That social responsibility is born by corporations, is also emphasised in John Ruggie's Protect, Respect and Remedy Framework.¹⁴³ This responsibility extends to corporations' supply chains, as "companies should consider whether they might contribute to [human rights] abuse through the relationships connected to their activities, such as with business partners, suppliers, state agencies, and other non-state actors".¹⁴⁴

¹³⁹

Id.

¹⁴⁰

See generally ICJ, *Study*, *supra* note 124, at 32.

¹⁴¹

See OECD Guidelines for Multinational Enterprises, *supra* note 61, at Art. 3

¹⁴²

ICJ, *Study*, *supra* note 124, at 15.

¹⁴³

Namely in its second pillar, the corporate responsibility to *respect* human rights. Ruggie, *Framework*, *supra* note 68.

¹⁴⁴

Id. at 57. Additionally, society now expects corporations to behave responsibly with regard to a wide range of stakeholders including shareholders, consumers, workers, persons living in the vicinity of its operations, and even the wider community and the environment. Jan Wouters & Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 NW. J. INT'L HUM. RTS. 262, 264 (2008).

Yet, according to Chocosuisse, a “socio-ethically fair trading system is a major concern”.¹⁴⁵ “The Swiss chocolate industry has long acknowledged its co-responsibility in the campaign against any related social injustice [...], and taken a very close interest in the social aspects of cocoa farming in West Africa.”¹⁴⁶ In November 2007, representatives of the Chocosuisse went on a fact-finding trip to Ghana, after which they launched a pilot project with the aim to find ethically produced cocoa in West Africa.¹⁴⁷ Then, in 2009, they carried out two study tours in Ivory Coast with the aim of “taking a close look at cocoa bean production [...] and pinpointing reliable sources of ethically produced cocoa”.¹⁴⁸ Based on these tours, various Swiss-based chocolate manufacturers were able to establish business contracts with reliable suppliers, Chocosuisse states.¹⁴⁹ The majority of Swiss chocolate manufacturers have for some years been committed to projects in both West Africa and South America.¹⁵⁰ They support training programs for cocoa bean farmers, the creation of infrastructure in terms of schools and basic medical care, as well as producer cooperatives that guarantee that the children of the cocoa farmers attend school.¹⁵¹

However, according to Berne Declaration, Chocosuisse incentive to participate in voluntary initiatives is because of consumer pressure.¹⁵² Flurina Doppler of Berne Declaration recently told the media “it is dishonest for companies to market their corporate responsibility credentials to consumers while failing to invest enough in the abolition of child slave labour”.¹⁵³ According to Berne Declaration, the chocolate industry’s main interest is to secure the cocoa supply to increase its earnings and companies are therefore often not willing to

¹⁴⁵ Association of Swiss Chocolate Manufacturers, *Ethical Aspects*, *supra* note 1.

¹⁴⁶ *Id.*

¹⁴⁷ Association of Swiss Chocolate Manufacturers, *Ethical Aspects*, *supra* note 1.

¹⁴⁸ Association of Swiss Chocolate Manufacturers, *Cocoa Bean Production*, *supra* note 2.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Erklärung von Bern, *Menschenrechte im Kakaoanbau*, *supra* note 15, at 4.

¹⁵³ Matthew Allen, *Big Business Pushes for Higher Cocoa Yields*, International Service of the Swiss Broadcasting Corporation, Jan. 29, 2012, English version available at http://www.swissinfo.ch/eng/business/Big_business_pushes_for_higher_cocoa_yields.html?cid=31992152 (last visited Sep. 29, 2013).

invest in voluntary measures that do not directly result in such an increase.¹⁵⁴ “They are far more interested in ensuring their supply of cocoa than improving social conditions.”¹⁵⁵ According to Berne Declaration, the only way of truly improving the livelihoods of farmers is to better regulate the global trade in the raw materials of food and beverages.¹⁵⁶

It is true that the economic ‘laws’ of competition, of supply and demand, tend to produce major human rights violations when markets are unregulated for social reasons.¹⁵⁷ “Economically there is the bottom line: companies must make a profit to stay in business. If the competition uses cheap labour, then it is difficult if not impossible for a company to use unionised, well-paid labour.”¹⁵⁸ Additionally, the concern is that corporations will take advantage of lenient regulations in foreign countries and commit violations of international human rights and labour standards in pursuit of profit making.¹⁵⁹ It follows that, if left unregulated, many transnational corporations will opt for short-term profits at the expense of human dignity for many persons affected directly and indirectly by their practices.¹⁶⁰

However, as long as the Swiss cabinet refuses to legislate on the commodity sector, there are other possible steps towards a sustainable cocoa economy to consider.

C. Possible Steps towards a Sustainable Cocoa Economy

Even though recent developments in the cocoa and chocolate sector show the shortcomings of voluntary measures, they may be useful to a certain extent. “While [...] self-imposed compliance may not be the most efficient manner of eliminating exploitative child labour, it

¹⁵⁴ Erklärung von Bern, *Menschenrechte im Kakaoanbau*, *supra* note 15, at 4.

¹⁵⁵ Allen, *supra* note 153.

¹⁵⁶ *Id.*

¹⁵⁷ FORSYTHE, *supra* note 49, at 288.

¹⁵⁸ *Id.* at 287.

¹⁵⁹ “Companies will be tempted to relocate to countries where social protection and the cost of labour are lower, and regulations are thought to be more ‘flexible’. This leads to downward pressures on wage costs and labour standards in other countries.” Bob Hepple, *Labour Regulation in Internationalised Markets*, in *REGULATING INTERNATIONAL BUSINESS: BEYOND LIBERALISATION* 183, 186 (Sol Picciotto & Ruth Mayne eds., 1999).

¹⁶⁰ FORSYTHE, *supra* note 49, at 292.

provides an opportunity to foster global consensus and cooperation among developed and developing countries until an international labour regimen is forthcoming.”¹⁶¹

However, the chocolate companies can only take measures if they know from what suppliers the cocoa they buy comes from, the Berne Declaration says.¹⁶² Subsequently, a transparent supply chain and the resulting traceability of the cocoa raw materials would be important prerequisites to improve the situation in West Africa.¹⁶³ Yet, as mentioned before, the cocoa supply chain is complex: small-scale farmers pass the beans to local middlemen, who pass them to local exporters and then international traders, who eventually sell them to the major international cocoa brands. Thus, chocolate companies would have to avoid intermediaries and establish direct links with cocoa producers if they wanted to know where the cocoa they buy comes from.

According to Berne Declaration’s recently conducted survey, however, over a third of Switzerland’s industrial chocolate makers could not or would not divulge details on how they buy cocoa beans.¹⁶⁴ One of the only two Swiss-based chocolate manufacturers that Berne Declaration classified as being ‘advanced’ concerning social responsibility is Chocolats Halba.¹⁶⁵ Halba, which produces mainly for ‘Coop’ chain of stores, started analysing environmental practices and potential for child labour abuse in cocoa-producing countries a few years ago.¹⁶⁶ However, the company’s head of project management, Christoph Inauen, stated in an interview that “after a while we realised the way we were purchasing was not really appropriate”.¹⁶⁷ “We decided to do a new strategy and go directly to the source, to work

¹⁶¹ DILLON, *supra* note 46, at 266.

¹⁶² Erklärung von Bern, *Menschenrechte im Kakaoanbau*, *supra* note 15, at 5.

¹⁶³ *Id.* at 4.

¹⁶⁴ *Id.* at 5.

¹⁶⁵ *Id.* at 4-5.

¹⁶⁶ Tim Neville, *Switzerland: Chocolate's Bitter Taste*, International Service of the Swiss Broadcasting Corporation, Mar. 13, 2009, English version available at <http://www.isn.ethz.ch/Digital-Library/Articles/Detail/?lng=en&id=97647> (last visited Sep. 29, 2013).

¹⁶⁷ *Id.*

directly with them so we can be certain there is no child labour in the production.”¹⁶⁸ In addition to that, Chocolats Halba is phasing out purchases from Ivory Coast altogether since, as discussed before, the market there – torn by war and political instability – makes transparent purchases difficult.¹⁶⁹ Instead, the company is focusing on Ghana and Central America, where the company guarantees to buy beans for prices that exceed production costs.¹⁷⁰ They also provide help with diversifying crops and creating sustainable farms.¹⁷¹ “This can be a farmer’s personal way out of poverty”, Inauen said.¹⁷²

Inauen’s statement associates with an argument put forth by developing nations: the lack of resources to address the problem of child labour.¹⁷³ Resources have to be funnelled into alternatives to work, such as schooling and vocational training, to make the shift from work a lucrative one for children and their families.¹⁷⁴ Accordingly, legal scholars stress that proposed solutions for a sustainable cocoa economy have to take into consideration the root causes of child labour – namely the poverty of the small-scale farmers in West Africa – if they aim to achieve more than a marginal success.¹⁷⁵ Also, Berne Declaration says that voluntary initiatives are unlikely to be successful in the long term, if they are exclusively engaged in the reduction of child labour and leave other problem areas unattended.¹⁷⁶ Thus, to act ethically and responsibly and contribute to a more sustainable cocoa economy, Swiss chocolate companies should focus on investing in local infrastructure, health, and education.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* Over the past years, the Swiss share of cocoa beans from Ivory Coast has fallen constantly: In 2008, Switzerland imported only 5 percent of its total cocoa bean requirements from Ivory Coast, the subsequent year, with 3.5 percent, even less. Instead, Switzerland aimed at buying cocoa from Ghana, with 59 percent of its total bean requirements imported from there in 2008, and 54.1 percent in 2009. *See* Association of Swiss Chocolate Manufacturers, *Ethical Aspects*, *supra* note 1; *accord.* Association of Swiss Chocolate Manufacturers, *Cocoa Bean Production*, *supra* note 2.

¹⁷⁰ Neville, *supra* note 160.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *See* Debora L. Spar, *Multinationals and Human Rights: A Case of Strange Bedfellows*, Human Rights Interest Group Newsletter, American Society of International Law 8 1, 13-16 (Winter 1998). “On the one hand, the transnational corporation must have cosy relations with the (all-too-often reactionary or at least insensitive) government that controls access to the resource [...] on the other hand, the transnational corporation often shows little interest in other aspects of the local population. The resource is mostly sold abroad, with a certain amount of the profits going to the governmental elite. If that elite does not act progressively to reinvest the profit into infrastructures that improve the lot of the local population, such as education, health care and ecological protection, the transnational corporation has often seen little short-term economic interest in the situation.”

¹⁷⁴ DILLON, *supra* note 46, at 196.

¹⁷⁵ Baradaran & Barclay, *supra* note 107, at 1.

¹⁷⁶ Erklärung von Bern, *Menschenrechte im Kakaoanbau*, *supra* note 15, at 5.

V. Conclusion

After discussing the efforts made by Chocosuisse in addition to any particular efforts made by individual firms, as well as initiatives on the international and national level, it is hard to believe that Berne Declaration claims in its new survey “little if nothing has happened”¹⁷⁷ with regard to improving the human rights situation in West Africa's cocoa sector. It is true that the Cocoa Industry Protocol failed at eliminating both, prohibited child labour and forced labour in cocoa growing, as well as establishing a certification system within its set deadline. However, as seen, voluntary measures provide an opportunity to “foster global consensus and cooperation among developed and developing countries until an international labour regimen is forthcoming.”¹⁷⁸ Particularly if these initiatives do not exclusively engage in the reduction of child labour but also attend to other problem areas such as reducing the poverty of the small-scale farmers who cultivate cocoa by ultimately investing in local infrastructure, health and education.

But not only transnational corporations should start to act more socially responsible: Switzerland should also work towards improving its home state duty to protect and unify and integrate a public policy on corporate social responsibility.

Yet, while the debate whether the observation of human rights in the supply chains of corporations can be best advanced through legally binding instruments or voluntary initiatives continues, it is important that customers are informed properly. Especially as questions such as the liability of transnational corporations under international law, the extraterritorial obligations of home states, when the host states are unwilling or unable to require a corporation to respect human rights, remain unanswered.

¹⁷⁷ *Id.* at 4.

¹⁷⁸ DILLON, *supra* note 46, at 266.

Órla Ryan, a journalist who covered the cocoa trade in Ghana for Reuters, says “properly informed customers could provide an impetus for action.”¹⁷⁹ “But simply choosing one bar instead of another will not help resolve deep-rooted issues. Other forces, such as the balance of industry power and regular elections are just as important in bringing about change.”¹⁸⁰

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ÓRLA RYAN, CHOCOLATE NATIONS 161 (2001).

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Id.