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A PROPOSAL ON HOW THE EU CAN IMPLEMENT DUE DILIGENCE TO TACKLE CHILD LABOUR IN COCOA SUPPLY CHAINS

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Supervisor: **Dr. Daniel Iglesias Márquez**

University: **Universidad de Seville, Facultad de Derecho**

Submitted by: **Bronagh Kieran**

ABSTRACT

Child labour remains widespread across the globe. Incidences in cocoa supply chains first received major international attention at the turn of the millennium. Since then, the cocoa sector launched the Harkin Engel Protocol to expel the practice from supply chains, but the promises made therein have not been fulfilled.

The central aim of this thesis is to question how the EU can ensure that EU-based companies carry out effective child labour due diligence on their cocoa supply chains in Côte D'Ivoire and Ghana. Due diligence standards would introduce a duty of care on business enterprise to identify, prevent and respond to child labour in their supply chain.

An assessment is made as to whether mandatory child labour due diligence could be introduced through an EU regulation. Alternatively, this thesis considers whether due diligence standards could be effectively introduced through a voluntary multi-stakeholder initiative, facilitated by the EU. Analysis of the advantages and disadvantage of both approaches draws on literature regarding the debate between hard law and soft law; a debate which permeates through the field of business and human rights at large.

The novel contribution of this thesis is that it proposes that the EU should take a proactive role in setting standards for child labour due diligence by EU companies. Proposals from the European Parliament regarding child labour in cocoa supply chains, including mandatory labelling and trade measures, have thus far fallen on deaf ears. Contrastingly, mandatory child labour due diligence has not, as of yet, been considered by the EU institutions.

Ultimately, this thesis takes it that due diligence obligations are an important tool at the disposal of the EU for addressing the extraterritorial impact of EU-based companies. It argues that child labour due diligence should be implemented through a complimentary combination of hard and soft measures at the EU level.

Key words: *cocoa, business and human rights, children's rights, child labour, due diligence*

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TABLE OF ABBREVIATIONS

BHR	Business and Human Rights
CRC	Convention on the Rights of the Child
CSO	Civil Society Organisation
EU	European Union
FAO	Food and Agricultural Organisation
HRDD	Human Rights Due Diligence
ICI	International Cocoa Initiative
ILO	International Labour Organisation
IOE	International Organisation of Employers
MSI	Multi-stakeholder Initiative
NAP	National Action Plan on Business and Human Rights
NGO	Non-governmental Organisation
OECD	Organisation for Economic Cooperation and Development
SDGs	Sustainable Development Goals
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNICEF	United Nations Children's Fund
UNGPs	United Nations Guiding Principles on Business and Human Rights

Note: In this thesis, children's rights are synonymous with the human rights of children.

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INTRODUCTION

The EU imports vast amounts of cocoa from Côte d'Ivoire and Ghana. Child labour is widespread in the cocoa supply chains of these countries. Despite efforts by local government, children continue to be forced into child labour. EU based companies then profit from this supply chain. Meanwhile, the EU aims to mainstream human rights in all its action. Drawing from international standards such as the United Nations Guiding Principles on Business and Human Rights (UNGPs), the EU is increasingly cognisant of the responsibility of EU-based companies to respect human rights abroad. The European Parliament proposed measures to reduce child labour in cocoa supply chains, such as mandatory labelling and trade restrictions, but these measures have failed to gain support across the EU institutions.

This thesis identifies an alternative measure that could be rolled out by the EU; child labour due diligence. The UNGPs encourage companies to complete human rights due diligence (HRDD) to identify and address human rights abuse in their supply chains. HRDD that solely focuses on child labour will be referred to as child labour due diligence throughout the analysis here under. It is the contention of this thesis that the process of due diligence engages companies and has the potential to engender material results in supply chains. This perspective is evidently gaining support, as many companies already carry out HRDD in their supply chain, and several Member States have introduced legislation on the topic. However, the present thesis shows that there is an appetite for standardisation by the EU.

The central research question at hand is how child labour due diligence should be implemented by the EU to address the problem of child labour in the cocoa supply chains of Côte d'Ivoire and Ghana. A key objective of this thesis is to advocate for child labour due diligence at an EU level. On this basis, a further objective is to consider whether it would be better to roll out due diligence obligations through legislation or to promote child labour due diligence through a multi-stakeholder initiative (MSI) coordinated by the EU.

The specific cases of Côte D'Ivoire and Ghana are used to provide a grounding to the research. These two countries are the States from which the EU imports the most cocoa. Moreover, many EU-based companies can trace their supply chains to these States. The situations in Côte D'Ivoire and Ghana have received such prolonged international attention that

corporations have been forced to act on the matter. For example, the Harkin-Engel Protocol was directed at Côte D'Ivoire and Ghana. Therefore, this case study shows the limitations of the corporate response at its best, thereby avoiding any straw-manning of the business perspective.

At the outset, it must be highlighted that there are already measures in place at an EU level to target child labour. This thesis is the first stage of more extensive research on EU measures to address cocoa supply chains. The scope of this thesis is limited to the role due diligence can play in this process. To this end, certain pre-existing measures are alluded to, but others are not.

Chapter one will provide an overview of child labour in the cocoa sector of Côte D'Ivoire and Ghana. It defines child labour and explains the failure of State policies, as a consequence of insufficient resources and deficient enforcement. Recognising that companies also have a role to play in preventing child labour, this chapter argues that the industry has thus far failed to remediate the problem.

Chapter two will introduce global standards for responsible business conduct and assess how the EU engages with these standards. With this basis in mind, the chapter further questions whether the EU perceives EU-based companies to have a responsibility to address child labour in cocoa supply chains. Before arriving at these conclusions, the chapter will trace the history of Corporate Social Responsibility (CSR) and the field of Business and Human Rights (BHR), leading up to recent global initiatives. It is in chapter two that the concept of due diligence is introduced. Due diligence is advanced as a method for ensuring that companies address human rights abuses in their supply chain. Chapter two stresses the importance of the UNGPs in the contemporary BHR context and outlines the definition of due diligence provided in the UNGPs. Other definitions of due diligence, such as the definition in the proposed BHR Treaty are also introduced. Moreover, the chapter sketches an outline of how child labour due diligence should be carried out.

Chapter three looks at the possibility of establishing mandatory child labour due diligence through an EU law. It proposes that this is within the competence of the EU. The chapter then engages with the political climate and argues that in light of a growing trend of domestic legislation on the topic, it can be inferred that Member States are likely to support EU legislation on child labour due diligence. Strengths and weaknesses of the domestic laws are presented, as a reference point for proponents of an EU law going forward. Special attention

is given to the recently passed law in the Netherlands on child labour due diligence. This law, it is argued, provides a template for child labour due diligence legislation. This chapter also contends that businesses would enjoy greater clarity on their obligations, were EU legislation implemented. Furthermore, the need for harmonisation across the EU may motivate the EU institutions to introduce legislation on child labour due diligence.

Chapter four looks at the possibility of an EU led multi-stakeholder initiative (MSI) implementing due diligence standards on child labour. To begin with, this chapter considers reasons why legislation might not be introduced. From this starting point, it considers the potential advantages of soft measures over hard measures. It introduces the concept of an MSI and explains that MSIs are often favoured over other soft measures because they allow for engagement between business and CSOs. Moreover, an MSI can facilitate coordination between the companies carrying out due diligence. This chapter proposes that an EU MSI could be a vessel for imposing child labour due diligence standards on EU-based companies. The Dutch CSR covenants are introduced, and the chapter proposes that the EU may refer to these covenants as a loose template when forming its own MSI on child labour in cocoa supply chains. The Dutch MSIs are then compared to the Harkin-Engel Protocol, in an effort to tease apart what constitutes an effective MSI on human rights in supply chains.

Finally, reflections on these proposals will be discussed. Following the logic of the UNGPs, the paper concludes that using both hard and soft measures in tandem is the most comprehensive solution. This approach, it is proposed, guarantees proactive engagement from both the business sphere and the State.

This thesis primarily relies on legal research. EU documents are used to establish the current position of EU institutions. This provides a basis for exploring new ideas including the prospect of child labour due diligence. Secondary sources are used to frame analysis on the measures proposed. The paper refers to literature on the topical debate regarding the use of hard measures versus the use of soft measures to promote human-rights-compliant business practice. Significantly, the thesis draws on the example of the Netherlands, which has implemented both hard and soft measures, in the form of national legislation on child labour and sector specific MSIs. This thesis qualitatively assesses the measures proposed, utilises a comparative method to assess these measures, and makes modest predictions about the likelihood of their use.

A STICKY PROBLEM

This chapter will introduce the cocoa sector of both Côte D'Ivoire and Ghana, highlight the problem of child labour in the sector, outline the international definition of child labour and the international framework prohibiting it, discuss the measures taken at a State level by Côte D'Ivoire and Ghana to tackle the practice, and postulate reasons as to why they may not have been successful. The chapter will then move on to discuss the role of EU-based business. It will identify EU-based business enterprise involved in the supply chain radiating from the cocoa sector of Côte D'Ivoire and Ghana and set out the steps taken by EU business enterprise to address the problem of child labour in Côte D'Ivoire and Ghana. Ultimately, the central point made is that the measures undertaken by EU-based business enterprise have been insufficient, nigh on evasive.

1.1 Cocoa Sector in Côte D'Ivoire and Ghana

Cocoa is a major contributor to the economy of Côte d'Ivoire and Ghana. Côte d'Ivoire is the biggest cocoa producer in the world and Ghana is the second biggest.¹ Historically, it was the main export from Ghana. Between 1955 and 1975, cocoa revenues amounted to one third of the total Ghana government revenues.² More recently, the Bank of Ghana reported that in the first quarter of 2011, cocoa bean and cocoa products' export receipts amounted to 61% of total export earnings in Ghana.³ The cocoa sector improved the living conditions of many

¹ Marcella Vigneri, 'Growth through pricing policy: The case of cocoa in Ghana' (Food and Agricultural Association of the United Nations, 2018) <<http://www.fao.org/3/I8329EN/i8329en.pdf>> accessed 17 April 2019, 1 - 2

² Ibid, 2

³ Ibid, 3

farmers and the rural community. A 2018 FAO report states that the cocoa sector played a salient role in the near halving of rural poverty between 1991 and 2004:

“Various studies conducted using the Ghana Living Standards survey show how the country has achieved significant reduction in poverty rates, with near halving of rural poverty between 1991/92 (64percent) and 2004/05 (39percent) [...] cocoa producing households have played a major role in these achievements; their poverty headcount dropped to 23.9 percent in 2005, down from 60.1 percent at the beginning of the 1990s.”⁴

Similarly, Côte d'Ivoire relies on the cocoa sector. Cocoa accounts for over 70% of the country's exports and employs over one million farmers.⁵ Since the 1960s, it has been a major contributor to the country's GDP.⁶ For instance, when Guardian writer Tim Adams questioned N'Zi Kanga Rémi, Governor of the Adzopé Department on the importance of cocoa, he said

“It means everything! It's his first source of income! My education was funded by cocoa! Our houses are built with cocoa! The foundations of our roads, our schools, our hospitals are cocoa! Our government runs on cocoa! All our policy focuses on sustaining cocoa!”⁷

1.2 Child labour

Despite the benefits, there are also human rights abuses associated with the cocoa sector, including child labour, health risks from pesticides, access to water, and food security. The infographic below, from a 2018 UNICEF report on children's rights in the cocoa growing communities of Côte d'Ivoire, demonstrates the threats to children's rights caused by cocoa farming:

⁴ Ibid, 12

⁵ Coulibaly Salifou and Erbao Cao, 'An empirical analysis of the determinants of cocoa production in Côte d'Ivoire' [2019] 8(5) Journal of Economic Structures, 2

⁶ Ibid.

⁷ Tim Adams, 'From bean to bar in Ivory Coast, a country built on cocoa' (The Guardian: Observer Special Report, 24 February) <<https://www.theguardian.com/global-development/2019/feb/24/ivory-coast-cocoa-farmers-fairtrade-fortnight-women-farmers-trade-justice>> accessed 17 April 2019

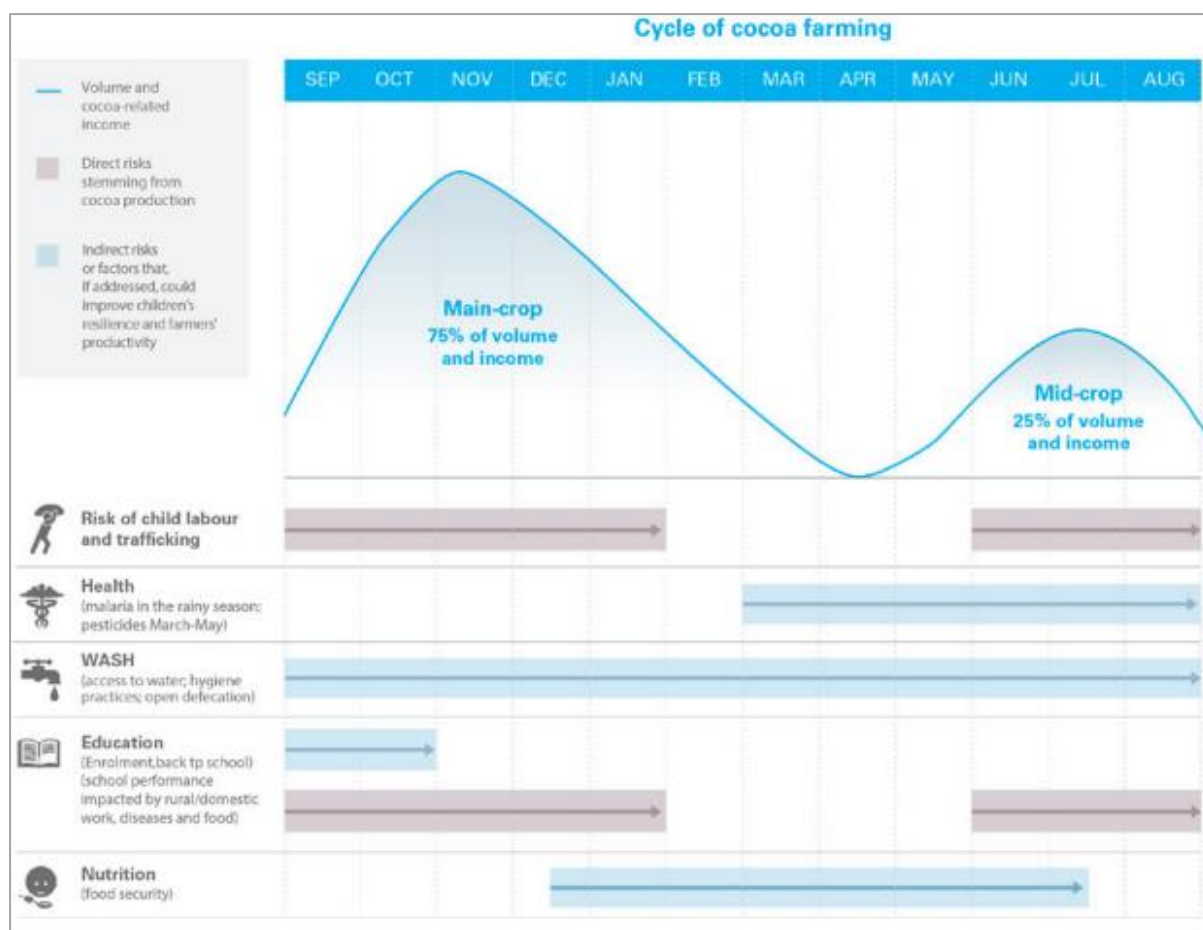


Figure 1. Description: “Main children’s rights issues in the context of the yearly cocoa farming cycle.” Source: UNICEF Children’s Rights in the Cocoa-Growing Communities of Côte d’Ivoire Synthesis Report.⁸

Child labour in the farming, harvesting and production of cocoa is highlighted in this chart.⁹ According to the 2018 Cocoa Barometer, an annual report funded by a consortium of fifteen civil society organisations including Oxfam and Public Eye,¹⁰ there are an estimated 2.1

⁸ UNICEF, “UNICEF Children’s Rights in the Cocoa-Growing Communities of Côte d’Ivoire Synthesis Report (November 2018) <<https://www.unicef.org/csr/css/synthesis-report-children-rights-cocoa-communities-en.pdf>> accessed 7 June 2019, 12

⁹ Another significant problem is deforestation. This problem also demands urgent attention. However, it is beyond the scope of this thesis. See:

European Commission, 'Deforestation and forest degradation – stepping up EU action' (EC Europa, 25 February 2019) <https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-6516782_en> accessed 1 March 2019,

and

Oxfam, “Feedback to the EU-Commission’s Roadmap on “Deforestation and forest degradation – stepping up EU action”, 15 January 2019

¹⁰ “The Cocoa Barometer is published and funded biennially by a global consortium of civil society organisations; ABVV-FGTB/Horval, FNV, Green America, Hivos, Inkota Netzwerk, International Labor Rights Forum, Mondiaal FNV, Oxfam (Belgium, Netherlands, USA), Public Eye, Solidaridad, Stop The Traffik (Australia, Netherlands), Südwind Institute, and the VOICE network.” Cocoa Barometer Website, 'About: Barometer

million children working in cocoa farms across Ghana and Côte d'Ivoire.¹¹ The problem is more prevalent in Côte d'Ivoire than in Ghana, as Côte d'Ivoire produces more cocoa. Furthermore, politically motivated violence recently destabilised Côte d'Ivoire.¹²

Poverty and lack of education is the major cause of child labour.¹³ The European Commission stated that other contributing factors include demography of the country (migration, fertility rates, health epidemics), and a limited labour market due to insufficient economic diversification.¹⁴ Culture and tradition also reinforce patterns of child labour. The issue is exacerbated by the fact that firing children could force them to work in worse conditions in the informal sector.¹⁵ A further factor which is drawing increased attention is birth registration. When a child does not have their birth formally registered, they are unable to attend secondary school. It is worth noting that export industries only account for a small percentage of incidences of child labour globally.¹⁶ To quell child labour more broadly, there needs to be a dramatic paradigm shift at the local level.

Why is child labour such a pressing issue? John Stewart Mill famously characterised human development as a tree rather than as a machine. To flourish, humans require the space to learn, to explore, to be children. He writes:

“Human nature is not a machine to be built after a model, and set to do exactly the work prescribed for it, but a tree, which requires to grow and develop itself on all sides, according to the tendency of the inward forces which make it a living thing.”¹⁷

Consortium ' (*Cocoa Barometer*) <http://www.cocoabarometer.org/Cocoa_Barometer/About.html> accessed 10 July 2019

¹¹ Antoine Fountain and Friedel Huetz-Adams “Cocoa Barometer 2018”(2018) available at: <http://www.cocoabarometer.org/cocoa_barometer/Download_files/2018%20Cocoa%20Barometer%20180420.pdf> accessed 2 July 2019, 3

¹² William Bertrand and Elke de Buhr, 'Trade, Development and Child Labor: Regulation and Law in the Case of Child Labor in the Cocoa Industry' [2015] 8(2) Law and Development Review. 517

¹³ Antoine Fountain and Friedel Huetz-Adams “Cocoa Barometer 2018”(2018) available at: <http://www.cocoabarometer.org/cocoa_barometer/Download_files/2018%20Cocoa%20Barometer%20180420.pdf> accessed 2 July 2019, 3

¹⁴ European Commission, “Staff Working Document on the Worst Forms of Child Labour” (30 April 2013) [http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/swd/2013/0173/COM_SWD\(2013\)0173_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/swd/2013/0173/COM_SWD(2013)0173_EN.pdf) accessed 19 May 2019, 7

¹⁵ Ans Kolk and Rob Van Tulder, 'The Effectiveness of Self- regulation: Corporate Codes of Conduct and Child Labour' [2002] 20(No 3) European Management Journal, 261

¹⁶ Ibid, 263

¹⁷ John Stewart Mill, Chapter 3 On Individuality as One of the Elements of Well-Being. in *On Liberty* (1859), 110-111

More recently, research conducted by the World Bank in Brazil demonstrates that working while in school has negative and long-lasting consequences on children.¹⁸ Similar research conducted in Tanzania discovered that child labour impacts marginal labour productivity 10 – 13 years later.¹⁹ The moral reprehensibility of child labour is compounded by the fact that children are forced into it as a result of factors outside their control such as poverty, often resulting from global economic inequality.²⁰

The international community has concerned itself with the goal of eradicating child labour for at least a hundred years, nonetheless, the phenomenon remains widespread. This pervasiveness was highlighted²¹ in the 2017 ILO Buenos Aires Declaration on Child Labour, Forced Labour, and Youth Unemployment.²² The declaration recognised that “152 million girls and boys are still engaged in child labour, with 73 million in its worst forms; that 25 million people, including more than 4 million children, are still subject to forced labour.”

How is child labour defined? The ILO defines child labour as “work that deprives children of their childhood, their potential and their dignity, and that is harmful to physical and mental development.”²³ This is in line with the definition under Article 3 of the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (2000).²⁴ To understand how this definition is applied in practice, it is important to delineate what does not count as child labour. The term child labour is not automatically applied to incidences of children helping with work on the family farm or in the family business. Instead, it only applies when work prevents children from pursuing their education, when the work is inappropriate for children due to the associated dangers or when there are long working hours. The distinction is sometimes articulated with reference to the terms child

¹⁸ Patrick E. Emerson and others, 'Child Labour and Learning' [2014] Policy Research Working Paper 6904(WPS6904) The World Bank Development Economics Vice Presidency Office of the Chief Economist. 28

¹⁹ Kathleen Beegle and others, 'The Consequences of Child Labour: Evidence from Longitudinal Data in Rural Tanzania' [2008] Policy Research Working Paper 4677 (WPS4677) The World Bank Development Research Group Macroeconomics and Growth Team. 21 -22

²⁰ Debra Satz, 'Child Labour: A Normative Perspective' [2003] 17(2) The World Bank Economic Review. 300

²¹ International Labour Organisation, 'Buenos Aires Declaration Child Labour, Forced Labour, and Youth Unemployment', (16 November 2017) https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/meetingdocument/wcms_597667.pdf accessed 25 March 2019. 3

²² Ibid.

²³ 'What is child labour' International Labour Organisation, 000) <<https://www.ilo.org/ipecc/facts/lang--en/index.htm>> accessed 23 April 2019.

²⁴ Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (adopted 17 June 1999, entered into force 19 November 2000) ILC 182 <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182> Accessed 24 April 2019. Art. 3

work versus child labour.²⁵ Bertrand and de Buhr found that most child labour in cocoa production in Ghana and Côte d'Ivoire is not on the basis of excessive hours. Rather, it is usually labelled child labour because of hazardous work practices including the use of sharp tools, exposure to agro-chemicals and carrying heavy loads.²⁶

Beyond the ILO, the UN also contributes to the international framework relating to the prohibition of child labour. For example, article 32 of the UN Convention on the Rights of the Child recognises the right of a child

“to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.”²⁷

As of 2013, interpretation of the Convention is framed by four General Principles²⁸; they are non-discrimination, best interests of the child, right to life, survival and development, and respect for the views of children. Furthermore, the UN Sustainable Development Goals (SDGs) address this issue. Target 8.7 sets the objective of ending child labour by the year 2025,²⁹ along with forced labour, modern slavery and human trafficking. Other international norms related to child labour include the 1973 Minimum Age Convention,³⁰ the corresponding 1973 recommendation³¹ and the 1999 Worst Forms of Child Labour Recommendation.³² The

²⁵ Ans Kolk and Rob Van Tulder, 'The Effectiveness of Self-regulation: Corporate Codes of Conduct and Child Labour' [2002] 20(No 3) European Management Journal. 262

²⁶ William Bertrand and Elke de Buhr, 'Trade, Development and Child Labor: Regulation and Law in the Case of Child Labor in the Cocoa Industry' [2015] 8(2) Law and Development Review 509

²⁷ United Nations Convention on the Rights of the Child

Convention on the Rights of the Child (adopted 29 November 1989, entered into force 2 September 1990) art 32 <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> accessed 24 April 2019.

²⁸ UN Committee on the Rights of the Child (CRC) General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, CRC/C/GC/14.

²⁹ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development* (21 October 2015, A/RES/70/1) <https://www.refworld.org/docid/57b6e3e44.html> accessed 25 April 2019. Goal 8.7

³⁰ Convention concerning Minimum Age for Admission to Employment (adopted, 26 June 1973, entered into force 19 June 1976) ILC C138 (Minimum Age Convention) https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312283:NO

³¹ Recommendation concerning Minimum Age for Admission to Employment (adopted 26 June 1973) ILC R146 https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312484:NO accessed 24 April 2019.

³² Worst Forms of Child Labour Recommendation (adopted 17 June 1999) ILC R190 https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312528:NO accessed 24 April 2019

1998 ILO Declaration on Fundamental Principles and Rights at Work set out four core labour standards including freedom from forced labour and from child labour.³³

1.3 Measures from Côte d'Ivoire and Ghana

States party to the Convention on the Rights of Children have an obligation regarding the impact of business on children's rights. This was clarified in General Comment no. 16 on the Convention on the Rights of Children.³⁴ It outlines that:

“Host States have the primary responsibility to respect, protect and fulfil children's rights in their jurisdiction. They must ensure that all business enterprises, including transnational corporations operating within their borders, are adequately regulated within a legal and institutional framework that ensures that they do not adversely impact on the rights of the child [...]”³⁵

Both Côte d'Ivoire and Ghana have ratified the Minimum Age Convention (2003/2011)³⁶ the Worst Forms of Child Labour Convention (2003/2000)³⁷ and the UN Convention on the Rights of the Child (1991/1990).³⁸ At a State level, there are provisions already in place to tackle child labour in the cocoa supply chains. In 2017, the Côte d'Ivoire

³³ Philip Alston, 'Core Labour Standards' and the Transformation of the International Labour Rights Regime. in VA Leary and D Warner (eds), *Social Issues, Globalisation and International Institutions: Labour Rights and the EU*, ILO, OECD and WTO (Koninklijke Brill NV 2006), 2

³⁴ UN Committee on the Rights of the Child (CRC), General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, 17 April 2013, CRC/C/GC/16

³⁵ Ibid.

³⁶ International Labour Organisation, 'Ratifications of C138 - Minimum Age Convention, 1973 (No 138)' (International Labour Organisation)

<https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312283> accessed 2 July 2019

³⁷ International labour organisation, 'Ratifications of C182 - Worst Forms of Child Labour Convention, 1999 (No 182)' (International Labour Organisation)

<https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312327> accessed 2 July 2019

³⁸ United Nations Treaty Collection, 'Chapter IV human rights: Convention on the rights of the child, New York, 20 November 1989' (United Nations, 1 July 2019)

<https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en> accessed 2 July 2019

expanded its Hazardous Work List that prohibits children from carrying out certain tasks³⁹. Further policies in place to tackle child labour within Côte d'Ivoire include:

Policy	Description
2010 Declaration of Joint Action to Support the Implementation of the Harkin-Engel Protocol (2010 Declaration) and Its Accompanying Framework of Action	Joint declaration by the Governments of Ghana, Côte d'Ivoire, and the United States, and the International Cocoa and Chocolate Industry. (75; 76; 34) Provides resources and coordinates with key stakeholders on efforts to reduce the worst forms of child labor in cocoa-producing areas. (75; 76) Ensures that all project efforts implemented under the Declaration and Framework align with Côte d'Ivoire's national action plans to promote coherence and sustainability. (75; 76; 34) USDOL-funded projects and some industry-funded projects carried out activities that support the spirit of this policy during the reporting period. (34)
Partnership Agreement	Forms an agreement between the International Cocoa Initiative (ICI) and CNS in support of the National Action Plan for the Fight Against the Worst Forms of Child Labor. Aims to reinforce and expand SOSTECI and improve school infrastructure. (77; 78) In November 2017, ICI and CNS signed another agreement to revise the training and awareness-raising tool by ICI and coordinate child labor monitoring and remediation efforts in cocoa growing areas. (15; 56)
Joint Declarations Against Cross-Border Trafficking	Bilateral declarations or cooperative agreements between Côte d'Ivoire, Ghana, and Burkina Faso to combat child trafficking and the worst forms of child labor. (79; 80; 81; 82) In 2017, Côte d'Ivoire and Burkina Faso agreed to implement a previously signed agreement to create and operationalize a permanent commission to combat the cross-border trafficking of children. (83)
Child Protection Policies	Includes the National Policy on Child Protection (PNPE) (2014–2018), led by the MWCPA, which seeks to reduce the incidence of violence, abuse, and exploitation of children; and the National Policy of Judicial Protection of Childhood and Youth (PNPJEJ) (2016–2020), led by the MOJ, aims to provide judicial protection to child victims of forced labor, which has yet to be officially adopted by the Council of Ministers. (84; 85) In 2017, the MWCPA began drafting a decree to establish a monitoring and coordination committee for the policy's implementation. (15)
National Development Plan (2016–2020)	Aims to improve governance and accelerate human capital development, including by combatting child labor. Allocates almost \$6.1 million over 5 years to conduct diagnostic studies on child labor and child trafficking; creates a unit to combat the worst forms of child labor in regional labor inspectorate offices; expands SOSTECI into 10 new departments; constructs 3 transit centers; and develops a national action plan to combat human trafficking, particularly of girls. (86) In 2017, launched SOSTECI (2018 – 2020)† which aims to expand SOSTECI into 33 new departments with a proposed budget of \$4.3 million. (12; 56)

Policy	Description
Compulsory Education Policy	In support of the Law on Education, aims to achieve 100 percent enrollment in primary school by 2020 and 100 percent enrollment in junior high by 2025. (29; 87) Allocates \$1.34 billion to modernize the education system, including by building new classrooms, providing free textbooks to low-income families, and providing additional pedagogical training to teachers. (29) In 2017, the Ministry of Education constructed 8,166 primary school classrooms, 36 school cantinas, 74 latrines, and distributed 4.4 million school kits. The Cocoa and Coffee Council distributed a further 60,000 school kits and the MEPS distributed 100 school kits. (56)
Decent Work Country Program (2017–2020)†	In collaboration with the ILO, this program aims to improve working conditions, strengthen SOSTECI, and combat the worst forms of child labor. (66; 88) It is pending adoption by the Council of Ministers. (26)

Figure 2. Description: “Key Policies Relating to Child Labour.”

Source: United States Department of Department of Labour Bureau of International Labour Affairs.⁴⁰

³⁹Arrêté n° 2017-017 MEPS/CAB du 2 juin 2017 déterminant la liste des travaux dangereux interdits aux enfants (Enacted 2 June, 2017) Ministère de l'Emploi et de la Protection Sociale République De Côte d'Ivoire <https://www.ilo.org/dyn/natlex/docs/MONOGRAPH/104712/127840/F1597937352/CIV-104712.pdf> accessed 25 April 2019

⁴⁰ United States Department of Labour Bureau of International Labour Affairs '2017 Findings on the worst forms of child labor. Côte d'Ivoire' (2017) <<https://www.dol.gov/sites/default/files/documents/ilab/CotedIvoire.pdf>> accessed 25 April 2019. 6

As can be seen in the prior infographic, the State initiated policies to address child labour. These include *inter alia* child protection policies such as the National Policy of Judicial Protection of Childhood and Youth (2016 – 2020) which seeks to provide judicial representation to victims of child labour. These policies are accompanied by a series of hands on social programmes funded by the government. Since this overview was published, in June 2019, Côte d'Ivoire set a minimum price for cocoa beans.⁴¹ This step, which will hopefully improve working conditions and payment for all employees in the cocoa sector, is predicted to decrease the levels of child labour in supply chains. In Ghana, the State has initiated similar policies.

Policy	Description
National Plan of Action Phase II on the Elimination of the Worst Forms of Against Child Labor (NPA2) (2017–2020)†	Aims to address gaps identified in the first NPA (2009–2015), improve coordination, and reduce the worst forms of child labor to 10 percent by 2020, with a focus on the fishing, mining, and cocoa sectors. (10; 83; 47) In 2017, signed MOUs with relevant ministries and requested cabinet approval for the Hazardous Child Labor Activity Frameworks drafted in 2008 and 2012. (44; 85; 47; 70)
National Plan of Action for the Elimination of Human Trafficking in Ghana (NPA) (2017–2021)†	Aims to improve data collection, enhance victim protection, increase accountability for perpetrators, and emphasize prevention and outreach, including an expansion of the Livelihood Empowerment Against Poverty (LEAP) Program. (86) In 2017, disseminated NPA through a workshop with stakeholders and requested all relevant ministries incorporate the NPA in their 2018 budgets. (87; 44)
Hazardous Child Labor Activity Frameworks	Includes the Hazardous Child Labor Activity Framework and the Hazardous Child Labor Activity Framework for the Cocoa Sector. Both frameworks were developed in consultation with workers' and employers' organizations and identify hazardous activities that should be prohibited for children and are awaiting cabinet approval before implementation. (88; 89; 90)
2010 Declaration of Joint Action to Support the Implementation of the Harkin-Engel Protocol (2010 Declaration) and Its Accompanying Framework of Action	Joint declaration by the Governments of Ghana, Côte d'Ivoire, and the United States, and the International Cocoa and Chocolate Industry. (91; 92; 93) Provides resources and coordinates with key stakeholders on efforts to reduce the worst forms of child labor in cocoa-producing areas. (91; 92) Ensures that all project efforts implemented under the Declaration and Framework align with Ghana's national action plans to promote coherence and sustainability. (91; 92; 93) USDOL-funded projects and some industry-funded projects carried out activities in support of this policy during the reporting period. (93)
Bi-Lateral Commitments to Combat Cross-Border Trafficking	Joint declaration signed by the First Ladies of Côte d'Ivoire and Ghana to combat the worst forms of child labor and advocate for sub-regional cooperation with other First Ladies. (94) A subsequent cooperative agreement between the two governments further operationalizes the declaration, which targets high-risk sectors, provides protection to victims, improves coordination, and prosecutes offenders. (95; 96) An MOU with the Government of Jordan formalizes labor recruitment practices and provides for support and repatriation of Ghanaian victims of human trafficking in Jordan. (64)
Minerals and Mining Policy of Ghana	Prohibits child labor in mining and stipulates children who visit mining sites must be supervised. (97)

Policy	Description
Strategy on Anti-Child Labor and Trafficking in Fisheries	Ministry of Fisheries and Aquaculture Development policy that aims to significantly reduce the incidence of child labor in fisheries by improving child protection systems and increasing prosecution of offenders. (98)

Figure 3. Description: “Key Policies Relating to Child Labour.” Source: United States Department of Department of Labour Bureau of International Labour Affairs.⁴²

⁴¹ Nellie Peyton, 'Ghana, Ivory Coast cocoa floor price seen as small step toward ending child labour' (Reuters, 14 June 2019) <<https://af.reuters.com/article/commoditiesNews/idAFL8N23L3DJ>> accessed 1 July 2019

⁴² United States Department of Labour Bureau of International Labour Affairs '2017 Findings on the worst forms of child labor. Ghana' (2017) <<https://www.dol.gov/sites/default/files/documents/ilab/Ghana.pdf>> accessed 25 April 2019, 6

Out of these policies, the National Plan of Action on the Worst Forms of Child Labour (2017 – 2020) is of interest because it directly addresses the issue of child labour. The Plan sets the target of reducing child labour by ten per cent by 2020.

Notwithstanding these instruments, the problem of child labour has not been remedied. An important consideration is that the laws in place can be difficult to enforce. In Côte d'Ivoire, a dearth of financial resources and insufficient training for criminal law investigators undermines effective enforcement.⁴³ These States' incapacity to enforce the laws in place begs the question of whether companies have an additional responsibility to ensure that their supply chains are free from child labour, especially when they have more resources at their disposal than the State.

1.4 EU enterprises' efforts to self-regulate

Europeans are heavily invested in the chocolate industry, both in terms of chocolate production and chocolate consumption. Eurostat notes that in 2016, the EU imported around 1.7 million tonnes of cocoa.⁴⁴ According to a European Commission report, the EU is accountable for over 60% of global cocoa imports.⁴⁵ Of the cocoa that enters the EU, the majority is from Côte d'Ivoire and Ghana.⁴⁶ As a result of this unique position of influence in the sector, Europe has a stake in the issue of child labour in cocoa supply chains. This infographic presents the top three destinations from which cocoa was imported to the EU.

⁴³ United States Department of Labour Bureau of International Labour Affairs '2017 Findings on the worst forms of child labor. Côte d'Ivoire' (2017)

<<https://www.dol.gov/sites/default/files/documents/ilab/CotedIvoire.pdf>> accessed 25 April 2019, 5

⁴⁴ Eurostat, 'Where does your Easter chocolate come from?' (*European Commission*, 2016)

<<https://ec.europa.eu/eurostat/web/products-eurostat-news/-/EDN-20170414-1?inheritRedirect=true>> accessed 13 July 2019

⁴⁵ Commission Directorate General for International Cooperation and Development, 'Report on the workshop: Cocoa, an Unsavoury Sweet Brussels 21 March 2018' [2018]

https://ec.europa.eu/europeaid/sites/devco/files/final_report_juin_2018.pdf accessed 25 March 2019, 2

⁴⁶ Eurostat, 'Where does your Easter chocolate come from?' (*European Commission*, 2016)

<<https://ec.europa.eu/eurostat/web/products-eurostat-news/-/EDN-20170414-1?inheritRedirect=true>> accessed 13 July 2019

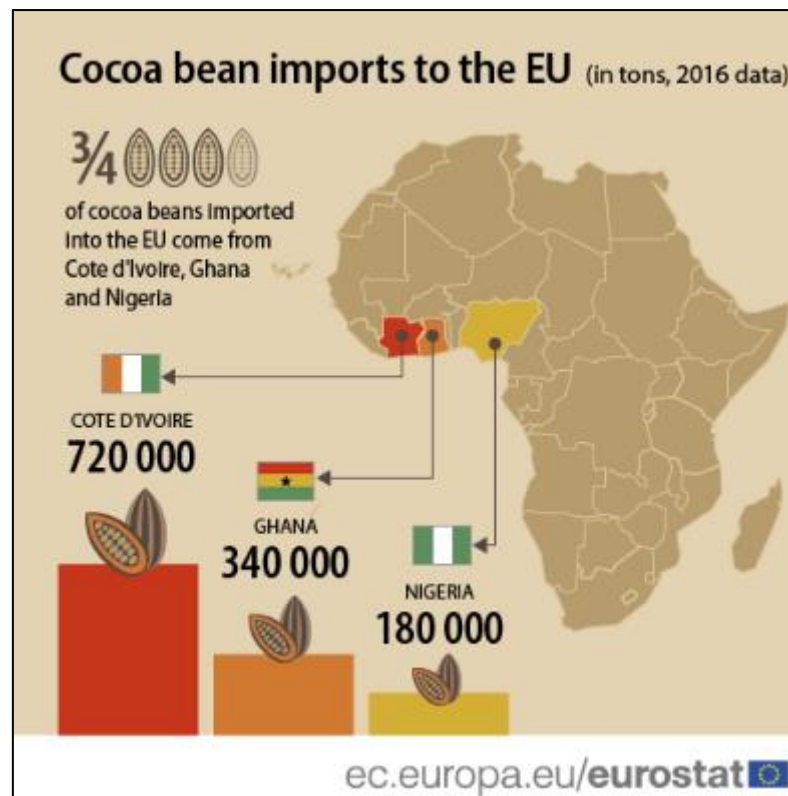


Figure 4. Description: “Cocoa bean imports to the EU.” Source: Eurostat, European Commission.⁴⁷

Companies based in the EU which are involved in chocolate manufacturing include the Ferrero Group, Barry Callebaut, Unilever, and Cadburys, among others. Nestlé and Lindt & Sprüngli are based in Switzerland. Acknowledging that Switzerland is not a part of the Union, nonetheless, it is part of the EU single market via bilateral agreements and the European Free Trade Association.⁴⁸ Therefore, they are relevant to this discussion.

The prevalence of child labour in cocoa supply chains was highlighted internationally in the late 1990s and the early 2000s. As support for reform gained traction, the topic featured in articles by the New York Times⁴⁹ and The Telegraph.⁵⁰ The ensuing controversy led policy

⁴⁷ Ibid.

⁴⁸ ECCJ “The EU competence and duty to regulate corporate responsibility to respect Human Rights through mandatory Human Rights Due Diligence” Briefing (November 2017). https://corporate-responsibility.org/wp-content/uploads/2017/11/Brief_The-EU-competence-and-duty-to-legislate_BLayout.pdf accessed 29 May 2019, 3

⁴⁹ Norimitsu Onishi, 'The Bondage of Poverty That Produces Chocolate' (The New York Times, 29 July 2001) <<https://www.nytimes.com/2001/07/29/world/the-bondage-of-poverty-that-produces-chocolate.html>> accessed 7 June 2019

⁵⁰ Christian Lamb, 'The child slaves of the Ivory Coast - bought and sold for as little as £40' (The Telegraph, 22 April 2001) <<https://www.telegraph.co.uk/news/worldnews/africaandindianocean/cotedivoire/1317006/The-child-slaves-of-the-Ivory-Coast-bought-and-sold-for-as-little-as-40.html>> accessed 6 June 2019

makers in the United States to propose the so-called Eliot Engel Bill, named after the New York Congressman. The proposal which was ultimately rejected by the Senate would have mandated that chocolate produce should include a label stating whether it was child labour and slave labour free.⁵¹

Since these stories came to light, corporate entities also made their own coordinated efforts to address the issue. The 2000 ILO Convention was followed in 2001 by a set of industry guidelines written by chocolate manufacturers and supported by Congressman Engel, known as the Harkin Engel Protocol.⁵² Through the Protocol, members of the Chocolate Manufacturers Association from the EU and the United States promised to eliminate the worst forms of child labour. Yet, almost 20 years on, widespread child labour in Côte d'Ivoire and Ghana persists.

Notably, the Harkin Engel Protocol led to the establishment of the International Cocoa Initiative (ICI) in 2002 which began working in Côte d'Ivoire and Ghana in 2007. In accordance with the Protocol, the ICI works alongside the cocoa industry, civil society and national governments to protect children through grassroots field projects. The Initiative's board is comprised of industry representatives including business from Europe such as Nestlé, Ferrero, and Barry Callebaut.⁵³ Where the total funding for the ICI comes from is not clear, however it is part financed by the United States. In 2015, it received 4.5 million dollars of funding from the US Department of Labour.⁵⁴ The 2010 Framework of Action to Support Implementation of the Harkin-Engel Protocol states that "Other donor entities, such as the European Union [...] are encouraged to fund projects that will support the goals of this Framework."⁵⁵ It is worth drawing attention to the fact that this purportedly company-led initiative receives significant financial contributions from a State.

⁵¹ Panorama, "Tracing the bitter truth of chocolate and child labour," (BBC, 24 March 2010) <http://news.bbc.co.uk/panorama/hi/front_page/newsid_8583000/8583499.stm> accessed 7 June 2019.

⁵² Chocolate Manufacturers Association, '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 worst forms of child labour' [2001]

⁵³ International Cocoa Initiative Website "Our Partners" <https://cocoainitiative.org/about-ici/our-partners/industry-members/> accessed 7 June 2019

⁵⁴ United States Department of Labour, "Child Labour Cocoa Coordination Group Annual Report" (2017) <<https://www.worldcocoafoundation.org/wp-content/uploads/2018/08/CLCCG2017AnnualReport.pdf>> accessed 7 June 2019. 3

⁵⁵ Harkin Engel Protocol, 'Framework of Action to Support Implementation of the Harkin-Engel Protocol' [2010] 2(d) <https://cocoainitiative.org/wp-content/uploads/2016/10/Cocoa_Framework_of_Action_9-12-10_Final-1-1.pdf> accessed 14 July 2019

In 2018, the ICI reported on the topic of their 2015 – 2010 strategy. This review emphasises promising developments, stating, “success has been faster and greater than that which was foreseen in the Strategy's original ambitions.”⁵⁶ However, external commentators criticise the Initiative for meagre results. The strategic litigator Terry Collingsworth, who brought cases against Nestlé in the United States under the Alien Tort Statute, decries the ICI’s spending on palatial offices in Switzerland rather than on sustained investment in local communities.⁵⁷ The ICI has rejected these accusations.

Regardless of whether the ICI itself is to blame or not, the fact that pervasive child labour continues is disappointing, and reflects badly on corporate commitments. However, a consideration to bear in mind is that even if a company has a *bona fide* interest in stopping child labour in their supply chain, they will still face many barriers. The problems tackling child labour are exacerbated by the fact that companies who purchase cocoa beans often do not have direct control over the supply chain. Notwithstanding the fact that the chocolate industry is highly centralised (with fewer than ten traders controlling three quarters of worldwide trade of cocoa beans, and the six biggest chocolate companies holding approximately 40% of the market share),⁵⁸ the supply chain of cocoa farmers is still difficult to trace, given the amount of intermediaries between the farm and the trader.

Marjin Boersma notes that only an estimated 6 % of the workforce for the world’s top 50 corporations (that control 60% of global trade) are employed directly. There is a hidden workforce of 116 million people.⁵⁹ These figures demonstrate how fragmented and complex global supply chains are, and this trend is equally true for cocoa. The Nestlé Cocoa Plan Report highlights the challenge of identifying, yet alone tackling, problems in upstream supply chains.⁶⁰

⁵⁶ International Cocoa Initiative, “Mid-Term Review and Revision of ICI’s 2015 – 2020 Strategy” (19 April 2018) <<https://cocoainitiative.org/wp-content/uploads/2018/11/ICI-Strategy-MTR-Board-Approved-EXT.pdf>> accessed 7 June 2019, 3

⁵⁷ Douglas Yu, “Mars is next: Human rights group to sue more chocolate companies after child slavery lawsuit against Nestlé and Cargill allowed to proceed,” (Confectionary News, 25 October 2018) <https://www.confectionarynews.com/Article/2018/10/25/Child-slavery-lawsuit-against-Nestle-and-Cargill-allowed-to-proceed>. 7 June 2019

⁵⁸ William Bertrand and Elke de Buhr, 'Trade, Development and Child Labor: Regulation and Law in the Case of Child Labor in the Cocoa Industry' [2015] 8(2) Law and Development Review, 513

⁵⁹ Martijn Boersma, 'Changing Approaches to Child Labour in Global Supply Chains: Exploring the Influence of Multi- Stakeholder Partnerships and the United Nations Guiding Principles on Business and Human Rights' [2017] 40(3) The University of New South Wales Law Journal, 1249

⁶⁰ Nestlé Cocoa Plan and International Cocoa Initiative, 'Tackling Child Labour 2017 Report' (2017) <https://www.nestlecocoaplanreport.com/sites/default/files/2017-10/NestleCocoaPlanReport2017_EN_0.pdf> accessed 25 April 2019, 11

The Nestlé Cocoa Plan is an example of a voluntary measure installed by a business enterprise to address the problem of child labour. In 2017, Nestlé released a report with the International Cocoa Initiative entitled “Tackling Child Labour”⁶¹ in which the plan’s blind spots were considered. One salient shortcoming is that only a third of Nestlé’s total cocoa supply are included in the plan.⁶² Despite this, progress has been made and the report claims that child labour in Nestlé’s supply chains dropped by 51%.⁶³ The main tool of the Nestlé Cocoa Plan is the Child Labour Monitoring and Remediation System (CLMRS). The ICI developed CLMRS and Nestlé first pioneered it in 2012.⁶⁴ According to figures provided by Nestlé, in 2018, CLMRS involved 67,074 farmers⁶⁵. Furthermore, 535,435 farmers attended awareness raising sessions⁶⁶. CLMRS is fully active in Côte d'Ivoire and it was recently introduced in Ghana. The infographic below highlights the actions and monitoring undertaken by Nestlé to actively decrease the number of children involved in child-labour.

⁶¹ Ibid.

⁶² Ibid, 11

⁶³ Ibid, 9

⁶⁴ Oliver Nieburg, “Fair Game: How Effective is Cocoa Certification?” (Confectionary News, 20 December 2017) < <https://www.confectionarynews.com/Article/2017/12/20/Fair-trade-How-effective-is-cocoa-certification> > accessed 7 June 2019

⁶⁵ Nestlé, 'Raw Materials - Cocoa' (Nestle.com) <<https://www.nestle.com/csv/raw-materials/nestle-cocoa-plan>> accessed 25 April 2019

⁶⁶ Ibid.

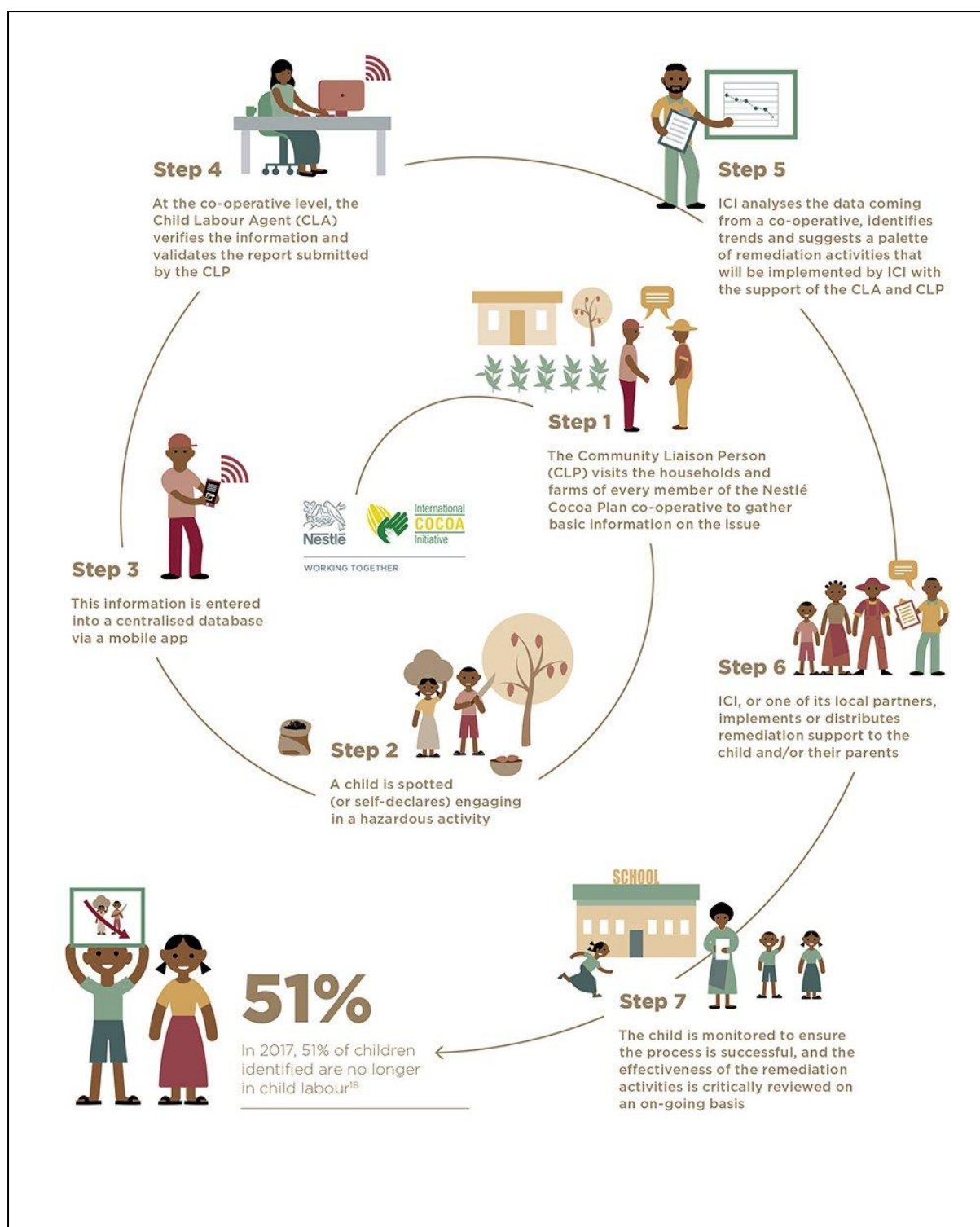


Figure 5. Description: “How our Child Labour Monitoring and Remediation System works.”

Source: Nestlé Cocoa Plan.⁶⁷

⁶⁷ Ibid.

While acknowledging that the sector is making efforts to address the issue, it is evident that they have refrained from carrying out widespread reform in a serious or coordinated fashion, presumably because of the associated costs. The half-heartedness with which the sector took up the mantle of protecting children's rights is perhaps best illustrated with reference to the promises made in the Harkin Engel Protocol that were ultimately left unkept.

For example, the 2001 Protocol set the goal of eradicating child labour from cocoa supply chains by 2005. When this did not happen, the deadline was pushed back to 2008, then 2010, and so on and so forth. Currently, the industry is working towards the goal of decreasing the amount of child-labour in Côte d'Ivoire and Ghana by 70% by 2020.⁶⁸ This practice evinces the flippancy with which the industry approached goal setting for reform.

Similarly, in a 2008 joint statement, parties to the Protocol set the target of having a sector wide independently verified certification process in operation by the end of 2010. An independent report⁶⁹ on the success of the Protocol from 2010 stated that the cocoa sector was still far from reaching this target.⁷⁰ To this day, this target has not been achieved.

Some commentators credit these failures to an over-reliance on lawyers when setting goals. Bertrand and de Buhr note that "earlier versions of the Harkin-Engel Protocol, crafted mostly by lawyers, set impossible standards from an empirical and measurement point of view."⁷¹ However, businesses should know about risk aversion and goal completion. They should have known to employ persons with expertise.

⁶⁸ Brian O'Keefe "Behind a Bittersweet Industry" (Fortune, 1 March 2016) <<http://fortune.com/big-chocolate-child-labor/>> accessed 7 June 2019.

⁶⁹ Funded by the US Bureau of International Labour Affairs.

⁷⁰ Payson Center for International Development and Technology Transfer Tulane University "Fourth Annual Report Oversight of Public and Private Initiatives to Eliminate the Worst Forms of Child Labor in the Cocoa Sector in Côte d'Ivoire and Ghana" (30 September 2010) <<https://static1.squarespace.com/static/54e1536ae4b0ef0a3e3f3bc2/t/551756f0e4b05c72e7f4e63e/1427592944945/tulane-fourthann-cocoa-rprt.pdf>> accessed 7 June 2019, 14

⁷¹ William Bertrand and Elke de Buhr, 'Trade, Development and Child Labor: Regulation and Law in the Case of Child Labor in the Cocoa Industry' [2015] 8(2) Law and Development Review, 519

RESPONSIBILITY OF BUSINESS ON CHILD LABOUR

The aim of this chapter is to introduce the notion of child labour due diligence and to explain what steps the EU has taken to address child labour. Underpinning this thesis is an understanding that HRDD serves a pivotal function in globalized world, where problems of extra-territoriality can prevent corporate accountability.

To provide context, the chapter will first introduce a history of corporate responsibility in the 20th century and highlight salient international initiatives on BHR, with specific emphasis on the UNGPs. It will highlight international standards on child labour due diligence. This chapter will initially adopt a global perspective and then narrow down its focus to the EU. The analysis will consider how the EU approached corporate responsibility over the past 20 years, and how different EU institutions are responding to EU based companies' complicity in the child labour found in supply chains.

In summary, this chapter will argue that child labour due diligence coordinated by the EU could be a critical step towards ensuring that EU-based companies take a more proactive approach to stopping the practice of child labour in Côte d'Ivoire and Ghana.

2.1. The responsibility of business through the 20th century

In the following section, the development business's responsibility to respect human rights will be considered. For the purpose of this thesis, this outline is important first, because it contextualises the solutions presented, and second, because a brief history goes some way towards dispelling the trap of presentism, where the status quo seems natural. The fact is that what we expect from businesses has changed over the past century. Mandatory due diligence measures may seem excessive at first, but viewed historically, they are merely the next step in a movement towards making corporate activity human rights compliant.

Agudelo recently provided a helpful literature review of academic work regarding corporate social responsibility in the twentieth century.⁷² He begins with the period following the Second World War, when the concept of corporate social responsibility did not exist. In the 1960s, in line with the mood of reform in the zeitgeist, commentators proposed that companies should have responsibilities beyond making profit. Keith Davis argued that companies should have social responsibility commensurate to their social power.⁷³

Through the 1970s, in line with new consumer expectations about company behaviour, the 1970s saw the establishment of businesses which framed their ethical behaviour as a key selling point. Some, such as the Body Shop (1976) and Ben & Jerrys (1978), remain household names.⁷⁴ The definition of CSR was refined in the 1980s. It was in this time that the terms business ethics and stakeholders became popularised in business jargon.⁷⁵ The movement of business ethics, DeGeorge states, took off in the 1980s in response to a series of corporate scandals including the Lockheed \$12 million bribery case and the Union Carbide disaster which killed thousands of people in Bhopal, India. The Union Carbide disaster led the chemical industry to adopt a voluntary code of ethical conduct, referred to as 'Responsible Care.'⁷⁶

In the 1990s, the idea of corporate social responsibility continued to grow in popularity, reaching international appeal. Philip Alston explains that in the years following 1990, employers made commitments to distinguish themselves from rogue exploiters who undermine the reputation of all corporations.⁷⁷ However, globalization led to the creation of more complex supply chains and it became difficult for companies to monitor their impact. Notwithstanding these difficulties, in the 1990s, CSR was increasingly institutionalised

In the past two decades, the contemporary field of BHR emerged and was consolidated by global standards such as the UNGPs, the considerable influence of which will be explained

⁷² Mauricio Andrés Latapí Agudelo et.al 'A literature review of the history and evolution of corporate social responsibility' [2019] 4(1) International Journal of Corporate Social Responsibility 1-23

⁷³ Ibid. 4, referencing both:

"Davis, K. (1960). Can business afford to ignore social responsibilities? California Management Review, 2(3), 70–76.

Davis, K. (1973). The case for and against business assumption of social responsibilities. Academy of Management Journal, 16(2), 312–322."

⁷⁴ Ibid.

⁷⁵ Ibid, 7

⁷⁶ R. De George (2015) "A History of Business Ethics", Markkula Center for Applied Ethics, available at: <https://www.scu.edu/ethics/focus-areas/business-ethics/resources/a-history-of-business-ethics/>

⁷⁷ Philip Alston, 'Core Labour Standards' and the Transformation of the International Labour Rights Regime. in VA Leary and D Warner (eds), Social Issues, Globalisation and International Institutions: Labour Rights and the EU, ILO, OECD and WTO (Koninklijke Brill NV 2006), 10

further in the Initiatives section below. Notably, while the growth of CSR precipitated the contemporary field of BHR, the two are not synonymous. Anita Ramasastry describes this distinction by stating that:

“While CSR emphasizes responsible behaviour, BHR focuses on a more delineated commitment in the area of human rights [...] BHR is, in part, a response to CSR and its perceived failure.”⁷⁸

CSR deals with several areas which are not solely explained by the rhetoric of human rights, even though they may be related; for example, environmental protection is not covered within BHR. Another difference between CSR and BHR is that BHR utilises a narrower approach by addressing justiciable rights, rather than discretionary acts of good will. Advocates for the field of BHR rely on international treaties and norms to ground the claims of victims in the international legal order.⁷⁹

Another characteristic of BHR is focusing on harms done rather than the potential of business to do good. In this regard, Thompson characterises BHR as focusing on the “responsibility to respect” rather than the “opportunity to affect”.⁸⁰ An approach that streamlines the responsibility to respect will focus on mitigating and remedying the worst harms brought about by business activities, rather than drawing attention to areas where business enterprise can more readily affect the community in a positive way. Today, CSR and BHR outlooks coexist in discourse about equitable trade. However, BHR initiatives are changing the landscape of global supply chains by accelerating the expected rate of change in corporate practice.

⁷⁸ Anita Ramasastry, 'Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability' [2015] 14(2) Journal of Human Rights. 238

⁷⁹ Ibid, 238

⁸⁰ Benjamin Thompson, 'The Dutch Banking Sector Agreement on Human Rights: An Exercise in Regulation, Experimentation or Advocacy?' [2018] 14(2) Utrecht Law Review, 88

2.2 Child labour due diligence

When companies carry out HRDD, this means that they have taken steps to identify and address risks to human rights in their supply chain. HRDD is seen as a necessary component of BHR policy. The Children's Rights and Business Principles define it as:

“a business's ongoing processes for assessing its actual and potential human rights impact, [...] integrating and acting upon its findings, tracking its responses and communicating how its impact is addressed [...] Human rights due diligence should cover adverse impact that the business may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by a business relationship.”⁸¹

Child labour due diligence is a form of HRDD that specifically seeks to identify and address child labour. The Children's Rights and Business Principles state that businesses should “meet their responsibility to respect children's rights and commit to supporting the human rights of children,”⁸² and “contribute to the elimination of child labour, including in all business activities and business relationships.”⁸³

Some major players in the cocoa sector already carry out HRDD that covers child labour in its ambit. Nonetheless this thesis argues for the creation of specific EU measures on child labour due diligence. There are two reasons for this. First, the HRDD currently in place varies in quality. There is need for greater standardisation. Second, child labour due diligence will do more to address the cocoa supply chains of Côte D'Ivoire and Ghana cocoa sector than broader HRDD.

⁸¹ UNICEF, the Global Compact, and Save the Children, Children's Rights and Business Principles (UNICEF, 2012) available at: <<https://resourcecentre.savethechildren.net/node/5717/pdf/5717.pdf>> accessed 13 July 2019, 6

⁸² Ibid, 10

⁸³ Ibid,10

What effect will child labour due diligence have in cocoa supply chains? De Schutter and Ramasastry argue that HRDD, in general, results in better corporate practice because it clarifies what is acceptable and hence makes it easier for the courts to determine compliance.⁸⁴ If companies must identify incidences of child labour, they will be better equipped to respond to the problem.

The State may play an important role by promoting due diligence among companies or mandating it through law. The Council of Europe released an Opinion on Business and Human Rights in 2016 in which article 22 states that its Member States (this includes all Member States of the EU) “should apply additional measures to require business enterprises to respect human rights, including, where appropriate, by carrying out human rights due diligence.”⁸⁵ Article 64 of this Opinion highlights that children’s rights should be mainstreamed in due diligence. It reads:

“Recognising that children often lack access to relevant information and face particular difficulties in exercising their right to be heard, member States should, in particular:

- a) encourage or, where appropriate, require that business enterprises specifically consider the rights of the child when carrying out human rights due diligence.”⁸⁶

What does child labour due diligence look like in practice? The UN Guiding Principles Reporting Framework provides a guidance on all the steps required for effective due diligence, in general.⁸⁷ Moreover, McCorquodale and others use empirical research to assess what HRDD looks like in companies.⁸⁸ Common practices they identified included:

“initial identification through human rights impact assessment, desktop research or gap analysis, perhaps followed or complemented by interviews; · assessment of human rights risks, including risks to rights-holders; · prioritization of human rights issues; development of action plans; strategic direction at the board level; cross-functionality; steering groups, working groups, interaction between relevant functions; integration of

⁸⁴ Olivier De Schutter; Anita Ramasastry; Mark B. Taylor; Robert C. Thompson, “Human Rights Due Diligence: The Role of States” December 2012 <http://corporatejustice.org/hrdd-role-of-states-3-dec-2012.pdf> accessed 27 May, 59

⁸⁵ Council of Europe, Recommendation CM/Rec (2016)3 of the Committee of Ministers to member states (Council of Europe, Strasbourg 2016), 24

⁸⁶ Ibid, 25 – 26

⁸⁷ UNGP reporting framework website, “UN Guiding Principles Reporting Framework,” (Shift Project, Marzar LLP) available at: <<https://www.ungpreporting.org/>> accessed 3 July 2019.

⁸⁸ Robert McCorquodale, ‘Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises’ [2017] 2(2)Business and Human Rights Journal, 195 - 224

human rights into internal compliance mechanisms, scoring and tools; translation and application of human rights to apply to each function; · inclusion of HRDD requirements in contractual provisions; having codes of conduct and operational policies; providing training to employees (and in some cases to other stakeholders); and ensuring that there are effective grievance mechanisms.”⁸⁹

Apart from these general practices, HRDD should be tailored to the context. Principle 17(b) of the UNGPs notes that due diligence: “will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations.”⁹⁰ In accordance with this requirement, a child labour sensitive approach to due diligence needs to be operationalised by companies.

There are several helpful tools to assist companies in carrying out child labour due diligence. The ILO-IOE 2015 child labour guidance tool for business sets out steps for how a company may effectively diagnose child labour in supply chains.⁹¹ In 2017, Menezes and others presented case studies of the integration of children’s rights into company management.⁹² They outline how the companies in question developed strategic maps.⁹³

The ILO-IOE child labour guidance tool outlines that businesses ought to develop and embed a policy commitment throughout the organisation, act on child labour, track their performance, communicate this performance, and ensure that victims have access to a remedy.⁹⁴ These steps represent a holistic engagement with the problem, but perhaps they seem too abstract. In practice, what does it mean to act on child labour? This will depend on the context. Addressing child labour on fisheries in Ghana will differ from child labour in textile production in Bangladesh, which will in turn differ from child labour in cocoa supply chains in Côte D’Ivoire and Ghana. However, in all instances, a tool at the disposal of international

⁸⁹ Ibid, 223 -224

⁹⁰ United Nations, “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” 2011
https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf Accessed 23 March 2019. 17 - 18


⁹¹ International Labour Organisation and International Organisation of Employers, ILO-IOE Child Labour Guidance Tool for Business: How to do business with respect for children’s right to be free from child labour (ILO 2015), 46 - 47

⁹² Livia Menezes Pagotto and others, 'Incorporating Children and Adolescents' Rights in Corporate Management: A Tool Based on Strategic Maps and the Sustainability Balanced Scorecard' [2017] 2(1) Business and Human Rights Journal

⁹³ Ibid, 176

⁹⁴ International Labour Organisation and International Organisation of Employers, ILO-IOE Child Labour Guidance Tool for Business: How to do business with respect for children’s right to be free from child labour (ILO 2015), 25 - 60

business enterprise is their leverage. The comparative power of international buyers allows them to influence practices among sellers and through the supply chain. The ILO-IOE child labour guidance tool lists the following reference points for how companies can best utilise leverage. They are listed in the infographic below.



Where can I find more information?

- The **ILO Helpdesk for Business** provides answers to questions about how to address child labour impacts and offers advice to companies. It can be contacted at assistance@ilo.org.
- Shift: *Using leverage in business relationships to reduce human rights risks* (New York, 2013). Available at: www.shiftproject.org/sites/default/files/Using%20Leverage%20in%20Business%20Relationships%20to%20Reduce%20Human%20Rights%20Risks.pdf.
 The report explores potential ways in which companies can use and build leverage to mitigate human rights risks in a wide range of relationships including with suppliers, joint venture partners, business customers, and governments.
- European Commission: *Employment and recruitment agencies sector guide on implementing the UN Guiding Principles on Business and Human Rights* (Brussels, 2012). Available at: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/employment_and_recruitment_agencies_2.pdf.
 Particular risks may arise in relationships that a company has directly or that its suppliers have with recruitment or employment agencies in contexts where those agencies are not effectively regulated and the various “push” or “pull” factors for child labour are present. This report provides guidance on what the UNGPs imply for the practices of recruitment and employment agencies, which can help companies understand some of the red flags to look for in terms of their policies and processes.

Figure 6. Description: “Part C.”

Source: Preventing and Addressing Child Labour Impacts: Practical Steps for Companies to Take.⁹⁵

Leverage from a single company, as influential as it may be, will not result in a change of practice. With regards to child in cocoa supply chains, one buyer demanding the end of child labour is unlikely to result in an end to this practice, when children continue to be forced into labour by poverty by lack of access to education. Therefore, child labour due diligence also includes working with stakeholders such as government representatives and local CSOs to tackle the underlying conditions which lead to child labour.⁹⁶ To be effective, it should involve

⁹⁵ Ibid, 39

⁹⁶ Ibid, 38

coordination with other buyers. Moreover, parent companies should insist on a threshold of respect for children's rights within their suppliers and subsidiaries, even if these rights are not integrated into national law.⁹⁷ Equally, companies can work with local stakeholders to push for recognition of international children's rights standards at a domestic and local level.

2.3 International initiatives

In the development of BHR globally, there are several stand-out initiatives aimed at clarifying the extent of business responsibility. More recent initiatives draw attention to the value of HRDD. These BHR initiatives include the Global Compact, the 2011 UN Guiding Principles on Business and Human Rights and the 2011 OECD Guidelines for Multinational Enterprises.⁹⁸ A binding treaty is also under negotiation. Of these measures, the UN Guiding Principles are significant because of the ground-breaking manner in which they attracted support from across different strata of society; from governments to businesses to civil society. They will be explained at some length in the following section, along with a short account of other pertinent initiatives.

The *Global Compact* is a voluntary programme based on ten principles of "good international corporate practice"⁹⁹ in the fields of human rights, labour and the environment. It was founded in 1999 and today, it is known as the world's largest sustainability project. In 2018, 9'500 companies and 3'000 non-business signatories, spanning across 160 countries, were party to the Global Compact.¹⁰⁰ Principle two of the Global Compact is that businesses should not be complicit in human rights abuses. One recommended method for satisfying this principle is by carrying out appropriate HRDD. Principle four of the Global Compact, is that

⁹⁷ Ibid, 38

⁹⁸ Other important instruments in the development of business and human rights include the 1975 UN Draft Code of Conduct on Transnational Operations, the ISO 26000 Guidance Standard on Social Responsibility, the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprise with regard to Human Rights (UN Norms) and the ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.

⁹⁹ L. Emmerij and R. Jolly (2009) "The UN and Transnational Corporations", UN Intellectual History Project. Available at: <http://www.unhistory.org/briefing/17TNCs.pdf>

¹⁰⁰ B. Frey, UN Global Compact 'The Communication on Progress Report (CoP) in Brief.' available at: <https://www.unglobalcompact.org/participation/report/cop> accessed 10 July 2019

“businesses should uphold the elimination of all forms of forced and compulsory labour.”¹⁰¹ To prevent child labour, the Global Compact recommends that companies should “support and help design education, vocational training, and counseling programmes for children removed from situations of forced labour.”¹⁰²

The *UN Guiding Principles on Business and Human Rights*¹⁰³ (UNGPs) were adopted by the UN in June 2011.¹⁰⁴ Special Representative for Business and Human Rights, John Ruggie authored them after six years of work. The Principles marked a seminal development as they are the first universally accepted global framework on BHR.¹⁰⁵

What are the UNGPs substantively? They comprise of 31 principles grouped into 3 pillars. How did they come into being? In 2005, the UN Human Rights Commission requested, by resolution E/CN.4/RES/2005/69¹⁰⁶ that the Secretary General appoint a Special Representative on human rights, transnational corporations and other business enterprise. This Special Representative, John Ruggie, developed the “Protect, Respect, Remedy” Framework in 2008.¹⁰⁷ No other common standard regarding the expected behaviour of companies in relation to human right had ever been accepted unanimously by the Human Rights Council before Ruggie presented his 2008 framework.¹⁰⁸

The 3 pillars of the UNGPs mimic the 2008 framework. Pillar one affirms the State’s duty to protect human rights against abuse by third parties. Pillar two highlights the corporate

¹⁰¹ United Nations Global Compact, 'Principle 4' (The Ten Principles of the UN Global Compact) <<https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-4>> accessed 13 July 2019

¹⁰² Ibid.

¹⁰³ UN, “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” 2011 <https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshreN.pdf> Accessed 23 March 2019

¹⁰⁴ Justine Nolan, The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law? in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013), 138

¹⁰⁵ Daniel Augenstein and others, 'The UNGPs in the EU: The Open Coordination of Business and Human Rights?' [2018] 3(1) *Business and Human Rights Journal*, 2

¹⁰⁶ Office of the High Commissioner for Human Rights 'Resolution on Human rights and transnational corporations and other business enterprises 2005/69' (20 April 2005) UN Doc E/CN.4/RES/2005/69.

¹⁰⁷ Human Rights Council, 'Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', A/HRC/8/5 (7 April 2008) (SRSG, '2008 Report')

¹⁰⁸ Mares Radu, *Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress*. in Mares Radu (ed), *The UN Guiding Principles on Business and Human Rights Foundations and Implementation* (Martinus Nijhoff 2012), 2

responsibility to respect human rights. Pillar three underscores the right of victims to remedy through State or non-State mechanisms.

The UNGPs are relevant to questions regarding human rights in supply chains because they go some way towards outlining the responsibility of companies for their subsidiaries and suppliers. Reflecting this, the G20 leaders, in 2017, referred to the Guiding Principles as a “core standard to be used in achieving sustainable global supply chains.”¹⁰⁹ In pillar one, it is set out that States have an obligation to take “appropriate steps” to prevent, investigate, punish and redress human rights abuse, including human rights abuse caused by business enterprise.¹¹⁰ To ensure that business enterprises address their adverse human rights impacts,¹¹¹ States may implement mandatory HRDD legislation.

The UNGPs do not give rise to any legal obligations. It is a piece of soft law. Consequently, the concept of business “responsibility” in pillar two is criticised because it reinforces a paradigm where companies are encouraged to respect human rights but not obliged to.¹¹² On the other hand, the extent of this responsibility is clearly defined. Principle 12 therein states that business responsibility refers to internationally recognised standards, understood at a minimum as “the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.”¹¹³ This clarification means that the UNGPs do not give a pass to use such woolly language as ‘doing good’ and ‘making an impact.’ Instead, if a business enterprise intends to follow the UNGPs, it is evident that they should use the international human rights framework as their basis.

The commentary of the UNGPs elaborates that these standards are a minimum, but where the risk of a certain human rights abuse is higher in a given sector, then the relevant

¹⁰⁹ John Sherman, 'Should a Parent Company Take a Hands-off Approach to the Human Rights Risks of its Subsidiaries?' [2018] Volume 19(No 1) Business Law International 25

¹¹⁰ UN, “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” 2011 https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf Accessed 23 March 2019, 1

¹¹¹ Ibid. 17

¹¹² Justine Nolan, The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law? in Surya Deva and David Bilchitz (eds), Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect? (Cambridge University Press 2013), 139

¹¹³ United Nations, “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” 2011 https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf Accessed 23 March 2019, 13

international standards on that issue also apply.¹¹⁴ For example, the cocoa sector gives rise to high rates of child labour, therefore the Convention on the Rights of the Child and the international prohibitions on forced labour should also be highlighted in company standards.

A key step business can take to adhere to these standards is to roll out HRDD. What does this due diligence look like? The UNGPs state that companies need to be able to “know and show” that they respect human rights.¹¹⁵ Guiding Principle 17 set out the parameters of HRDD, and Principles 18 – 21 outline the essential components of HRDD.¹¹⁶ Accordingly, HRDD should be “assessing actual and potential human rights impacts, integrating and acting upon the findings, and tracking responses as well as communicating how impacts are addressed.”¹¹⁷

These holistic standards of due diligence could be said to place a high burden on businesses enterprise. However, the commentary of the UNGPs presents a case to business leaders that effective due diligence should not only benefit potential victims of human rights abuse, but also provide a defence for business in civil lawsuits regarding corporate complicity in human rights abuse.¹¹⁸ Where a harm was genuinely brought about by factors outside of business practice, companies may point to effective due diligence to demonstrate that they took every possible step to prevent such occurrences from taking place.

The UNGPs motivated developments on the matter of children’s rights and child labour due diligence. The UNGPs led the CRC to further define the relationship between business actors and children’s rights. In 2016, it produced General Comment (GC) 16 on State Obligations regarding the impact of business sector on children’s rights.¹¹⁹ While discussing children’s rights and global operations, the General Comment notes that home States have obligation “to respect, protect and fulfil children’s rights in the context of businesses’ extraterritorial activities and operations, provided that there is a reasonable link between the

¹¹⁴ Ibid, 14

¹¹⁵ Ibid, 16

¹¹⁶ Ibid, 18

¹¹⁷ Olivier De Schutter; Anita Ramasastry; Mark B. Taylor; Robert C. Thompson, “Human Rights Due Diligence: The Role of States” December 2012 <http://corporatejustice.org/hrdd-role-of-states-3-dec-2012.pdf> accessed 27 May, 7

¹¹⁸ United Nations, “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” 2011 https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr_eN.pdf Accessed 23 March 2019, 19

¹¹⁹ UN Committee on the Rights of the Child (CRC), General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, 17 April 2013, CRC/C/GC/16

State and the conduct concerned.”¹²⁰ In this regard, the Treaty Body pushed a broader view of State’s extraterritorial responsibility than is outlined in the UNGPs themselves. Principle 2 of the UNGPs outlines that States have a concrete obligation to protect children’s rights from the negative consequences of business practice within their territory. Contrastingly, regarding business practice abroad, States are merely encouraged to set standards, in the interest of predictability for business enterprise and maintaining the State’s reputation.¹²¹

Moving on to the next international initiative, the Organisation for Economic Co-operation and Development’s (OECD) revised its *Guidelines for Multinational Enterprises*¹²² in 2011 to line up with the UNGPs. First adopted in 1976, this marked the fifth revision of the Guidelines.¹²³ One way the Guidelines echo the UNGPs is that they introduce HRDD. They state that businesses should use their relations with other entities to “seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.”¹²⁴ The Guidelines provide more specific direction on how to carry out due diligence by sector. With regards to agricultural supply chains, the OECD partnered with the FAO to help enterprise in this sector to meet standards of responsible business conduct.¹²⁵ This guidance includes a framework for risk based due diligence.¹²⁶ Companies can refer to these standards when conducting child labour due diligence in the cocoa sector.

¹²⁰ Ibid.

¹²¹ UN, “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” 2011 <https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshreN.pdf> Accessed 23 March 2019, 4

¹²² Organisation for Economic Cooperation and Development (OECD), ‘OECD Guidelines for Multinational Enterprises,’ 2011 <http://www.oecd.org/daf/inv/mne/48004323.pdf> accessed 29 May 2019.

¹²³ Tori Loven Kirkebø and Malcolm Langford, ‘The Commitment Curve: Global Regulation of Business and Human Rights’ [2018] 3(2) Business and Human Rights Journal, 179

¹²⁴ Organisation for Economic Cooperation and Development (OECD), ‘OECD Guidelines for Multinational Enterprises,’ 2011 <http://www.oecd.org/daf/inv/mne/48004323.pdf> accessed 29 May 2019, 31

¹²⁵ OECD/FAO, Guidance for Responsible Agricultural Supply Chains (OECD Publishing 2016) available at <<https://www.oecd-ilibrary.org/docserver/9789264251052-en.pdf?expires=1563019680&id=id&accname=guest&checksum=86269A4C6AE9C063540B0DE0CECC16AC>> accessed 13 July 2019

¹²⁶ OECD, ‘OECD-FAO Guidance for Responsible Agricultural Supply Chains’ (Responsible Business Conduct OECD Guidelines for Multinational Enterprise) <<http://mneguidelines.oecd.org/rbc-agriculture-supply-chains.htm>> accessed 13 July 2019

Going forward, *an international treaty on business and human rights* could transpose BHR norms into hard law. Such a treaty would constitute the first international legally binding document on the matter. The UN attempted to draft a prescriptive regulatory code for companies in the early 1970s but failed. Several States from the global south are rallying behind efforts to create a treaty,¹²⁷ however the process so far has been fraught with controversy. In 2013, Initially, Ecuador proposed the establishment of a working group with the goal of negotiating a treaty¹²⁸ and in 2014, the intergovernmental working group was formed by the UN Human Rights Council. Notably, it was established with a weaker political mandate than the UNGPs due to division among the Council.¹²⁹ Since then, a “zero draft”¹³⁰ of the treaty was released by Ecuador in July 2018.

One criticism of the treaty is that it could distract from thorough implementation of the UNGPs.¹³¹ Kirkebø and Langford note that John Ruggie, author of the UNGPs is a critic,¹³² as he believes that it is premature, given that “social change in international relations requires shifts in social norms.”¹³³ Further, a division between the Global North and the Global South emerged over who the subject of the treaty should be. Ecuador among others advocate that the treaty should solely pertain to international business enterprise, whereas negotiators from the Global North argue that it should also be possible to hold subsidiary companies and local enterprise accountable under the Treaty,¹³⁴ lest transnational corporations become a scapegoat for activities carried out by domestically based companies.

¹²⁷ Daniel Augenstein and others, 'The UNGPs in the EU: The Open Coordination of Business and Human Rights?' [2018] 3(1) Business and Human Rights Journal, 22

¹²⁸ Ionel Zamfir “Towards a Binding International Treaty on Business and Human Rights” (European Parliament Briefing, April 2018)

<[http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620229/EPRS_BRI\(2018\)620229_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620229/EPRS_BRI(2018)620229_EN.pdf)> accessed 9 June 2019, 4

¹²⁹ Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights - State of Play. Brussels, 14.7.2015 SWD(2015) 144 final.

¹³⁰ Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises: Zero Draft (16 July 2018)

<<https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>> accessed 9 June 2019

¹³¹ Daniel Augenstein and others, 'The UNGPs in the EU: The Open Coordination of Business and Human Rights?' [2018] 3(1) Business and Human Rights Journal, 22

¹³² John Ruggie, 'What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge' (1998) 54:4 International Organization, 855

¹³³ Tori Loven Kirkebø and Malcolm Langford, 'The Commitment Curve: Global Regulation of Business and Human Rights' [2018] 3(2) Business and Human Rights Journal. 158

¹³⁴ Ionel Zamfir “Towards a Binding International Treaty on Business and Human Rights” (European Parliament Briefing, April 2018)

<[http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620229/EPRS_BRI\(2018\)620229_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620229/EPRS_BRI(2018)620229_EN.pdf)> accessed 9 June 2019, 7

This zero draft of the treaty is of relevance to this thesis because of its provisions relating to due diligence. In Article 9, it states that State parties *shall* ensure that there is domestic legislation mandating that “persons with business activities of transnational character” shall carry out due diligence obligations.¹³⁵ Article 9.2 provides a definition of due diligence. Negotiations over the draft treaty are far from being resolved however these provisions are worthy of note because they offer another conception of what is entailed by comprehensive due diligence.

In summary, the concept of HRDD is evidently increasingly influential, following its inclusion in the UNGPs. Collectively, these initiatives contribute to the international ecosystem of standards informing a definition of HRDD. These standards also generate a picture of what child labour due diligence should look like.

2.4 The EU perspective on business responsibility for child labour in cocoa supply chains

Moving from a global perspective, the chapter will now focus on the EU. Influenced by the international developments just described, the EU played a role in defining the responsibility of business within its jurisdiction. This section of the chapter hopes to demonstrate not only that the implementation of child labour due diligence fits with EU commitments but also that it would be complimentary to current EU policy. First, the EU’s general approach to business responsibility will be outlined. Second, the EU’s response to child labour in cocoa supply chains will be set out.

According to Article 2 TEU, “the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.”¹³⁶ Within its competences, the EU will protect human rights when it adopts legislations and when it interacts with the broader world.¹³⁷ This is reaffirmed in Articles 2, 3.5 and 21 of the Treaty of

¹³⁵ Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises: Zero Draft (16 July 2018) <<https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>> accessed 9 June 2019

¹³⁶ European Union, Treaty on European Union (Consolidated Version) [2016] OJ C202/13 (TEU 2016)

¹³⁷ ECCJ, “The EU competence and duty to regulate corporate responsibility to respect Human Rights through mandatory Human Rights Due Diligence” Briefing (November 2017). <https://corporate-responsibility.org/wp->

the European Union, TEU.¹³⁸ Internally, the Charter for Fundamental Rights protects human rights.¹³⁹ As the child labour under consideration takes place in Côte d'Ivoire and Ghana, the Charter for Fundamental Rights is not relevant in this instance. External action of the EU and other areas of cooperation such as development cooperation¹⁴⁰ are framed through the prism of human rights. Article 21 TFEU states that:

"the Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to [...] consolidate and support democracy, the rule of law, human rights and the principles of international law".¹⁴¹

Moreover, the 2015-2019 Action Plan on Human Rights and Democracy¹⁴² frames external action of the EU in relation to human rights. In the Action Plan, High Representative of the EU for Foreign Affairs and Security Policy, Federica Mogherini, states that it is essential to ensure coherence between internal and external policies and to mainstream human rights in all the EU's policies and activities.¹⁴³ The Action Plan also draws attention to Article 21 of the Treaty on EU¹⁴⁴ which affirms the EU's determination to promote human rights and democracy in all its external action including in trade, development and investment policies. The 2015 Trade for All strategy outlines that "[o]ne of the aims of the EU is to ensure that economic growth goes hand in hand with social justice, respect for human rights, high labour and environmental standards, and health and safety protection."¹⁴⁵

[content/uploads/2017/11/Brief_The-EU-competence-and-duty-to-legislate_BLayout.pdf](#) accessed 29 May 2019, 1

¹³⁸ Ibid.

¹³⁹ Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights - State of Play. Brussels, 14.7.2015 SWD(2015) 144 final, 4

¹⁴⁰ Ibid, 4 – 5

¹⁴¹ European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02

¹⁴² Council of the European Union "EU Action Plan on Human Rights and Democracy" (2015 -2019) https://eeas.europa.eu/sites/eeas/files/eu_action_plan_on_human_rights_and_democracy_en_2.pdf accessed 30 May 2019

¹⁴³ Ibid, 6

¹⁴⁴ European Union, Treaty on European Union (Consolidated Version), Treaty of Maastricht , 7 February 1992, Official Journal of the European Communities C 325/5

¹⁴⁵ European Commission, "Trade for all - towards a more responsible trade and investment policy", October 2015, ISBN: 978-92-79-50488-4 • 978-92-79-50470-9 http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf accessed 25 March 2019

The EU advocates for human rights compliant business practice and has expressed a strong commitment to the UNGPs. In the Action Plan on Human Rights and Democracy, objective 8 is entitled “Advancing on Business and Human Rights.”¹⁴⁶ The Plan calls on Member States to integrate the UNGPs into their CSR strategies and to develop National Action Plans (NAPs) on BHR. Similarly, in 2016,¹⁴⁷ a Commission communication requested that EU Member States produce NAPs.¹⁴⁸ What are NAPs? They are plans created by States to assess how they can best implement the Guiding Principles. They highlight priorities and actions taken. Since the release of the UNGPs, 23 States across the world have published a NAP.¹⁴⁹ A large percentage are from the EU. However, there have been shortcomings in Member State NAPs. Augenstein and others posit that the lack of coherence across different Member State’s NAPs demonstrates a need for increased cooperation across the EU in relation to BHR.¹⁵⁰

Support for the UNGPs was confirmed in the EU Council’s ‘Conclusions on Business and Human Rights’¹⁵¹ in 2016. They marked the fifth anniversary of the UNGPs. In the same month, the Council adopted ‘Conclusions on Sustainable Supply Chains.’¹⁵² The 2016 Conclusions on BHR referred to the creation of an EU Action Plan dedicated to responsible business conduct. As of yet, the Commission has not produced the promised action plan on BHR but MEPs and certain Member States are pressuring the Commission to follow through. The Netherlands, Sweden, Finland, France and Denmark submitted a letter to Vice President of the Commission, Frans Timmermans calling for the missing Action Plan, and in April 2019, the Responsible Business Conduct Working Group, comprised of MEPs, delivered a shadow

¹⁴⁶ Council of the European Union “EU Action Plan on Human Rights and Democracy” (2015 -2019) https://eeas.europa.eu/sites/eeas/files/eu_action_plan_on_human_rights_and_democracy_en_2.pdf accessed 30 May 2019, 20

¹⁴⁷ Following a recommendation in the Council Conclusions on EU and Responsible Global Value Chains,

¹⁴⁸ Council of the European Union “EU Action Plan on Human Rights and Democracy” (2015 -2019) https://eeas.europa.eu/sites/eeas/files/eu_action_plan_on_human_rights_and_democracy_en_2.pdf accessed 30 May 2019, 7

¹⁴⁹ Danish Institute for Human Rights, 'National Action Plans on Business and Human Rights' (Global NAPs, 2019)<<https://globalnaps.org/country/>> accessed 14 July 2019

¹⁵⁰ Daniel Augenstein and others, 'The UNGPs in the European Union: The Open Coordination of Business and Human Rights?' [2018] 3(1) Business and Human Rights Journal, 18

¹⁵¹ Council Conclusions on Business and Human Rights (3477th meeting held on 20 June 2016) accessed 19 May 2019

¹⁵² Council Conclusions on Responsible Global Value Chains (3462nd meeting held on 12 May 2016) <http://data.consilium.europa.eu/doc/document/ST-8833-2016-INIT/en/pdf> 12 May 2016

Action Plan¹⁵³ to the Commission. This type of Action Plan would reinforce the EUs commitment to ensuring that EU business operations respect human rights abroad.

On the matter of child labour, Article 32 of the EU Charter of Fundamental Rights prohibits child labour and protects young people at work.¹⁵⁴ Directive 94/33/EC¹⁵⁵ on the protection of young people at work sets out that Member States will prohibit the employment of children under the age of 15, or children still in formal education. However, these protections do not extend to children who work in third countries, even if they work indirectly for companies based in the EU. This raises the question of how the EU should respond to the problem of child labour in countries where EU-based companies operate. It could be argued that Member States have obligations to address children's rights beyond their territory. General Comment no.16 of the Convention of the Rights of Children explains that:

“Under the Convention, States have the obligation to respect and ensure children's rights within their jurisdiction. The Convention does not limit a State's jurisdiction to “territory”. In accordance with international law, the Committee has previously urged States to protect the rights of children who may be beyond their territorial borders. It has also emphasized that State obligations under the Convention and the Optional Protocols thereto apply to each child within a State's territory and to all children subject to a State's jurisdiction.”¹⁵⁶

It further elaborates that States must engage in cooperation to realise the rights of children beyond their borders.¹⁵⁷ As all Member States of the European Union are party to the Convention on the Rights of Children, this applies to them. General comments from treaty bodies are not binding, so Member States are not obliged to act this basis. Nonetheless, General Comments are frequently used by States to interpret the extent of their obligations. In this way, the CRC's view that State's must take steps to protect children beyond their territorial borders is not authoritative, but it could influence State action. Further, it could influence an EU decision to promote child labour due diligence.

¹⁵³ Responsible Business Conduct Working Group “Shadow EU Action Plan on the Implementation of the UN Guiding Principles on Business and Human Rights within the EU” (10 April 2019) <https://responsiblebusinessconduct.eu/wp/wp-content/uploads/2019/03/SHADOW-EU-Action-Plan-on-Business-and-Human-Rights.pdf> accessed 30 May 2019

¹⁵⁴ European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02

¹⁵⁵ Council Directive on the protection of young people at work [1994] OJ 2 216/12

¹⁵⁶ UN Committee on the Rights of the Child (CRC), General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, 17 April 2013, CRC/C/GC/16

¹⁵⁷ Ibid.

The institutions of the EU have taken differing approaches regarding child labour in cocoa supply chains. Objective 15 of the 2015 EU Action Plan on Human Rights and Democracy on promoting, protecting and fulfilling children’s rights¹⁵⁸ placed emphasis on supporting partner countries in the fight against child labour. In 2012, the European Parliament adopted a resolution¹⁵⁹ recommending that the European Commission investigate legislative measures imposing mandatory labelling to address child labour in cocoa bean production. The Parliament also suggested that the Commission look into trade measures to disincentivise child labour. This followed a 2010 resolution¹⁶⁰ on human rights, social and environmental standards in international trade agreements, which recommended that the Commission initiate a legislative proposal on “a traceability mechanism banning the import of goods produced using modern forms of slavery or forced labour”.¹⁶¹

Following a Council request, the Commission responded with a staff working document¹⁶² on the worst forms of child labour in 2013.¹⁶³ In this working document, the Commission outlined problems with traceability in complex supply chains¹⁶⁴ and noted that a ban on goods produced using child labour could disadvantage the economies of developing countries. Given that child labour is linked to poverty, this move could be counterproductive.¹⁶⁵ They noted that most child labour takes place in sectors not related to trade,¹⁶⁶ and concluded against the use of a restrictive trade policy.

¹⁵⁸ Council of the European Union “EU Action Plan on Human Rights and Democracy” (2015 -2019) https://eeas.europa.eu/sites/eeas/files/eu_action_plan_on_human_rights_and_democracy_en_2.pdf accessed 30 May 2019

¹⁵⁹ European Parliament resolution on child labour and the cocoa sector (14 March 2012)

¹⁶⁰ European Parliament resolution of 25 November 2010 on human rights and social and environmental standards in international trade agreements (25 November 2010) <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2010-434> accessed 19 May 2019

¹⁶¹ European Parliament, 'Europe as a stronger global actor' (Legislative Train, 4 April 2019) <<http://www.europarl.europa.eu/legislative-train/pdfs/legislative-train-schedule-theme-europe-as-a-stronger-global-actor-04-2018.pdf>> accessed 19 May 2019, 1

¹⁶² European Commission, “Staff Working Document on the Worst Forms of Child Labour” (30 April 2013) [http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/swd/2013/0173/COM_SWD\(2013\)0173_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/swd/2013/0173/COM_SWD(2013)0173_EN.pdf) accessed 19 May 2019

¹⁶³ This built on the 2010 staff working document “Combatting Child Labour”.

¹⁶⁴ European Commission, “Staff Working Document on the Worst Forms of Child Labour” (30 April 2013) [http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/swd/2013/0173/COM_SWD\(2013\)0173_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/swd/2013/0173/COM_SWD(2013)0173_EN.pdf) accessed 19 May 2019, 16

¹⁶⁵ Ibid, 10

¹⁶⁶ Ibid, 5

Subsequently the Council recommended to the Commission, through its 2016 conclusion on child labour,¹⁶⁷ that EU trade instruments should be used more effectively to combat child labour,¹⁶⁸ in line with the Trade for All strategy¹⁶⁹. The European Union Trade for All strategy pledges to incorporate values into European Union trade and investment policy. According to point 4.2.3 of the policy; “Responsible management of global supply chains is essential to align trade policy with European values.”¹⁷⁰

The European Parliament adopted an own initiative resolution reiterating its earlier 2010 recommendation on human rights, social and environmental standards in international trade agreements. This resolution stressed the need to include the goal of tackling child labour in “the trade and sustainable development chapters of EU trade agreements.”¹⁷¹

In a recent briefing on child labour, the European Parliament Think Tank underscored that the West African Partnership Agreement¹⁷² which will apply to Côte d'Ivoire and Ghana, (pending the ratification of Nigeria) does not include a comprehensive Trade and Sustainable Chapter (TSD). Instead, it merely references negotiating sustainable development provisions in the future.¹⁷³ This is in contrast to the Vietnamese Agreement which “obliges the parties to comply with ILO norms and fundamental conventions, including on child labour”.¹⁷⁴ Evidently trade agreements with Côte d'Ivoire and Ghana have not been heavily influenced by concerns over child labour in supply chains.

¹⁶⁷ Council Conclusions on Child Labour (3477th meeting held on 20 June 2016)

<http://data.consilium.europa.eu/doc/document/ST-10244-2016-INIT/en/pdf> accessed 25 March 2019

¹⁶⁸ European Parliament, 'Europe as a stronger global actor' (Legislative Train, 4 April 2019)

<<http://www.europarl.europa.eu/legislative-train/pdfs/legislative-train-schedule-theme-europe-as-a-stronger-global-actor-04-2018.pdf>> accessed 19 May 2019, 1

¹⁶⁹ European Commission, “Trade for all - towards a more responsible trade and investment policy”, October 2015, ISBN: 978-92-79-50488-4 • 978-92-79-50470-9

http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf accessed 25 March 2019

¹⁷⁰ Ibid, 24

¹⁷¹ European Parliament, 'Europe as a stronger global actor' (Legislative Train, 4 April 2019)

<<http://www.europarl.europa.eu/legislative-train/pdfs/legislative-train-schedule-theme-europe-as-a-stronger-global-actor-04-2018.pdf>> accessed 19 May 2019, 2

¹⁷² European Parliament Briefing “Child labour: A priority for EU human rights action”[Jan 2019]

¹⁷³ Ibid.

¹⁷⁴ Ibid.

In terms of how this topic will develop going forward, the Parliamentary subcommittees remain steadfast in their support for legislative measures to quell child labour in the cocoa sector. In July 2018, the human rights and development sub-committees of the European Parliament hosted a joint hearing¹⁷⁵ on child labour and rainforest devastation from cocoa and coffee bean farming.

The Commission may move away from its initial hesitance to legislate or implement trade measures to address the issue of child labour. At the very least, it is exploring different options. In 2018, it held a workshop¹⁷⁶ on the topic of cocoa production. Moreover, in January 2019, the Commission published a report entitled “Towards a Responsible Europe,”¹⁷⁷ which discusses many of the problems associated with global supply chains, including child labour.

A relevant development for the purposes of this thesis is that recently, the Commission appears to be more open to human rights due diligence measures for business. In the 2018 Action Plan Financing Sustainable Growth,¹⁷⁸ the Commission committed “to assess by 2019 the possibility of introducing supply chains due diligence requirements for corporate boards.”¹⁷⁹ Currently, at the request of DG for Justice and Consumers of the European Commission, the British Institute for Law and Comparative Law is carrying out a study on human rights due diligence in supply chains.¹⁸⁰

This thesis argues that due diligence measures have been overlooked by the EU as a means for tackling child labour in cocoa supply chains. It proposes that child labour due diligence could be implemented by the EU alongside the measures already proposed by the Parliament. This could prove a feasible and effective means of placing responsibility on companies to take responsibility for their global supply chains.

¹⁷⁵ Europa.eu, ‘11-07-2018 - Joint hearing on Cocoa and Coffee - devastating rainforest and driving child labour: the role of EU consumption and how the EU could help’ (European Parliament Committees, 03 July 2018)

¹⁷⁶ Commission Directorate General for International Cooperation and Development, ‘Report on the workshop: Cocoa, an unsavoury sweet Brussels 21 March 2018’ [2018]

¹⁷⁷ European Commission “Reflection Paper Towards a Sustainable Europe by 2030” Brussels, 30.1.2019 COM(2019) 22 final. <http://ec.europa.eu/transparency/regdoc/rep/1/2019/EN/COM-2019-22-F1-EN-MAIN-PART-1.PDF> accessed 26 May 2019

¹⁷⁸ Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and The Committee of the Regions: “Action Plan: Financing Sustainable Growth”, COM/2018/097 final. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52018DC0097> accessed 30 May 2019

¹⁷⁹ European Coalition for Corporate Justice, “Evidence for Mandatory Due Diligence Legislation” Briefing Note November, 2018 http://corporatejustice.org/policy-evidence-mhrdd-november-2018-final_1.pdf accessed 28 May 2019, 2

¹⁸⁰ British Institute of International and Comparative Law “European Commission Study on Human Rights Due Diligence in Supply Chains” (2018) <https://www.biicl.org/bhr-eu> accessed 30 May 2019

The Parliament are keen to legislate on child labour, and so it is likely that they would extend the same support to due diligence measures. Moreover, under political pressure, the Commission might be more inclined to support an initiative for child labour due diligence legislation. The wave of political support for HRDD legislation will be discussed in the next chapter. In their efforts to address child labour in the cocoa supply chains, it is posited here that EU institutions will be more likely to come to a consensus on an approach that places child labour due diligence at its core, rather than on measures previously proposed (such as trade restrictions).

MANDATORY CHILD LABOUR DUE DILIGENCE

This chapter will present an argument for mandatory child labour due diligence through EU legislation. The chapter will demonstrate that it is within the competence of the EU to legislate on human rights due diligence. It will consider domestic human rights due diligence legislation in Member States, drawing attention to the law on child labour recently passed in the Netherlands. After presenting the domestic legislation, this chapter will argue that the wave of domestic HRDD across Member States could imply that there would be support across those EU Member States for an EU regulation on child labour due diligence. The chapter analyses advantages and disadvantages of these domestic legislative instruments, as a way of highlighting relevant factors for drafters of EU legislation going forward.

3.1 EU competence to introduce HRDD

There is currently no generalised requirement from the EU for companies to conduct HRDD, or to prevent the adverse impact of EU-based business on human rights outside EU territory.¹⁸¹ The first matter to be addressed is whether it is possible for the EU to legislate on this matter. In other words, does the EU have the competence to legislate for HRDD? This question is pivotal because the EU only has the competence in areas which the Member States have permitted. The Commission are cognisant of the limitations of their competences and in a staff working document on implementing the UNGPs, they write that in relation to BHR, they primarily see their role as facilitating the sharing of good practice and experience among Member States. However, there is a case to be made that the EU does have competence to

¹⁸¹ Tiphaine Beau de lomé, *From Human Rights Due Diligence to Duty of Vigilance*. in Angelica Bonfanti (ed), *Business and Human Rights in Europe: International Law Challenges* (Transnational Law and Governance) (Routledge 2018), 139

legislate on this matter. While Member States hold ultimate responsibility for the protection of human rights, the EU shares this duty in areas of shared competence.¹⁸²

Regulation of companies' due diligence touches on company law, and therefore falls within EU shared competences.¹⁸³ The European Coalition for Corporate Justice, in discussing the competence of the EU to put in place HRDD legislation, draws attention to the EU treaties relevant to harmonising domestic company law:

“Article 50(2)g of the Treaty on the Functioning of the European Union (TFEU) gives the EU the competence to harmonise national company laws in order to attain freedom of establishment of companies. The EU carry out this duty by means of directives (Article 50(1)). In conjunction to Article 50, Article 114 TFEU allows for the EU to approximate legislation in order to ensure the establishment and proper functioning of the internal market.”¹⁸⁴

An example of a comparable piece of legislation to HRDD, which was successfully enacted, is the 2014 Non-Financial Reporting Directive.¹⁸⁵ This Directive pertains to companies but also relates to human rights concerns. It requires that, as of 2018, large companies must annually publish non-financial information on environmental protection; social responsibility and treatment of employees; respect for human rights; anti-corruption and bribery; and diversity on company boards in terms of age, gender, educational and professional background.¹⁸⁶ The adoption of the Directive was justified by the Commission on the grounds that different reporting standards across the EU led to the fragmentation of the legislative framework. To ensure that companies operating across the Union did not have to spend unnecessary amounts of money on adhering to different reporting standards, the Directive provided for a common standard. Another reason for the Directive, according to the

¹⁸² Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights - State of Play. Brussels, 14.7.2015 SWD(2015) 144 final, 6

¹⁸³ ECCJ “The EU competence and duty to regulate corporate responsibility to respect Human Rights through mandatory Human Rights Due Diligence” Briefing (November 2017). https://corporate-responsibility.org/wp-content/uploads/2017/11/Brief_The-EU-competence-and-duty-to-legislate_BLayout.pdf accessed 29 May 2019, 2

¹⁸⁴ Ibid.

¹⁸⁵ Directive of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ 2 330/1 - 9

¹⁸⁶ European Commission “Non-financial reporting” *Europa* https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/non-financial-reporting_en accessed 30 May 2019

Commission, is that it brings to light valuable information for investors.¹⁸⁷ This same logic could be used as a basis for the creation of EU legislation on due diligence regarding child labour. A Fundamental Rights Agency Opinion on Access to Remedy notes that Article 50 (2) of the TFEU could be read along with other provisions to provide the legal basis of HRDD legislation at the EU level. These other provisions are listed below:

“Article 26 of the TFEU [...] concerns the internal market, specifying that it “shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured”.

Article 114 of the TFEU allows for approximation of “law, regulation or administrative action in Member States which have as their objective the establishment and functioning of the internal market”.

Article 114 (3) provides for “a high level of protection” for approximation “concerning health, safety, environmental protection and consumer protection”

[...] Article 352 of the TFEU, provides for a legal basis to take action where such is otherwise not explicitly foreseen but where action is needed to achieve an objective of the Treaties.”¹⁸⁸

This demonstrates that there is an arguable basis in the Treaties for mandatory child labour due diligence. It is also worth noting that due diligence standards regarding supply chains are not a foreign concept to the Union. It is already mandatory for companies to conduct checks over the supply chains of certain imported good. Two examples are the EU Conflict Minerals Regulation and the 2010 Timber Regulation. An initiative has also been proposed for the garment sector.

¹⁸⁷ ECCJ “The EU competence and duty to regulate corporate responsibility to respect Human Rights through mandatory Human Rights Due Diligence” Briefing (November 2017). https://corporate-responsibility.org/wp-content/uploads/2017/11/Brief_The-EU-competence-and-duty-to-legislate_BLayout.pdf accessed 29 May 2019, 2

¹⁸⁸ European Union Agency on Fundamental Rights, Opinion on improving access to remedy in the area of business and human rights at the EU level, Vienna, 10 April 2017, FRA Opinion – 1/2017, 52

- Under the EU Conflict Minerals Regulation (2016),¹⁸⁹ EU importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, must satisfy supply chain due diligence obligations.¹⁹⁰
- The 2010 Timber Regulation¹⁹¹ lays down that EU Member States must adopt laws to prevent “illegally harvested timber” and wood products from illegally harvested timber from being imported into the EU.¹⁹² The Regulation also requires traders who bring timber into the EU market to carry out due diligence.
- A flagship initiative on the garment sector was proposed by the European Parliament via a resolution in April 2017. The resolution called on the European Commission to adopt binding legislation mandating due diligence on garments imported into the EU.¹⁹³ Additionally, the resolution proposed conditional trade preferences for States that export textiles.¹⁹⁴

These Regulations provide a precedent for child labour due diligence. The fact that they focus on specific sectors offers one potential template for future due diligence mechanisms. This thesis contends that a specific regulation, targeting the issue of child labour would be beneficial for several reasons. First, a stand-alone regulation makes the issue a priority for company reporting. This is merited on the grounds that child labour remains a pervasive problem globally. Moreover, EU-based companies are heavily involved in the cocoa sector, a sector responsible for widespread child labour in Ghana and Côte D’Ivoire. Second, the nuance of the approach required for tackling child labour would be lost in a general human rights reporting obligation. For due diligence legislation to escape the fate of becoming a box-ticking

¹⁸⁹ Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

¹⁹⁰ European Coalition for Corporate Justice, “Evidence for Mandatory Due Diligence Legislation” Briefing Note November, 2018 http://corporatejustice.org/policy-evidence-mhrdd-november-2018-final_1.pdf accessed 28 May 2019, 20 - 30

¹⁹¹ Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market [2010] OJ 2 295/23 - 34

¹⁹² Olivier De Schutter; Anita Ramasastry; Mark B. Taylor; Robert C. Thompson, “Human Rights Due Diligence: The Role of States” December 2012 <http://corporatejustice.org/hrdd-role-of-states-3-dec-2012.pdf> accessed 27 May, 24

¹⁹³ Commissioned by the ministry of foreign affairs of the Netherlands, 'Government Policy to Stimulate International Responsible Business Conduct' [January 2018] Change in Context, 25

¹⁹⁴ Ibid, 25

enterprise, limiting scope is an important step. Therefore, a general approach could dilute the effectiveness of due diligence requirements in engendering change. Third, a mechanism targeting a specific issue may be more likely to enjoy cross stakeholder support than a general mechanism.

The Conflict Mineral Regulation and the Timber Regulation are sector-specific, rather than issue specific. Nonetheless, there is much to be learned from the fact that their focus is narrow and deep, as opposed to general and shallow. An alternative approach would be to legislate on the cocoa sector. However, the issues associated with the cocoa sector are multifarious. Indeed, the other major issue often connected to the cocoa sector, deforestation, is already being addressed by the EU. This year, the Commission launched an initiative to step up its efforts to address deforestation.¹⁹⁵ The issue of child labour has not resulted in analogous concrete steps. Due diligence legislation on the topic could fill this lacuna.

3.2 Member States and due diligence legislation

Some may argue that there is no need for mandatory due diligence standards at the EU level given that Member States are already beginning to legislate on HRDD. However, in this section, various domestic measures will be assessed, and the disadvantages of a fragmented approach will be underlined. But first, what prompted Member State to enact mandatory HRDD? Many were precipitate by NAPs on BHR. As previously mentioned, NAPs are plans put in place by States, in the wake of the UNGPs, detailing how they plan to promote BHR. Many of these NAPs led States to consider the possibility of legislation mandating HRDD from companies. In the following section, domestic laws regarding HRDD are set out:

¹⁹⁵ European Commission “Roadmap Communication on stepping up EU Action against Deforestation and Forest Degradation” 18 December 2018 < https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-6516782_en > accessed 14 June 2019.

- **United Kingdom:** The Modern Slavery Act¹⁹⁶ was adopted in 2015. This mandates that companies domiciled in the United Kingdom must disclose the measures they have taken to prevent child slavery in their supply chain, including due diligence measures.¹⁹⁷
- **France:** France is the first country to transpose HRDD¹⁹⁸ into civil law.¹⁹⁹ The *Devoir de Vigilance* law establishes a duty of care on parent companies for the human rights abuses of their subsidiaries. It also requires companies to publish a vigilance plan.²⁰⁰ At the end of 2017, Amnesty described the law as one of the most significant legal developments in the field of BHR.²⁰¹ Furthermore, they highlight that under the law claimants can seek compensation:

“Crucially, it facilitates access to remedy by establishing that human rights harm resulting from a lack of vigilance as prescribed by the law can be invoked before a French court to seek compensation”²⁰²

- **Netherlands:** The Dutch Senate voted in favour of the Child Labour Due Diligence Law (Wet Zorgplicht Kinderarbeid) on the 14th of May 2019.²⁰³ The Bill requires companies to declare that they have carried out due diligence to assess whether there is child labour in their full supply chain, in accordance with the standards set out in the ILO-IOE’s “Child Labour Guidance for Business.”²⁰⁴ This guidance draws heavily on

¹⁹⁶ Modern Slavery Act 2015. (2015). House of Commons: UK Parliament.

<http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted> accessed 23 March 2019

¹⁹⁷ ECCJ “The EU competence and duty to regulate corporate responsibility to respect Human Rights through mandatory Human Rights Due Diligence” Briefing (November 2017). <https://corporate-responsibility.org/wp-content/uploads/2017/11/Brief-The-EU-competence-and-duty-to-legislate-BLayout.pdf> accessed 29 May 2019, 3

¹⁹⁸ Ibid, 2

¹⁹⁹ LOI relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre 2017, SI 2017/399 <https://www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/jo/texte> accessed 23 March 2019

²⁰⁰ European Coalition for Corporate Justice, “Evidence for Mandatory Due Diligence Legislation” Briefing Note November, 2018 http://corporatejustice.org/policy-evidence-mhrdd-november-2018-final_1.pdf accessed 28 May 2019, 1

²⁰¹ Amnesty International and Business & Human Rights Resource Center ‘Parent Company Liability’ 2017, 3

²⁰² Ibid.

²⁰² Ibid.

²⁰³ MVO, ‘The Netherlands takes an historic step by adopting child labour due diligence law’ (*MVO Platform*, 14 May 2019) <https://www.mvplatform.nl/en/the-netherlands-takes-a-historic-step-by-adopting-child-labour-due-diligence-law/> accessed 29 May 2019

²⁰⁴ International Labour Organisation and International Organisation of Employers, ILO-IOE Child Labour Guidance Tool for Business: How to do business with respect for children’s right to be free from child labour (ILO 2015)

the UNGPs as a reference point. The declaration must be submitted to the authorities via a statement.²⁰⁵

This law should be highlighted because it provides a template for specific due diligence legislation targeting the issue of child labour. The success and failures of the implementation of this law will assist the EU in shaping its own legislation. From the outset, a potential shortcoming of the law is that the enforcement mechanism seems to be somewhat tokenistic. Where a company fails to submit a declaration or where child labour is identified in the supply chain, there is a fine of €4'100, mere pittance to any international business enterprise.²⁰⁶ Moreover, it will fall to external actors to submit complaints to the regulator, and the regulator will not investigate matters on its own initiative. The process will also be staggered, as the complainant must first submit their concerns to the company itself. Penalties will only be applied due to inaction from the company following the receipt of the complaint.²⁰⁷

Several aspects of the implementation of the law are yet to be determined through an instrument known as a General Administrative Order (GAO), for which the executive responsibility lies with the government, although both chambers of the Dutch Parliament will also need to approve it.²⁰⁸ The specific requirements for the statement provided by companies will be clarified by this GAO. At present, there is no requirement for how often these declarations will have to be submitted.²⁰⁹ Moreover, given that the vote in favour of the Bill only took place in May, the timeline for when the law will be implemented is not yet decided. Aside from these ambiguities, certain elements have already been set in stone, including a requirement that statements submitted will be published on the website of the regulator.²¹⁰ It has also been established that where a company identifies a high probability of child labour in their supply chain, they must put in place an action plan, in accordance with the UNGPs and

²⁰⁵ ECCJ “The EU competence and duty to regulate corporate responsibility to respect Human Rights through mandatory Human Rights Due Diligence” Briefing (November 2017). https://corporate-responsibility.org/wp-content/uploads/2017/11/Brief_The-EU-competence-and-duty-to-legislate_BLayout.pdf. accessed 29 May 2019, 3

²⁰⁶ Mvo platform, 'Update: Frequently Asked Questions about the new Dutch Child Labour Due Diligence Law' (MVO Platform, 3 June 2019) <<https://www.mvoplatform.nl/en/frequently-asked-questions-about-the-new-dutch-child-labour-due-diligence-law/>> accessed 2 July 2019

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ Ibid.

the OECD Guidelines on Multinational Enterprise, on how to prevent this.²¹¹ In line with the conciliatory and realistic spirit of the UNGPs, the law does not set an expectation that companies will eradicate child labour from supply chains, but rather that Dutch companies should execute the reasonable steps they should be expected to take to prevent child labour from occurring.²¹² This focus on the UNGPs is an element of the law that could be transposed into EU legislation.

The trend of launching mandatory HRDD shows no sign of slowing down. The following countries have indicated that they are considering initiating HRDD legislation:

- **Finland:** The new government of Finland announced its intention to enforce mandatory HRDD for companies. The government's programme released in June 2019 set out this intention.²¹³ Before drafting the legislation, the government will first commission a study to assess how best to frame this legislation.²¹⁴
- **Italy:** The 2001 Legislative Decree on administrative liability of legal entities states that companies will be criminally liable for the actions of their employees who break the law for the benefit of the company. Moreover, this liability may accrue when companies are working abroad.²¹⁵ Now, following the proliferation of the UNGPs, the 2016 NAP of Italy²¹⁶ promised that the State will investigate the integration of human rights standards into the 2001 Legislative Decree.²¹⁷

²¹¹ Ibid.

²¹² Ibid.

²¹³ Finnwatch "Finnish Government commits to HRDD legislation" (ECCJ, 3 June 2019) <<http://corporatejustice.org/news/15476-finnish-government-commits-to-hrdd-legislation>> accessed 12 June 2019

²¹⁴ Ibid.

²¹⁵ European Coalition for Corporate Justice, "Evidence for Mandatory Due Diligence Legislation" Briefing Note November, 2018 http://corporatejustice.org/policy-evidence-mhrdd-november-2018-final_1.pdf accessed 28 May 2019, 1

²¹⁶ Italian Action Plan on Business and Human Rights (2016-2021) http://cidu.esteri.it/resource/2016/12/49117_f_NAPBHRENGFINALEDEC152017.pdf accessed 29 May 2019

²¹⁷ European Coalition for Corporate Justice, "Evidence for Mandatory Due Diligence Legislation" Briefing Note November, 2018 http://corporatejustice.org/policy-evidence-mhrdd-november-2018-final_1.pdf accessed 28 May 2019, 1

- **Germany:** In the German NAP on BHR²¹⁸, the German government promised to consider mandatory HRDD if fewer than half of the major German companies implement their own due diligence programmes by 2020.
- **Switzerland:** As mentioned in chapter one, even though Switzerland is not a part of the EU, because of the trade agreements between Switzerland and the EU, they are still relevant to this thesis. The Swiss Responsible Business Initiative aimed to place a duty of care onto Swiss-based companies in the constitution.²¹⁹ The initiative included mandatory corporate due diligence regarding the environment and BHR, in line with the UNGPs and the OECD Guidelines.²²⁰ The constitutional initiative was proposed by the Swiss Coalition for Corporate Justice, who represent over eighty non-governmental organizations in Switzerland.²²¹ It was supported by the First Chamber of the Swiss Parliament in June 2018.

In February 2019, the Swiss Commission for Legal Affairs of the Council of States endorsed a counterproposal,²²² which set out a more limited version of corporate liability. However, in March 2019, the Senate rejected both the counter proposal and the original Responsible Business Initiative.²²³ Following the vote, the matter was sent back to National Council's Legal Affairs Committee. This Committee returned to the original draft and it is expected that there will a referendum on this original draft sometime after February 2020.²²⁴

²¹⁸ National Action Plan, implementing the UN Guiding Principles on Business and Human Rights, 2016- 2020. Published by the Federal Foreign Office; German Government Coalition Agreement, 2018, in Chapter XII.6: Human Rights, Crisis Prevention and Humanitarian Aid. <https://www.auswaertiges-amt.de/blob/610714/fb740510e8c2fa83dc507afad0b2d7ad/nap-wirtschaft-menschenrechte-engl-data.pdf> accessed 29 May 2019

²¹⁹ Ibid.

²²⁰ European Coalition for Corporate Justice, "Evidence for Mandatory Due Diligence Legislation" Briefing Note November, 2018 http://corporatejustice.org/policy-evidence-mhrdd-november-2018-final_1.pdf accessed 28 May 2019, 1

²²¹ Nicolas Bueno, "The Swiss Popular Initiative on Responsible Business, From Responsibility to Liability", forthcoming in L.F.H. Enneking, I. Giesen, F.G.H. Kristen, L. Roorda, C.M.J. Ryngaert, A.L.M. Schaap (eds.), *Accountability and International Business Operations: Providing Justice for Corporate Violations of Human Rights and Environmental Standards*, London, New York: Routledge, Taylor & Francis Group, 2018, 12

²²² Business and Human Rights Resource Center, "Switzerland: Debate intensifies around Initiative for responsible business conduct launched by NGO coalition" *business-humanrights.org* (2019) <https://www.business-humanrights.org/en/switzerland-ngo-coalition-launches-responsible-business-initiative> accessed 29 May 2019

²²³ Jessica Davis Pluss and Andrea Tognina "Responsible business initiative heads closer to a national vote" *SwissInfo* (12 March 2019). https://www.swissinfo.ch/eng/corporate-responsibility_responsible-business-initiative-heads-closer-to-a-national-vote/44818824. Accessed 29 May 2019

²²⁴ Business and Human Rights Resource Center, "Switzerland: Debate intensifies around Initiative for responsible business conduct launched by NGO coalition" *business-humanrights.org* (2019)

- **Sweden:** The Swedish Agency for Public Management recommended the government to look into the possibility of HRDD legislation for companies.²²⁵ This recommendation may be found in a study commissioned by the Minister of Trade.²²⁶

These measures and plans collectively demonstrate a growing desire for corporate HRDD among EU Member States. It is conceivable that this wave of support could be harnessed to garner support for EU wide mandatory child labour due diligence. Granted, in the political reality of the EU, nothing is guaranteed, but the trend discussed here, at the very least, demonstrates that there is a basis to work towards such a measure.

A fragmented approach to HRDD and child labour due diligence, with Member States taking on different standards, poses problems for the functioning of the common market. Moreover, there are various shortcomings in the domestic HRDD laws already enacted. The EU can glean valuable lessons from the weaknesses in these domestic instruments. These weaknesses include the scope, scant enforcement measures, the burden of proof and forum shopping.

i. *The scope:* One problem identified regarding the French *Devoir de Vigilance* law is the limited scope of its application. Because the law only addresses companies above a certain size, in total, it only applies to 150 companies.²²⁷ On the other hand, the Dutch due diligence law on child labour applies to companies from anywhere in the world that deliver goods to the Netherlands twice or more a year.²²⁸ The scope of the Dutch law, as a contrast point, highlights the narrowness of the French law's application.

<https://www.business-humanrights.org/en/switzerland-ngo-coalition-launches-responsible-business-initiative> accessed 29 May 2019

²²⁵ European Coalition for Corporate Justice, "Evidence for Mandatory Due Diligence Legislation" Briefing Note November, 2018 http://corporatejustice.org/policy-evidence-mhrdd-november-2018-final_1.pdf. accessed 28 May 2019, 1 - 2

²²⁶ Report of the Swedish Agency for Public Management, March 2018 (in Swedish). <http://www.statskontoret.se/nyheter/fns-vagledande-principer-for-foretag-och-manskliga-rattigheter--utmaningar-i-statens-arbete/> accessed 29 May 2019

²²⁷ Axel Marx, et. al (Leuven Center for Global Governance) "Access to legal remedies for victims of corporate human rights abuses in third countries" European Parliament Think Tank, Directorate General for External Policies (February 2019)

[http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU\(2019\)603475_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf) accessed 29 May 2019, 109

²²⁸ Mvo platform, 'Update: Frequently Asked Questions about the new Dutch Child Labour Due Diligence Law' (MVO Platform, 3 June 2019) <<https://www.mvoplatform.nl/en/frequently-asked-questions-about-the-new-dutch-child-labour-due-diligence-law/>> accessed 2 July 2019

ii. *Scant enforcement measures*: While the scope of the UK Modern Slavery Act extends to more business enterprise, it is criticised for weak enforcement measures. An independent report,²²⁹ led by The Rt Hon Baroness Butler-Sloss GBE, recommended that enforcement measures should be strengthened to guarantee that reporting standards are adhered to.²³⁰ Where there is no mechanism to enforce standards, mandatory due diligence practices run the risk of becoming a mere box-ticking exercise.²³¹

iii. *The burden of proof*: In the French *Devoir de Vigilance* law, the burden lies with the claimant to demonstrate a breach of duty, harm and causation.²³² This can prove long and expensive. To remedy this, a Parliament Think Tank Study makes the novel suggestion of reversing the burden of proof. This would mean that when an alleged human rights abuse takes place that it connected to business practice, it would fall on the parent company to demonstrate that they had taken the necessary steps to fulfil their due diligence obligations.²³³

iv. *Forum-shopping*: Currently, the varying standards across the EU incentivises companies with business relations in third States to choose their home State within the EU selectively on the basis of the HRDD law.²³⁴ This implicitly penalises Member States who have taken steps to put the UNGPs into practice. Harmonisation through an EU initiative would create a level playing field across the Member States and would prevent forum shopping on this basis.

²²⁹ The Rt Hon Baroness Butler-Sloss GBE, Frank Field MP and Maria Miller MP “Independent Review of the Modern Slavery Act: Second interim report: Transparency in supply chains” January 2019 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/796500/FINAL_Independent_MSA_Review_Interim_Report_2_-_TISC.pdf accessed 29 May 2019

²³⁰ Cherie Blair QC, “Law on Parent Company Liability Moving in the Right Direction: As businesses reap the benefits of globalisation they must not forget their responsibility to play a positive role in global society” The Times <https://www.thetimes.co.uk/article/law-on-parent-company-liability-moving-in-right-direction-gqhl99knh> accessed 28 May 2019

²³¹ Ibid.

²³² Ibid.

²³³ Ibid.

²³⁴ Ibid.

3.3 The EU position going forward

Reasons to introduce mandatory child labour due diligence at the EU level extend beyond problems with individual domestic laws. There are stand-alone advantages associated with an EU mechanism of this nature. They include increased harmonisation and assisting business leaders.

i. *Increased harmonisation:* The absence of harmonised standards across the Union could lead to unpredictable outcomes where complaints regarding human rights abuses are made. Complainants as well as the companies themselves are unsure as to the outcome of a complaint, depending on the jurisdiction. The Fundamental Rights Agency notes that

“A more uniform system rooted in the core values, consumers, shareholders, creditors and other stakeholders – and certainly businesses – would have a more level playing field, across the entire single market; a more uniform system could thus encourage investments and entrepreneurship”²³⁵

ii. *Business support:* A 2018 briefing by the European Coalition for Corporate Justice lists indicia of support for HRDD from the business community. One of the more notable statistics listed is that:

“Senior corporate executives, have ranked “make HRDD a legal requirement” in the top 3 out of 10 measures to enable companies to fulfil their responsibility to respect human rights, in a global survey²³⁶ by the Economist.”²³⁷

While this statistic relates to general HRDD, it indicates support for the type of legislation involved in an EU Regulation on child labour due diligence.

²³⁵ European Union Agency on Fundamental Rights, Opinion on improving access to remedy in the area of business and human rights at the EU level, Vienna, 10 April 2017, FRA Opinion – 1/2017, p. 52 – p. 53

²³⁶ The Economist Intelligence Unit “The road from principles to practice. Today’s challenges for business in respecting human rights” (2015) https://www.mazars.com/content/download/773111/39635892/version//file/Mazars%20and%20EIU%20global%20report%20on%20Human%20Rights%20and%20Business_March%202015.pdf accessed 30 May 2019

²³⁷ European Coalition for Corporate Justice, “Evidence for Mandatory Due Diligence Legislation” Briefing Note November, 2018 http://corporatejustice.org/policy-evidence-mhrdd-november-2018-final_1.pdf accessed 28 May 2019, 3 - 4

As previously mentioned, in June 2019, the Finnish government announced its intention to draft mandatory HRDD legislation domestically. As the Finnish government will hold Presidency of the EU for six months, starting on 1 July 2019, the Finnish government also announced that they intend to push the concept of mandatory HRDD at the European level.²³⁸ This is significant because while the plan is in its infancy at present, the announcement nonetheless reveals the potential for meaningful corporate due diligence obligations mandated by the EU in years to come, including child labour due diligence.

²³⁸ Phil Bloomer, “Europe Takes Big Step Towards Companies Having Duty of Care on Human Rights” (EureReporter, 12 June 2019) <<https://www.eureporter.co/economy/2019/06/12/europe-takes-a-big-step-towards-companies-having-duty-of-care-on-humanrights/>> accessed 12 June 2019

MULTI-STAKEHOLDER INITIATIVE

This chapter will focus on a soft measure, specifically an EU led multi-stakeholder initiative, as a vehicle for imposing child labour due diligence on companies involved in the cocoa sector. The chapter begins by explaining why mandatory child labour due diligence legislation at an EU level might not be created. Beyond this, it introduces reasons for using soft measures rather than hard measures for implementing child labour due diligence in cocoa supply chains. To show the viability of such an initiative, this chapter outlines previous soft measures on BHR issues utilised by the EU.

The chapter then defines MSIs and explains their basis in stakeholder theory. It will introduce the pre-existing EU MSI on the SDGs and explain why this is not an ideal platform for rolling out child labour due diligence. By drawing on the example of sectoral covenants in the Netherlands, it will outline steps that could be taken by the EU to ensure that an MSI would not replicate the shortcomings in many soft measures. The point of this chapter is to convey the value of a multi-stakeholder initiative on child labour in the EU due diligence. The chapter argues that such an MSI would be valuable both in tandem with legislation and in the absence of it.

4.1 Why consider soft measures by the EU?

The idea of mandatory child labour due diligence through EU legislation may not come into fruition for many reasons. It may be that the political mechanisms of the EU do not champion the cause. Generally, the EU has demonstrated a reticence to legislate on matters relating to BHR. For example, after eight national parliaments launched the green card, Vice

President Timmermans responded in a Commission overview of current CSR policy, by stating that the Commission has no plans to introduce new legislation.²³⁹

Beyond the question of whether the child labour due diligence *could* be implemented through EU law, lies the question of whether child labour due diligence *should* be implemented through hard law. In the field of BHR, there are heated debates on whether hard measures or soft measures are best able to engender corporate compliance. In practice, soft law is a popular option. In 2008, Vogel estimated that there were upwards of 300 voluntary CSR codes.²⁴⁰ While the strategies introduced to establish business responsibility have been varied, one shared characteristic is that they mostly rely on soft measures.²⁴¹ Soft measures have many advantages over hard law.

An advantage of soft law is that it is more appealing to influential stakeholders.²⁴² International corporations prefer to create industry standards than to be bound by hard law. Additionally, if States and businesses think that new binding standards will lead to additional costs, they will be hesitant to accept it.²⁴³ For this reason, it is easier to come to a consensus when drafting soft law.²⁴⁴ Further, creating soft measures is usually quicker than drafting hard law.

Soft law can precipitate the creation of hard law. For example, stakeholders may test out accountability measures through soft law before enacting them in hard law.²⁴⁵ Due to soft law standards, hundreds of companies now commit to human rights standards.²⁴⁶ Presently, it may be difficult to hold them to account, but the civilising force of hypocrisy is a powerful instrument.²⁴⁷ Equally, the acceptance of soft-law standards by States can precurse the adoption of national legislation, thereby giving these soft-law standards a hard-edge. An

²³⁹ Commissioned by the ministry of foreign affairs of the Netherlands, 'Government Policy to Stimulate International Responsible Business Conduct' [January 2018] Change in Context, 20

²⁴⁰ David Vogel, 'Private Global Business Regulation' (2008) 11 Annual Review of Political Science, 261

²⁴¹ Justine Nolan, The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law? in Surya Deva and David Bilchitz (eds), Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect? (Cambridge University Press 2013), 139

²⁴² Ibid, 142

²⁴³ Tori Loven Kirkebø and Malcolm Langford, 'The Commitment Curve: Global Regulation of Business and Human Rights' [2018] 3(2) Business and Human Rights Journal. 159

²⁴⁴ Justine Nolan, The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law? in Surya Deva and David Bilchitz (eds), Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect? (Cambridge University Press 2013) 142

²⁴⁵ Ibid, 143

²⁴⁶ Ibid, 154

²⁴⁷ Yvonne Xin Wang, (2015) Contextualisation Universal Human Rights: An Integrated Human Rights Frameworks for ASEAN Duke Journal of Comparative & International Law (25), 407

example of this was when domestic laws integrated the Guiding Principles on Internal Displacement.²⁴⁸

It is possible for the EU to support soft measures promoting ethical behaviour from corporations. The Commission's approach to CSR is built upon "a smart mix of voluntary policy measures and, where necessary, complementary regulation,"²⁴⁹ as well as on the notion that "the development of CSR should be led by enterprises themselves."²⁵⁰ This shows that the EU is more open than before to legislation on business responsibility regarding human rights, but that the Commission prefers soft measures led by companies themselves.

There is precedent for soft measures facilitated by the EU on corporate responsibility. The European Commission pioneered programmes like the European Business Network for Social Cohesion in 1996 (which was later named CSR Europe). In 2001, the EU Commission published a green paper on CSR.²⁵¹ Following the input on this Green Paper, the EU published a CSR strategy entitled: A Business Contribution to Sustainable Development. Voluntary activities were promoted in this strategy.²⁵² In 2005, the European Commission launched its roadmap for business, named "Towards a Competitive and Sustainable Enterprise," and this was followed by numerous updates, the most recent of which is the Enterprise 2020 Manifesto.

The EU's support for voluntary measures is counter-balanced by its increasing support for BHR, which prioritises accountability. Following the publishing of the Guiding Principles, the EU moved from advocating for the voluntary approach of CSR to a more overtly rights-based approach. The European Union CSR strategy now links to human rights more explicitly.²⁵³ This is evinced by the EU creating a peer review of national CSR policies.²⁵⁴

²⁴⁸ Justine Nolan, *The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?* in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013) 158

²⁴⁹ Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights - State of Play. Brussels, 14.7.2015 SWD(2015) 144 final, 7

²⁵⁰ Ibid.

²⁵¹ European Commission, 'Green Paper – Promoting a European Framework for Corporate Social Responsibility' (July, 2001) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52001DC0366> accessed 21 May 2019

²⁵² Commissioned by the Ministry of Foreign Affairs of the Netherlands, 'Government Policy to Stimulate International Responsible Business Conduct' [January 2018] Change in Context, 17

²⁵³ Fundamental Rights Agency, 'Improving access to remedy in the area of business and human rights at the EU level. Opinion of the European Union Agency for Fundamental Rights' (10 April 2017) https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-opinion-01-2017-business-human-rights_en.pdf accessed 21 May 2019, 75

²⁵⁴ Ibid, 75

Moreover, the European Commission's renewed strategy 2011 – 2014 for Corporate Social Responsibility created a new definition of CSR and referenced the UNGPs.²⁵⁵

In this context, where there is increased interest in the EU's role in mediating the business-related human rights responsibilities of companies, it may be that there is room for a voluntary MSI coordinated by the EU. This would provide an opportunity for authoritative and coordinated due diligence standards to be drafted, albeit in non-legal form.

4.2 A definition and justification of multi-stakeholder initiatives

This chapter proposes that the EU should establish an MSI on child labour in cocoa supply chains. In making this case, it is necessary to define an MSI. MSIs are based in stakeholder theory, which, according to Boersma, “emphasises the role of morals and values in managing organisations and explaining their actions.”²⁵⁶ Stakeholder theory points to the value of a corporate entity acting for the interests of all people with a stake in the actions of the company, rather than acting solely for the pursuit of profit. In practice, this claim would translate to mean that the interests of the communities which produce cocoa should be a consideration for a business enterprise profiting from cocoa.

Is this a slippery slope? How does one draw the line on who is or is not a stakeholder? Boersma puts this question to rest by clarifying that there are different categories of stakeholder. Arbitrary or distant stakeholders cannot supersede a company's business interests, but where the rights and dignity of a stakeholder are being violated or are at a risk of being violated as a result of business practice, this issue overrides other business priorities. This central claim of stakeholder theory is substantiated by Principle 24 of the UNGPs which states that:

²⁵⁵ European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A renewed EU strategy 2011-14 for Corporate Social Responsibility” Brussels, 25.10.2011 COM(2011) 681 final. Available at: < [http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com\(2011\)0681_/com_com\(2011\)0681_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2011)0681_/com_com(2011)0681_en.pdf)> accessed 13 July 2019

²⁵⁶ Martijn Boersma, 'Changing Approaches to Child Labour in Global Supply Chains: Exploring the Influence of Multi- Stakeholder Partnerships and the United Nations Guiding Principles on Business and Human Rights' [2017] 40(3) The University of New South Wales Law Journal. 1258. Referring to R Edward Freeman, *Strategic Management: A Stakeholder Approach* (Cambridge University Press, first published in 1984, 2010 ed).

“Where it is necessary to prioritise actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable.”²⁵⁷

This evinces that there is a standard for drawing a line under who can be counted as a stakeholder and when the claims of stakeholders hold influence.

As well as acting in the interests of stakeholders, another characteristic of MSIs is that they engage with a cross section of these stakeholders in order to create standards for business practice. In an MSI, different stakeholders assemble and discuss a topic of common concern. The partnerships in these fora include “companies, trade union representatives, NGOs, [...] local affiliates and [...] government.”²⁵⁸ The reasoning behind MSIs is clear. Van Tudler writes:

“Most of the issues we face today are neither owned nor solved by individual stakeholders anymore. With growing interdependence comes a growing need to search for collaborative approaches”²⁵⁹

This observation about global trade networks reflects the complex nature of the cocoa sector. No single actor exercises effective control over the cocoa production process from start to finish; a reality which means that cooperation is essential if problems in the supply chain are to be addressed. Equally, no single stakeholder on their own will be able to stop the phenomenon of child labour in isolation.

²⁵⁷ *Guiding Principles on Business and Human Rights*, UN Doc A/HRC/17/31, annex Guiding Principle 24. As referenced in Martijn Boersma, 'Changing Approaches to Child Labour in Global Supply Chains: Exploring the Influence of Multi- Stakeholder Partnerships and the United Nations Guiding Principles on Business and Human Rights' [2017] 40(3) The University of New South Wales Law Journal

²⁵⁸ Martijn Boersma, 'Changing Approaches to Child Labour in Global Supply Chains: Exploring the Influence of Multi- Stakeholder Partnerships and the United Nations Guiding Principles on Business and Human Rights' [2017] 40(3) The University of New South Wales Law Journal, 1268

²⁵⁹ Dorothee Baumann-Pauly and others, 'Industry-Specific Multi-Stakeholder Initiatives That Govern Corporate Human Rights Standards: Legitimacy assessments of the Fair Labor Association and the Global Network Initiative' [2017] 143(4) Journal of Business Ethics 772. Citing: Van Tulder, R. (2012). Foreword—The necessity of multi-stakeholder initiatives. In van Huijstee, M. (Ed.), Multi-stakeholder initiatives: A strategic guide for civil society organizations, SOMO. <http://somo.nl/news-en/somo-publishes-strategic-guide-on-multistakeholder-initiatives-for-civil-society-organizations>

One reason this chapter argues for MSIs, instead of another form of soft measures, is that MSIs are more democratically legitimate than other soft measures. Scharpf elaborates on the different ways in which an initiative may gain legitimacy.

“Scharpf has argued that democratic legitimacy focuses on two principal questions: To what extent is the regulation perceived as justified or credible (input legitimacy)? To what extent does the regulation effectively solve the issues that it targets (output legitimacy)”²⁶⁰

By consulting with stakeholders, MSIs have more input legitimacy. By drawing on local expertise, MSIs are more likely to solve the issues at hand, resulting in output legitimacy.

²⁶⁰ Dorothee Baumann-Pauly and others, 'Industry-Specific Multi-Stakeholder Initiatives That Govern Corporate Human Rights Standards: Legitimacy assessments of the Fair Labor Association and the Global Network Initiative' [2017] 143(4) *Journal of Business Ethics*, 772
Citing: Risse, T. (2004). Transnational governance and legitimacy. Working Paper. http://userpage.fu-berlin.de/~atasp/texte/tn_governance_benz.pdf. And Scharpf, F. W. (1999). *Governing in Europe. Effective and democratic*. Oxford: OUP

4.3 Form of the multi-stakeholder initiative

Having defined an MSI, this chapter will now turn to consider the nuts and bolts of what such an EU initiative would look like. There are numerous risks associated with soft measures. The following section will elaborate on these interconnected risks and pose methods to mitigate for them in an MSI.

Risk:	Woolly language	Mitigation Method:	Streamline the UNGPs Limited scope & timeframe
Risk:	No accountability	Mitigation Method:	Structural separation Transparency
Risk:	Corporate capture	Mitigation Method:	Clear parameters & rules
Risk:	Erosion of State responsibility	Mitigation Method:	Involvement of relevant ministries/institutions

To illustrate these issues, the chapter will refer to a series of sectoral MSIs created by the Netherlands on supply chains. The publication of the Dutch NAP led to the creation of these sectoral MSIs. In 2014, KPMG investigated which CSR issues require the most attention. This research identified 13 sectors which contain the most relative risks. Following from this, the Netherlands coordinated MSIs for these sectors, which led to the creation sector specific CSR covenants,²⁶¹ including on banking and food stuffs.²⁶² All of the CSR covenants were created by numerous stakeholders. In the case of the DBA, this included the banking sector, unions,

²⁶¹ MVO platform, 'The Contribution of Companies to the SDGs' (Business and Human Rights, June 2018) <<https://www.business-humanrights.org/sites/default/files/Companies-contribution-to-the-SDGs.pdf>> accessed 24 June 2019, 33

²⁶² Unfortunately, the covenant on food stuffs is unavailable in English. However, the Dutch Banking Sector Agreement (DBA) which was announced in 2016 is available.

CSOs and the government.²⁶³ Due diligence was considered an essential element for the success of these CSR covenants.²⁶⁴ An EU MSI could use the Dutch CSR covenants as a loose blueprint.

Conceptual woolliness is a potential shortcoming of all soft measures. Examples of woolly concepts one might see in voluntary codes of conduct are “a conviction to do good” or “a commitment to improving lives.” Loose terms, such as these, do not set out specific goals, nor do they provide a metric for assessing progress. Nolan²⁶⁵ refers to the first interim report by the Special Representative in which he explained that one weakness of voluntary codes of conduct is the tendency for them to choose their own definition of human rights rather than adhering to internationally agreed standards.²⁶⁶ McKeon notes that:

“Inquiry into corporations’ strategies in engaging in multistakeholder arrangements indicates, not surprisingly, that they adhere to those which valorise their current or desired practices and avoid those which would require changes they feel would not be in line with their business strategies.”²⁶⁷

Any action, no matter how limited, can be framed by corporate actors as a positive outcome, where there is no standard. By referring to international standards such as the UNGPs as a basis, an EU MSI could ensure that the terms used correspond to standards which can be used as a yardstick for progress. Under the DBA, banks must report in line with an initiative based on the UNGPs, called the UN Guiding Principles Reporting Framework. This framework, launched in 2015, and created by the Shift project and Mazars LLP, aims to assist companies in satisfying the responsibility to respect human rights set out in pillar two of the UNGPs. Moreover, the adherents to the Covenant must take into account the work of the OECD Working Group on Responsible Business Conduct.²⁶⁸

²⁶³ Benjamin Thompson, 'The Dutch Banking Sector Agreement on Human Rights: An Exercise in Regulation, Experimentation or Advocacy?' [2018] 14(2) Utrecht Law Review, 85

²⁶⁴ MVO platform, 'The Contribution of Companies to the SDGs' (Business and Human Rights, June 2018) <<https://www.business-humanrights.org/sites/default/files/Companies-contribution-to-the-SDGs.pdf>> accessed 24 June 2019, 34

²⁶⁵ Justine Nolan, The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law? in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013), 153

²⁶⁶ To the Secretary General on Human Rights and Transnational Corporations and other Business Enterprise to the Human Rights Council.

²⁶⁷ Nora McKeon, 'Are Equity and Sustainability a Likely Outcome When Foxes and Chickens Share the Same Coop? Critiquing the Concept of Multistakeholder Governance of Food Security' [2017] 14(3) *Globalizations*, 394

²⁶⁸ *Ibid.*

Integrating the UNGPs into an EU MSI will shift the focus of the MSI from valorizing positive acts to highlighting the potential adverse effects of business practice.²⁶⁹ This will help to paint a more realistic, albeit negative, picture of the severity of the problem of child labour in cocoa supply chains. This focus may not be as marketable for companies because it requires the identification of unresolved issues in one's supply chain. However, the international reputation of the UNGPs means that companies can use the clout gained for engaging with them to offset the potential damage from admitting to problems in their supply chain. Indeed, Boersma²⁷⁰ highlights a study from the SHIFT project which identifies increased commitment to human rights protection in the wake of the UNGPs.²⁷¹

The limited time frame in the Dutch CSR covenants means that they are more focused and potentially more impactful than other soft measures.²⁷² Due to its limited scope in terms of the substance it addresses and the time it covers, the covenant is very specific.²⁷³ It only applied for three years. The material covered was limited to "project finance and corporate lending, with the potential to broaden its scope to asset management."²⁷⁴ Another laudable aspect is that unlike other soft measures, and indeed other stakeholder initiatives, the covenants have clear deliverables "against which progress is monitored."²⁷⁵ In summary, to avoid conceptual woolliness, an EU MSI should use clear language to communicate specific goals to be achieved over a set period of time.

The inability to hold corporate parties *accountable* for non-compliance can undermine the effectiveness of a soft measure. Non-compliance can be a major issue for soft measures. Bäumlisberger identified an exploitation motive and a protection motive to explain incidences of non-compliance. The exploitation motive involves companies free riding on the moral

²⁶⁹ Martijn Boersma, 'Changing Approaches to Child Labour in Global Supply Chains: Exploring the Influence of Multi-Stakeholder Partnerships and the United Nations Guiding Principles on Business and Human Rights' [2017] 40(3) The University of New South Wales Law Journal, 1264

²⁷⁰ Ibid, 1252

²⁷¹ Shift, Human Rights Reporting: Are Companies Telling Investors What They Need to Know? (Report, May 2017) <<https://www.shiftproject.org/media/resources/docs/ShiftMaturityofHumanRightsReportingMay2017.pdf>>

²⁷² MVO platform, 'The Contribution of Companies to the SDGs' (Business and Human Rights, June 2018) <<https://www.business-humanrights.org/sites/default/files/Companies-contribution-to-the-SDGs.pdf>> accessed 24 June 2019, 34

²⁷³ Benjamin Thompson, 'The Dutch Banking Sector Agreement on Human Rights: An Exercise in Regulation, Experimentation or Advocacy?' [2018] 14(2) Utrecht Law Review, 95

²⁷⁴ Ibid, 95

²⁷⁵ MVO platform, 'The Contribution of Companies to the SDGs' (Business and Human Rights, June 2018) <<https://www.business-humanrights.org/sites/default/files/Companies-contribution-to-the-SDGs.pdf>> accessed 24 June 2019, 34

sacrifices of others.²⁷⁶ By contrast, the protection motive stems from a concern that “others might exploit one’s own moral commitment to their own advantage”.²⁷⁷ Many of the most globally influential corporations, including Nestlé,²⁷⁸ have been involved in the Global Compact since its conception in 2001 and yet there are still ongoing issues in most global supply chains, not least the matter of child labour.

To ensure that companies are held to account for non-compliance, an EU MSI could include formal enforcement measures such as a delisting procedure which strikes off non-compliant companies from the list of parties to the MSI. How will the MSI know that companies are non-compliant? Many MSIs include a monitoring body, which produces reports on the achievements and failures of members. Cafaggi’s study on the effectiveness of transnational private regulatory initiatives underscores the importance of structural separation to avoid conflicts of interest.²⁷⁹

As the standards set by an MSI are not legally binding, failure to comply with its provisions will not result in legal sanctions. With this limitation in mind, the creators of an MSI should consider the critical role played by non- formal enforcement mechanisms. For example, the media can act as a watchdog by reporting on progress. Thompson notes that this ex-ante measure allowed for banks to be held to account in the Dutch Banking MSI.²⁸⁰ Transparency is essential for the media and CSOs to be able to chart the success of an MSI and to hold participants to account. Transparency is not a subject free from controversy. The principle of business confidentiality can conflict with the principle of transparency. When Sun Hye and others conducted interviews with members of MSIs, a salient issue flagged by interviewees was the difficulties in striking a balance between cooperation and confidentiality.²⁸¹

²⁷⁶ D. Bäumlisberger, (2017) “The United Nations Global Compact as a Facilitator of the Lockean Social Contract” Springer Science+Business Media, B.V. 2017, 3

²⁷⁷ Ibid, 3

²⁷⁸ United Nations Global Compact, 'Company Information' (UN Global Compact) <<https://www.unglobalcompact.org/what-is-gc/participants/6882-Nestle-S-A->> accessed 28 June 2019s

²⁷⁹ Benjamin Thompson, 'The Dutch Banking Sector Agreement on Human Rights: An Exercise in Regulation, Experimentation or Advocacy?' [2018] 14(2) Utrecht Law Review, 95. citing: F. Cafaggi, 'A Comparative Analysis of Transnational Private Regulation: Legitimacy, Quality, Effectiveness and Enforcement', Working Paper Law 2014/15, <<https://ssrn.com/abstract=2449223>> (accessed 14 May 2018), 21

²⁸⁰ Ibid, 95

²⁸¹ Sun Hye Lee and others, 'No Size Fits All: Collaborative Governance as an Alternative for Addressing Labour Issues in Global Supply Chains' [2019] Journal of Business Ethics. <https://doi.org/10.1007/s10551-019-04198-5>, 11 – 12

A further threat to the success of a soft measure is *corporate capture*. This is when a business enterprise exercises disproportionate control over the initiative. Imagine if the agenda of the proposed EU MSI was set solely by the corporate actors. The very purpose of the MSI would be undermined, because the voices of other stakeholders would be lost. The involvement of CSOs is essential to the success of MSIs because their commitment to values and normative frameworks is a pivotal ingredient in keeping private actors in any MSI in tow with the spirit of the initiative.²⁸² The threat of corporate capture is exacerbated when the founders of an MSI assume that all parties hold the same amount of power, and do not put structures in place to offset power imbalances. Business actors will often have more power and more resources at their disposal.²⁸³

To offset this risk, any EU MSI must contain clear parameters to encourage participation of the marginalized stakeholders.²⁸⁴ Martens and others argue that the tenets of Habermas's conception of democratic participation can provide helpful axes for developing the quality of engagement in MSIs.²⁸⁵ They note that Habermas stressed the importance of five elements in deliberative democracy. They are:

“1. Preparation of rule-production in public discussions; 2. Representative decision-making about regulations; 3. Implementation by an administration; 4. Adjudication of norms in factual situations; and 5. Meta-regulation of these four elements in a constitutional framework.”²⁸⁶

The inclusion of these tenets of deliberative democracy in an MSI would provide an opportunity ensure ample participation in MSIs. While a detailed account of Habermas' oeuvre and its contribution to deliberative democracy is beyond the scope of this analysis, it is worth noting that should the EU decide to establish MSIs on child labour in cocoa supply chains, there is a wealth of literature to draw from on this topic.

²⁸² Benjamin Thompson, 'The Dutch Banking Sector Agreement on Human Rights: An Exercise in Regulation, Experimentation or Advocacy?' [2018] 14(2) Utrecht Law Review 97. Citing: K. Abbot & D. Snidal, 'Strengthening International Regulation through Transmittal New Governance: Overcoming the Orchestration Deficit', (2009) 42 Vanderbilt Journal of Transnational Law, pp. 501-578, p. 548.

²⁸³ Nora Mckeon, 'Are Equity and Sustainability a Likely Outcome When Foxes and Chickens Share the Same Coop? Critiquing the Concept of Multistakeholder Governance of Food Security' [2017] 14(3) Globalizations, 380

²⁸⁴ Ibid, 380

²⁸⁵ Will Martens and others, 'How to Assess the Democratic Qualities of a Multi-stakeholder Initiative from a Habermasian Perspective? Deliberative Democracy and the Equator Principles Framework' [2017] 155(4) Journal of Business Ethics, 1115 - 1133

²⁸⁶ Ibid, 1118 – 1119.

Some view the network of soft measures emerging over the world as having a more pernicious by-product than mere inefficiency. This trend is seen to erode the perceived *responsibility of the State* to legislate on business related human rights abuse. As a matter of international law, the State remains the primary duty bearer for protecting human rights. Nonetheless, a focus on voluntary self-regulation can distract from the State obligation to protect human rights. On this matter, the EU can look to the Dutch MSI on banking for guidance. This MSI included representation from relevant government ministries.²⁸⁷ Notably, the Government is not treated solely as a regulator. Instead, they are deemed to hold obligations alongside the banks.²⁸⁸ Similarly, an EU MSI could include representation from relevant EU institutions.

These factors should all be considered by the EU, if it decides to establish of an MSI on the topic of child labour in cocoa supply chains. An interesting counterpoint to the examples given from the Dutch MSI is the Harkin-Engel Protocol. The Harkin Engel Protocol was introduced in chapter one. It is the leading voluntary initiative specifically targeting child labour in the cocoa supply chains of Ghana and Côte D'Ivoire. Chapter one also disparaged the Protocol because it made promises that were not kept. It would be convenient to suggest that the Harkin-Engel Protocol and the Dutch covenants are worlds apart; to characterise the Protocol as a complete failure and the Dutch covenants as a flawless beacon of hope. The reality is more complex. Similarities between the Dutch covenants and Harkin-Engel Protocol demonstrate that nuanced, seemingly insignificant, details make a significant impact to the outcome of an MSI.

For example, there is a degree of structural separation in both agreements. Implementation of the Harkin-Engel Protocol was monitored by an independent overseer. In 2006, a team from Tulane University won a competitive bidding process to conduct oversight activities.²⁸⁹ The Dutch banking MSI has an independent monitoring body, however its ability to publish material to the public is even more limited than the overseers for the Harkin Engel

²⁸⁷ Benjamin Thompson, 'The Dutch Banking Sector Agreement on Human Rights: An Exercise in Regulation, Experimentation or Advocacy?' [2018] 14(2) Utrecht Law Review, 98

²⁸⁸ Ibid, 98

²⁸⁹ William Bertrand and Elke de Buhr, 'Trade, Development and Child Labor: Regulation and Law in the Case of Child Labor in the Cocoa Industry' [2015] 8(2) Law and Development Review, 512

Protocol. Both MSIs have limited enforcement mechanisms and both MSIs rely on multi-stakeholder engagement. The ILO provided significant input to the Harkin Engel Protocol.²⁹⁰

However, a noteworthy difference is engagement with the home State of the companies. It must be stated that the ICI (which arose from the Harkin-Engel Protocol) makes efforts to work with the governments of the host States, Ghana and Côte D'Ivoire.²⁹¹ The same cannot be said for home States. Despite being funded in part by the US government, it does not place obligations on the US government that are comparable to those placed on the Dutch ministries in the Dutch CSR covenants. Another difference between the Dutch CSR covenants and the Harkin-Engel Protocol is that the UNGPs are central to the former and incidental to the latter.

The Dutch CSR covenants are relatively recent, so their effectiveness will only be determined in time. Nonetheless, they provide a template for the EU, of an MSI that mainstreams due diligence and avoids many of the shortcomings associated with voluntary measures. This analysis demonstrates some methods for improving on the Harkin-Engel Protocol, which is the biggest MSI addressing child labour in Ghana and Côte D'Ivoire.

4.4 4.4 EU MSI on the Sustainable Development Goals

There is already an EU MSI dealing with matters relating to supply chains, that is the European Commission's multi-stakeholder platform on the 2030 Sustainable Development Goals (SDGs). The matter of child labour falls under the auspices of this MSI as Goal 8.7 of the SDGs relates to the eradication of child labour. Why not direct this pre-existing platform towards the eradication of child labour in cocoa supply chains?

One reason is that the issue of child labour could be side-lined in favour of other goals. While all of the SDGs should in theory be addressed to the same extent, in practice, companies often focus on the areas where they can have most affect, sometimes neglecting human rights in the process. MVO Platform write that:

“research by PwC shows that companies will only focus on a small number of SDGs that are most relevant to their business operations or on those goals to which they

²⁹⁰ William Bertrand and Elke de Buhr, 'Trade, Development and Child Labor: Regulation and Law in the Case of Child Labor in the Cocoa Industry' [2015] 8(2) Law and Development Review 516

²⁹¹ Ibid, 517

already make substantial contributions (the “easy wins”), such as SDG 8 about economic growth. Professor Ruggie, author of the UN Guiding Principles (UNGPs), also warns for “cherry-picking” of the goals and emphasises that a positive contribution to one goal does not compensate for negative impacts in other regards, such as human rights.”²⁹²

Another reason for the creation of a stand-alone MSI is that the SDGs do not focus on HRDD or business responsibility as much as the UNGPs. Granted, the Danish Institute for Human Rights has highlighted the how HRDD can contribute to the sustainable development goals,²⁹³ and the Institution provides specific information on how this has been put into practice regarding the issue of child labour.²⁹⁴ Nonetheless, this thesis contends that for ensuring that businesses respond to child labour, the UNGPs should be favoured over the SDGs as a framework because HRDD is engrained into the very fibre of the initiative.

4.5 An argument in favour of an MSI irrespective of whether EU legislation is applied.

The final argument of this chapter is that, even if an EU regulation on child labour due diligence is enacted, regardless, it would still be valuable to have an MSI on child labour in supply chains. This thesis advocates for hard and soft measures to be introduced together. However, introducing a regulation is no mean feat. If it were not introduced, an MSI would still have some impact, albeit much more limited.

No single actor can solve the problem of child labour. Therefore, cooperation between EU companies involved in the cocoa sector is essential if the issue of child labour is to be eradicated from cocoa supply chains in Ghana and Côte D’Ivoire. An MSI can facilitate this

²⁹² MVO platform, 'The Contribution of Companies to the SDGs' (Business and Human Rights, June 2018) <<https://www.business-humanrights.org/sites/default/files/Companies-contribution-to-the-SDGs.pdf>> accessed 24 June 2019. Citing: PwC (2015), Make it your business: Engaging with the Sustainable Development Goals, pp. 12-13 & PwC (2017), SDG Reporting Challenge 2017. Exploring business communication on the global goals, p. 12. And Ruggie, J. (2016), Making Globalization Work for All: Achieving the Sustainable Development Goals Through Business Respect for Human Rights. Shift.

²⁹³ The Danish Institute for Human Rights, 'Salient human rights issues' (Sustainable Development through Human Rights Due Diligence, 0000) <<http://biz.sdg.humanrights.dk/salient-issues>> accessed 24 June 2019

²⁹⁴ The Danish Institute for Human Rights, 'Child Labour' (Sustainable Development through Human Rights Due Diligence, 0000) < <http://biz.sdg.humanrights.dk/salient-issue/child-labour> > accessed 24 June 2019

type of cooperation. For example, the Dutch MSI on banking includes an expectation that banks would coordinate and learn from each other's experiences when it comes to the creation and implementation of due diligence measures.²⁹⁵ Through stakeholder consultation, an MSI will provide an opportunity for EU companies to glean greater knowledge about their supply chain. Companies may not understand labour rights, human rights or the nuance of children's rights and their application.²⁹⁶ There are authoritative guides that the EU can incorporate into an MSI to carry out effective stakeholder engagement on the topic of child labour. The 2015 ILO and IOE Child Labour Guidance Tool for Business²⁹⁷ highlights the following:

ILO-IPEC	Website providing information on social dialogue in addressing child labour. ²⁹⁸
UNICEF	Engaging stakeholders on children's rights: A tool for companies 2014. ²⁹⁹
Stop Child Labour:	Action plan for companies to combat child labour 2012. ³⁰⁰
Shift Project	Bringing a Human Rights Lens to Stakeholder Engagement. Shift workshop report No. 3, August 2013. ³⁰¹
UN Committee on the Rights of the Child	General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights. ³⁰²

²⁹⁵ Ibid.

²⁹⁶ Martijn Boersma, 'Changing Approaches to Child Labour in Global Supply Chains: Exploring the Influence of Multi- Stakeholder Partnerships and the United Nations Guiding Principles on Business and Human Rights' [2017] 40(3) The University of New South Wales Law Journal, 1268

²⁹⁷ International Labour Organisation and International Organisation of Employers, ILO-IOE Child Labour Guidance Tool for Business: How to do business with respect for children's right to be free from child labour (ILO 2015), 59

²⁹⁸ ILO-IPEC website, "Social Dialogue and Child labour," (ILO) available at:

<https://www.ilo.org/ipecc/Action/social-dialogue/lang--en/index.htm> accessed 3 July 2019

²⁹⁹ UNICEF, *Engaging stakeholders on children's rights: A tool for companies* (UNICEF, 2014) available at: https://www.unicef.org/csr/css/Stakeholder_Engagement_on_Childrens_Rights_021014.pdf accessed 3 July 2019

³⁰⁰ Stop Child Labour, *Action plan for companies to combat child labour* (ILO, 2012).

https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/tackling_child_labour_en_0.pdf accessed 3 July 2019

³⁰¹ Shift, *Bringing a Human Rights Lens to Stakeholder Engagement*. (Shift workshop report No. 3, August 2013) available at:

https://www.shiftproject.org/media/resources/docs/Shift_stakeholderengagement2013.pdf accessed 3 July 2019

³⁰² UN Committee on the Rights of the Child (CRC), General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, 17 April 2013, CRC/C/GC/16

An effective MSI will take account the “specifics of industries, communities, legislative frameworks, geographical regions, and the interests of stakeholders.”³⁰³ Therefore, the proposed EU MSI should include specific partners from Ghana and Côte D’Ivoire, including representatives from local CSOs and the government. An example of an MSI facilitating knowledge transfer is the ILO convened meetings between buyers and suppliers. Through these meetings, suppliers could communicate how demand for low cost goods encourage exploitative behaviour.³⁰⁴ By linking CSOs with companies, MSIs also increase the network that each party can draw on. For example, a CSO may be more aware of the other organisations that could assist a company with assessment of their supply chains.³⁰⁵ This results in companies adopting more proactive and pluralistic strategies.³⁰⁶

³⁰³ Martijn Boersma, 'Changing Approaches to Child Labour in Global Supply Chains: Exploring the Influence of Multi- Stakeholder Partnerships and the United Nations Guiding Pri4ciples on Business and Human Rights' [2017] 40(3) The University of New South Wales Law Journal, 1269

³⁰⁴ Ibid, 1268

³⁰⁵ Ibid, 1269

³⁰⁶ Ibid, 1272

CONCLUSIONS AND RECOMMENDATIONS

A RECIPE FOR A RESPONSIBLE COCOA SECTOR

Conclusions

The central research question of this thesis is how child labour due diligence should be implemented by the EU to address the problem of child labour in the cocoa supply chains of Côte d'Ivoire and Ghana. This thesis concludes that the EU should implement a regulation on child labour due diligence and establish an MSI on child labour in cocoa supply chains. The research conducted has yielded several further conclusions.

A. On the reality of child labour in cocoa supply chains:

Child labour is a pervasive problem in the cocoa supply chains of Ghana and Côte d'Ivoire. This is despite efforts by the government to identify, prevent and address child labour. It is also despite the voluntary efforts of EU-based companies. The most salient global industry initiative is the Harkin-Engel Protocol. It is specifically aimed at eradicating child labour from the cocoa supply chains of Côte d'Ivoire. The Harkin-Engel Protocol has repeatedly failed to meet the targets it sets.

B. As regards the value of child labour due diligence:

The UNGPs highlight HRDD as an essential component of responsible business conduct. HRDD allows companies to identify and address human rights abuse in their supply chains. The potential impact child labour due diligence standards could have on cocoa supply chains has not been considered in depth by the European Parliament. The Parliament has proposed other measures to address the problem of child labour in cocoa supply chains, including trade agreements and through mandatory labelling on cocoa products. Unlike these standards, which place additional responsibility on the host State and consumers respectively, due diligence measures place additional responsibility on business enterprise. This focus has been missing from previous attempts to reform the cocoa sector.

C. As concerns the EU's commitment to ensuring that EU-based companies respect human rights:

Following the publication of the UNGPs, the EU expressed a reinforced commitment to promoting responsible business conduct. Notwithstanding its initial reluctance, the Commission seems to have opened up to the idea of legislative action on BHR, in particular human rights due diligence legislation. In the 2018 Action Plan Financing Sustainable Growth, the Commission set out that by the end of 2019, it would assess the possibility of introducing supply chain due diligence requirement for corporate boards.

Moreover, among Member States, there is a clear commitment to implementing the UNGPs. The trend of due diligence legislation in Member States saw the UK, France and the Netherlands pass domestic HRDD laws since 2015. Finland, Italy, Germany, Switzerland and Sweden are also considering HRDD laws. These factors all point to a growing appetite within the EU for measures that reinforce the corporate responsibility to respect human rights.

Recommendations

There is an adage to the effect of 'the more I know, the more I realise I know nothing at all.' Over the course of this research, this has proved to be true. The investigations conducted highlighted ignorance on the part of the writer, but also gaps in the literature. The following channels of enquiry would supplement the academic sources currently available on the EU's approach to child labour in cocoa supply chains.

- Thorough research on engagement between the Harkin-Engel Protocol and the EU.
- Empirical research regarding perspectives from stakeholders involved in the cocoa sector, on the topic of child labour due diligence.
- Further research on the complementarity of due diligence measures with the proposals of the European Parliament (concerning trade arrangements and labelling). This is motivated by the need for EU action to be coherent.

In addition, several recommendations regarding substantive EU action are forwarded.

- The primary recommendation is that the EU should mainstream child labour due diligence. EU action on child labour due diligence would assist Member States in satisfying their obligations to protect children's rights against the adverse effects of business practice, as set out in General Comment 16 of the CRC.
- Like the Netherlands, the EU may utilise a two-pronged approach by utilising both hard and soft measures to implement child labour due diligence. This approach was already put into practice. The Netherlands recently passed a law on mandatory child labour due diligence. Prior to this, they launched MSIs prioritising HRDD in high risk sectors. This approach reflects the spirit of the UNGPs, which acknowledges the limits of what any one actor can do and encourages a mutual appreciation of the capacities of different parties.
- Legislation mandating child labour due diligence has the additional advantage of increasing harmonisation through the EU and ensuring predictability. This is beneficial for EU-based companies that operate between EU Member States.
- It is contended that legislation on child labour due diligence falls within the competence of the EU. It is recommended that the EU can rely on Article 50 (2) TFEU pertaining to the competence of the EU to harmonise national company laws to establish this competence.
- When considering the possibility of implementing legislation on mandatory due diligence regarding child labour, it is recommended that the EU draw on examples of domestic HRDD legislation in Member States. These examples are illustrative of the different options available to legislators regarding the scope, enforcement measures, and the burden of proof of a potential law.
- The EU may consider that hard legislation could take the form of a regulation, given that there are previous examples of this type of due diligence regulation, such as the 2016 Conflict Mineral Regulation and the 2010 Timber Regulation.

- EU legislation mandating child labour due diligence should internalise pertinent international standards on due diligence including the UNGPs and the OECD Guidelines for Multinational Enterprise. It should refer to relevant initiatives on children's rights including the Children's Rights and Business Principles and the CRC's General Comment 16 on State obligations regarding the impact of the business sector on children's rights.
- It is posited that the implementation of an MSI alongside legislation is important, not least because MSIs provide a useful avenue for stimulating the acculturation of human rights among companies.
- It is advanced that the EU should consider establishing an MSI to address child labour in cocoa supply chains. This would provide a forum for the exchange of knowledge on the specificities of child labour in cocoa supply chains. It would also allow for companies to share their experiences in implementing due diligence.
- The EU has engaged with soft measures to address BHR issues in the past. Back in 1996, the EU pioneered initiatives like the European Network for Social Cohesion (CSR Europe). This foundation was built upon and major EU programmes are now in place, including the Enterprise 2020 Manifesto. Given this history, an MSI on child labour in cocoa supply chains is within the realm of conceivability.
- The Dutch CSR covenants provide a template for the EU on how to create an MSI that avoids the shortcomings typically associated with soft measures, including woolly language, the risk of corporate capture and limited accountability. The methods used by the Dutch CSR covenants to avoid these defects include a reliance on the UNGPs, structural separation within the MSI, a set timeline, and clear rules on the functioning of the initiative. Conversely, the EU may learn from the faults in the Harkin-Engel Protocol. These include a failure to engage with experts from a non-legal background when setting targets, and insufficient engagement with the home State of companies.

- The final recommendation is that a regulation and an MSI should be applied together. It is not that these measures are merely complimentary. Rather, they are mutually dependent on each other.

The necessity of these two measures being introduced in tandem cannot be understated. If implemented on its own, a regulation could lead to a fractured response, where individual EU-based companies work in isolation. Cocoa supply chains are complex. To effectively identify, prevent and address child labour, cooperation is needed. Without cooperation, these companies may end up working at cross purposes. This would be an ineffective use of company resources and would reduce the likelihood of due diligence processes making an impact.

The corollary is also true. An MSI may introduce some measures to offset the possibility of corporate capture however, the non-binding nature of any soft measure and the inability to enforce commitments always poses a threat to the effectiveness of the initiative. The spectre of defeatism often lurks behind the rhetoric extolled by business enterprise when they address the topic of child exploitation. There is an acknowledgement of the apparent impossibility of the task before it has even begun. And yet, the framework of human rights asks for more. The idea that a child has a human right to attend school, to live with dignity, to develop, means that this is not some side project to be considered by corporate entities at their leisure. The concept of a right demands to be satisfied. It is non-negotiable. It is urgent. On this basis, the EU should utilise both soft measures and hard measures to implement child labour due diligence. While an MSI facilitates cooperation, a regulation should provide for enforcement and accountability.

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