ELECTRONICS AND SUPPLY CHAINS

A spate of class action lawsuits followed news reports in 2015 about the use of trafficked labor in the Thai seafood industry. Sarah Rathke from Squire Patton Boggs says that the plaintiffs' bar will likely respond similarly to recent news reports about Congolese mining practices for cobalt, which is a common component in the batteries that power personal electronic devices.

Is Tech the New Thai Seafood, and What Does This Mean for Electronics Supply Chains?

By Sarah Rathke

The past five years have seen unprecedented political and legal interest in global corporate supply chains. The trend began in 2010 with the California Transparency in Supply Chain Act, which requires companies doing business in California to post reports on their websites identifying what efforts, if any, they undertake to detect and prevent trafficked and child labor in their supply chains.

Since 2014, the Business Supply Chain Transparency on Trafficking and Slavery Act has been pending before Congress, proposing that publicly traded companies disclose their efforts to identify and address trafficked

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and child labor in their SEC filings. In 2015, the UK got into the game with the Modern Slavery Act, which requires similar website disclosures by companies doing business in the UK.

And just last month, President Obama signed into law the Trade Facilitation and Trade Enforcement Act, which removed the so-called ''consumptive use'' exception to the 1930 Tariff Act, now requiring Customs to disallow the import into the U.S. of goods for which there is ''reasonable but not conclusive belief'' were made using forced labor.

Food Industry Consumer Class Actions

With this increased political attention has come increased legal attention as well, at least in the U.S. Beginning in 2015, plaintiffs' class action lawyers in California began filing putative consumer class actions against major U.S. food manufacturers and retailers, alleging that their products (most often seafood from

Thailand and cocoa from West Africa) were fished or harvested by suppliers using trafficked or child labor.

In November 2015, this trend expanded with a lawsuit against Wal-Mart Stores, initiated by a shareholder group seeking access to Wal-Mart's books and records for the purpose of allowing the plaintiffs to "investigate problems with the defendant's world-wide supply chains, including the reliance on child and forced labor."

One thing that nearly all of these lawsuits have in common was that they were precipitated by media (often UK publication The Guardian) or NGO attention and reports, documenting the alleged practices in question. Between 2014 and 2016, The Guardian has run over three dozen articles targeting slavery in the Thai fishing industry, documenting instances of forced labor from the fishing boats used to catch food for farmed shrimp to the factories in which shrimp are peeled for export and sold to international grocery store chains. In many cases, plaintiffs have been able to simply repurpose this coverage into legal complaints.

Some of these lawsuits have now been dismissed on technical grounds, but the damage to corporate reputation remains.

Still, it seemed at first that this type of criticism was limited to food products. After all, despite years of growing awareness of trafficked and child labor in supply chains, the tech industry was rarely if ever a target. Until now, that is.

Reporting on 'Artisinal' Cobalt

In January 2016, Amnesty International and Democratic Republic of Congo-based NGO, Afrewatch, published an exhaustive joint report concerning the "artisanal" cobalt mining industry in the DRC entitled, "This is What We Die for: Human Rights Abuses in the Democratic Republic of the Congo Power the Global Trade in Cobalt."

The report details the rampant use of child labor in unsafe conditions in the small—or "artisanal"—cobalt mines in the southern DRC. According to the report, children as young as seven years old work long hours in unsafe conditions, usually for only $1-2 per day. They use rudimentary hand tools and no safety equipment, and are subject to beatings at the hands of mine operators.

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Cobalt is an ingredient used in all lithium-ion batteries, necessary in all portable technology devices such as smartphones, laptop computers, and electric vehicles that use chargeable batteries. According to the report, 50 percent of the world's cobalt supply comes from the DRC, and 20 percent of the DRC's exports come from the so-called "artisanal" miners in the southern part of the country. Thus, this issue is related to, but conceptually distinct from, the SEC rule that requires publicly listed companies in the US to disclose information concerning their use of "conflict minerals" — tin, tungsten, tantalum, and gold.

The report describes the DRC cobalt supply chain, which begins in DRC mining operations, both industrial and artisanal. From the mines, cobalt ore is transported to local DRC markets, where it is purchased by traders, who are often Chinese. These traders then sell the ore to larger companies in the DRC, who smelt the ore in their plants and then export it in commercial quantities.

One of the largest cobalt exporting companies in the DRC, according to the report, is Congo Dongfang Mining International ("CDM"), which is a 100 percent subsidiary of China-based Zhejiang Huayon Cobalt Company Ltd., and has been operating in the DRC since 2006. CDM exports its cobalt to its Chinese parent, which further processes it and sells it to lithium-ion battery manufacturers worldwide. From there, the cobalt goes into our mobile devices.

The report makes the case that, given the DRC's dominance in the international cobalt market, it is reasonable to assume that most if not all of the global technology brands using lithium-ion batteries are purchasers of DRC artisanal cobalt. However, when asked by the NGOs, most companies denied having any knowledge that this was their source of cobalt.

Visibility in Supply Chains

It is clear, therefore, that many if not most global tech companies don't have clear visibility into their supply chains. In some ways, this is understandable. Supply chains for high-tech products are much longer and more complex than supply chains for food products typically are. While there is little doubt what ingredients go into shrimp that is sold in grocery stores, tracing tech products down to their metal components and down to the individual mines from which these metals are extracted is a monumental task.

Still, the lesson learned from the food industry is that the consuming public will soon expect tech companies to undertake this task, and to work transparently in doing so.

Tech can benefit from the fact that the food industry has gone first and in many cases can follow the food industry's lead. For example, the food industry has pioneered certification programs like the Rainforest Alli-

ance certification program and Starbucks' C.A.F.E. certification in the coffee industry.

So what's next for tech companies and their supply chains? Quite possible, litigation and legislation.

Certification programs typically employ independent reviewers to verify that suppliers of raw material meet sustainability, human rights, and sometimes economic targets. Certification programs thus are valuable tools when sustainability or human rights issues plague an entire region or industry.

Hand in hand with certification programs is working alongside NGOs that have experience and insight into the problem at issue. GOs have been instrumental in the food industry in increasing sustainability, ensuring improved labor conditions, and ending other practices that are abusive to local communities.

Organizations like Rainforest Alliance and Oxfam have been critical of corporations, on one hand, but have been proactive in engaging with them to eliminate the social harms caused by practices in their supply chains on the other. NGOs often provide valuable expertise in getting to the root cause of the typically systematic and structural problems that underlie supply chain human rights issues.

Oft-noted examples of corporate-NGO partnerships include efforts by Nestle, Marks & Spencer and McDonald's, according to a January 2016 report by Sigwatch, a global network that tracks and analyzes activist campaigns. Food companies have also come together to form trade groups for the purpose of improving supply chain operations and conditions.

The Roundtable on Sustainable Palm Oil is an example, and claims over 2000 members from over 75 companies that operate at various stages of the palm oil supply chain. The Roundtable convened for the purpose of developing and implementing global standards for sustainable palm oil and group in response to criticism about environmental and other practices in the industry.

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And of course, the food industry has pioneered the development of supply chain verification, traceability and auditing programs that can help corporations be more aware of what is going on in the farthest reaches of their supply chains. Although some auditing programs have come under fire for merely "checking the boxes" or for reporting the findings that corporations want them to report, rather than obtaining actual information or solving actual problems, there is no doubt that these practices have changed the industries in which they have become widespread. Supply chain auditing may have a long way to go, but there is no doubt that it has effectively gotten us somewhere.

To date, tech companies have been comparatively ignored by media and NGOs on issues relating to trafficked and child labor. For industrial companies, this makes sense. NGOs typically focus on consumer goods companies because that is the area where negative publicity tends to have the most impact.

The cobalt discovery, however, impacts many global consumer brands, such as Apple and Samsung, so it is reasonable to assume that when the NGO community begins looking at tech, this is where it will look.

Furthermore, mining has long been an NGO focus, so the roots for NGO scrutiny of the tech industry may already be in existence. Indeed, while mining has long been an NGO focus, NGOs have not been particularly effective at changing practices in the mining industry, so they may well see this connection with consumer electronics a way to increase their impact.

SIGWATCH is a private research organization that tracks and records NGO campaigning across the world, and that releases an annual report identifying the "Most Praised" and "Most Criticized" companies by NGOs. The report for 2014-2015, released in January 2016, list few companies on either the "Most Praised" or "Most Criticized" lists. But with the cobalt report, that is likely to change.

Moreover, cobalt is not the only problematic material in tech supply chains. The U.S. Department of Labor's "List of Goods Produced by Child Labor or Forced Labor" includes electronics from China and Malaysia and zinc from Bolivia, for example. The fact that these products have not yet attracted NGO attention is unremarkable. After all, the Department of Labor's list included cobalt from the DRC since 2009.

Litigation and Legislation Coming?

So what's next for tech companies and their supply chains? Quite possible, litigation and legislation. Those who thought that the conflict minerals rule in the U.S. would exhaust the public interest in technology supply chains are probably wrong. Not only will tech supply chains be subject to newly enacted general supply chain

transparency laws—and since many of these were enacted against the background of food supply chain discoveries, these laws may or may not fit tech companies' supply chain operational abilities well—there may be particular laws enacted in Western companies geared toward tech supply chains.

And then there's litigation. It is naïve to believe that the California consumer class action lawsuits that have plagued food industry companies will not expand to tech. Not only has the Amnesty International/Afrewatch been issued, but The Guardian has picked up on the cobalt story too.

In short, there is no reason for plaintiffs' lawyers to ignore the tech industry, and perhaps every reason for them to attack it, since most global tech companies' response to the cobalt report showed that they didn't know where their cobalt came from.

However, as tech companies continue to confront and work through issues associated with international sourcing, they will increasingly face this area, where business interests, government oversight and policy, the law and NGO intervention intersect. The heart of the problem with cobalt is the same as with Thai shrimp and with African cocoa beans: It isn't realistically possible to produce the product at issue economically using normal sources of labor.

And this is where ''best practices'' companies in the food industry have really shined. Leaders in the food industry haven't been afraid to engage meaningfully with their suppliers to show how improvements in technology can increase profit margins and reduce the need to depend on forced or child labor.

Tech can learn from this example.