FIGHTING FORCED LABOR: A BUSINESS AND HUMAN RIGHTS-BASED PROPOSAL TO REFORM THE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT

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The number of individuals in forced labor worldwide continues to rise. From 2012 to 2021 the estimated number of people in forced labor rose from 20.9 million to 27.6 million. One aspect of this global problem is the role that multinational corporations play in contributing to the continued prevalence of forced labor in their supply chains. In response, the United States has taken significant legislative action, including banning the import of goods made at least in part by forced labor. These laws are significantly limited in their ability to address the problem, however. Private litigation by victims of forced labor is another potentially powerful mechanism. The Alien Tort Statute was a promising avenue for civil suits, but recent Supreme Court decisions have severely limited that option. In its place, some plaintiffs have turned to the Trafficking Victims Protection Reauthorization Act ("TVPRA"). However, the Act's civil liability provisions are not well suited for supply chain situations. Thus, this Article proposes a minor but potentially impactful reform of the TVPRA by utilizing terms from the United Nations Guiding Principles on Business and Human Rights; these terms were specifically designed to determine a corporation's connection to an adverse human rights impact and the corporation's necessary response. Incorporating these terms will allow victims of forced labor to use the TVPRA to hold corporations accountable when they are complicit in forced labor violations in their supply chains.

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INTRODUCTION

The United Nations Sustainable Development Goals contain the ambitious goal of ending forced labor, modern slavery, and the worst forms of child labor by 2030.[1] In 2012, the International Labor Office ("ILO") estimated that there were 20.9 million people around the world in forced labor.[2] In subsequent estimates, the ILO found an upward trend; the number of people in forced labor rose to 24.9 million

1. *United Nations Sustainable Development Goals*, U.N., https://www.un.org/sustainabledevelopment/sustainable-development-goals/ [https://perma.cc/6UJ5-HFJY].

2. INT'L LAB. OFF. (ILO) & SPECIAL ACTION PROGRAMME TO COMBAT FORCED LABOUR (SAP-FL), ILO GLOBAL ESTIMATE OF FORCED LABOUR: RESULTS AND METHODOLOGY 13 (2012), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_182004.pdf [https://perma.cc/RRD3-JSCY]. This was the ILO's second estimate. The first estimate, released in 2005, utilized a different research methodology and was not directly comparable to the 2012 numbers. *Id.* at 11. The 2005 report found that there were "at least" 12.3 million people in forced labor. PATRICK BELSER, MICHAËLLE DE COCK & FARHAD MEHRAN, ILO MINIMUM ESTIMATE OF FORCED LABOUR IN THE WORLD 1 (April 2005), https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_081913.pdf [https://perma.cc/S7RN-HUAE].

in 2016[3] and then to 27.6 million in 2021.[4] Surprisingly, this upward trend occurred during a period of time when there was increased media and legislative attention to the issue.

Over the last decade, there have been numerous high-profile news stories on forced labor. For example, journalists reported on the use of forced labor to build the soccer stadiums for the 2022 FIFA World Cup in Qatar for several years leading up to the event.[5] In 2019, reports of forced labor in the Xinjiang region of China began to emerge, which eventually resulted in a U.S. law directed at banning the importation of certain goods from the region.[6] Also in 2019, the book *The Outlaw Ocean*, which reported on forced labor on international fishing ships,[7] reached the *New York Times* bestseller list.[8]

On the legislative front, for over 15 years federal law has required the Department of Labor to produce a list of goods made with forced labor and child

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3. INT'L LAB. ORG. & WALK FREE FOUND., GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE 9–10 (2017), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf [https://perma.cc/77LM-42PX].

4. INT'L LAB. ORG., WALK FREE & INT'L ORG. FOR MIGRATION, GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE 22 (2022), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/publication/wcms_854733.pdf [https://perma.cc/A53R-3NCB]. The increase between 2016 and 2021 was not just in absolute terms, but also in terms of prevalence per thousand people (3.4 to 3.5 per thousand). *Id.* Although COVID-19 played a role in the increase of these numbers, the ILO's estimates do not fully capture that impact. *See id.* at 2, 22.

5. *See, e.g.*, Marina Lopes, *Qatar Deports Migrant Workers Protesting Alleged Abuses Before World Cup*, WASH. POST (Aug. 23, 2022, 4:56 AM), https://www.washingtonpost.com/world/2022/08/23/qatar-2022-fifa-world-cup-migrant-protest/ [https://perma.cc/WV6F-XR85] (discussing the problem of forced labor in building World Cup stadiums in Qatar in 2022); Sabrina Toppa, *The Embargo of Qatar Is Hurting Foreign Workers More Than Qatari Citizens*, WASH. POST (July 20, 2017, 6:00 AM), https://www.washingtonpost.com/news/worldviews/wp/2017/07/20/the-embargo-of-qatar-is-hurting-foreign-workers-more-than-qatari-citizens/ [https://perma.cc/BJ5N-8LRQ] (discussing the problem of forced labor in building World Cup stadiums in Qatar in 2017); Terrence McCoy, *Staggering Number of Workers Said to Die as Qatar Prepares for World Cup*, WASH. POST (Apr. 15, 2014, 4:25 AM), https://www.washingtonpost.com/news/morning-mix/wp/2014/04/15/staggering-number-of-workers-die-as-qatar-prepares-for-worldcup/ [https://perma.cc/FW6M-48MJ] (discussing the problem of forced labor in building World Cup stadiums Qatar in 2014). Although Qatar did implement some reforms, "[c]ritics point out that Qatar's biggest changes only took place after much of the major construction was completed or were narrowly applied only to World Cup projects, and that enforcement remains patchy." Tariq Panja & Bhadra Sharma, *The World Cup's Forgotten Team*, N.Y. TIMES, https://www.nytimes.com/2022/11/16/sports/soccer/world-cup-migrant-workers.html [https://perma.cc/EJ36-MMWJ] (Nov. 17, 2022).

6. *See infra* notes 52–54 and accompanying text.

7. *See generally* IAN URBINA, THE OUTLAW OCEAN: JOURNEYS ACROSS THE LAST UNTAMED FRONTIER (2019).

8. *Hardcover Nonfiction*, N.Y. TIMES (Sept. 8, 2019), https://www.nytimes.com/books/best-sellers/2019/09/08/hardcover-nonfiction/ [https://perma.cc/8MFK-GUCG].

labor.[9] For over 20 years, the Department of State has published a mandatory annual report evaluating different countries' efforts and progress toward eliminating human trafficking and forced labor.[10] Since 2010, California has required certain corporations to publicly disclose what actions, if any, they have taken to ensure there are no instances of forced labor and human trafficking in their supply chains.[11] This law has spurred similar legislation in the United Kingdom and Australia.[12]

Despite these efforts and many others,[13] forced labor continues to increase.[14] As shown by the above examples, this is not due to a lack of awareness by government, business, or the public more generally, but instead to the ineffectiveness of efforts to fight forced labor. Addressing the problem of forced labor requires a multipronged approach.[15] This Article focuses on one part of the problem: the role of multinational corporations in the persistent presence of forced labor in global supply chains.[16] In brief, it is fair to say that forced labor—among other exploitive labor practices—is not found in corporate supply chains despite corporations' best efforts to eradicate it, but that corporations' supply chain practices can be a significant reason why forced labor and other human rights abuses continue to exist.[17]

This Article proceeds as follows. Part I begins by providing an overview of the role of corporations as one of the root causes of forced labor in global supply chains. This Part also describes current federal laws and regulations that demonstrate

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9. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 105, 119 Stat. 3557, 3566–67 (2005). The report is produced by the Department of Labor's Bureau of International Labor Affairs. § 105(b)(1)(c). *See also* BUREAU OF INT'L LAB. AFFS., 2022 LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR, U.S. DEPT. OF LAB. 21 (2022), https://www.dol.gov/sites/dolgov/files/ILAB/child_labor_reports/tda2021/2022-TVPRA-List-of-Goods-v3.pdf [https://perma.cc/9WUS-RHC4].

10. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-825, HUMAN TRAFFICKING: BETTER DATA, STRATEGY, AND REPORTING NEEDED TO ENHANCE U.S. ANTITRAFFICKING EFFORTS ABROAD 26–28 (2006), https://www.gao.gov/assets/gao-06-825.pdf [https://perma.cc/3PTQ-LNL6].

11. California Transparency in Supply Chains Act, CAL. CIV. CODE § 1714.43.

12. *See infra* notes 312–20 and accompanying text.

13. *See infra* Sections IV.B–C.

14. *See supra* notes 2–4 and accompanying text (showing that ILO estimates of forced labor increased by over 30% between 2012 and 2021).

15. *See* INT'L LAB. ORG. et al., *supra* note 4, at 79–98 (setting out a variety of key policy priorities that are necessary to combat forced labor).

16. Forced labor is found throughout the world and is most prevalent in the private economy. INT'L LAB. ORG. et al., *supra* note 4, at 3. The ILO found that 63% of forced labor is in the private economy, 23% is in commercial sexual exploitation, and 14% is state imposed. *Id.* Looking at the forced labor numbers as a proportion of the population in the different regions of the world, the ILO found the following order of prevalence: "the Arab States (5.3 per thousand people), followed by Europe and Central Asia (4.4 per thousand), the Americas and Asia and the Pacific (both at 3.5 per thousand), and Africa (2.9 per thousand)." *Id.* Eighty-seven percent of forced labor occurred in the following industries: "services (excluding domestic work), manufacturing, construction, agriculture (excluding fishing), and domestic work." *Id.* The remaining numbers were spread throughout a variety of industries. *Id.*

17. *See infra* Section I.A.

the United States' strong commitment to fighting forced labor, before noting that these laws have yet to make a significant difference. Part II discusses the Alien Tort Statute ("ATS"), which for many years was viewed by human rights advocates as a potentially powerful tool to hold corporations accountable for their complicity in human rights abuses abroad. As Part II notes, however, recent Supreme Court rulings have severely limited its potential use by plaintiffs.

Part III reviews the evolution of the Trafficking Victims Protection Reauthorization Act ("TVPRA"), which some commentators have identified as a possible alternative basis for plaintiffs to bring civil suits against corporations for human rights abuses in their supply chains—though the TVPRA is limited to claims of forced labor and human trafficking and does not extend to all human rights violations.[18] This Part also identifies the significant problems plaintiffs face in bringing TVPRA claims based on forced labor in supply chains, including unclear definitions of key TVPRA liability terms, extraterritorial jurisdiction issues, and Article III standing challenges.

To lay the groundwork for this Article's reform proposal, Part IV describes the latest instruments and legislation on business and human rights. This Part describes the soft law that has established the well-recognized corporate responsibility to respect human rights. Next, it sets out the various ways that countries—primarily in Europe—have passed legislation to harden that soft law guidance. Part V provides this Article's reform proposal for the TVPRA. The proposal utilizes the soft law categories of a corporation's connection to an adverse human rights impact—"cause," "contribute," and "directly linked"—to reform the TVPRA's civil liability provisions.[19] Unlike the TVPRA's liability provisions, these terms were specifically developed to determine a corporation's responsibility for adverse human rights impacts in its supply chain.[20] The use of these terms helps to avoid the problems Part III identifies with using the TVPRA for forced labor in supply chains. This is followed by a brief discussion of potential public enforcement and a conclusion.

I. OVERVIEW OF FORCED LABOR AND THE ROLE OF MULTINATIONAL CORPORATIONS

Forced labor, and slavery of all forms, is universally recognized as a violation of human rights.[21] In brief, forced labor is any "work or service which is exacted from any person under the menace of any penalty and for which the said

18. *See infra* Section III.A.

19. *See infra* notes 294–96 and accompanying text (defining the terms cause, contribute, and directly linked).

20. *See infra* Section V.A (discussing a corporation's responsibilities under the UNGPs based on its connection to the harm).

21. The Universal Declaration of Human Rights ("UDHR") states that "[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms." G.A. Res. 217 A (III), Universal Declaration of Human Rights (Dec. 10, 1948). Article 8 of the International Covenant on Civil and Political Rights ("ICCPR") states that "[n]o one shall be required to perform forced or compulsory labour." International Covenant on Civil and Political Rights, 999 U.N.T.S. 171.

person has not offered himself voluntarily."[22] A key element of the definition is the lack of consent to work.[23] Forced labor falls under the broader term "modern slavery," which also includes human trafficking and other severely exploitive practices.[24]

Section A describes the role of multinational corporations in contributing to forced labor in global supply chains. This is followed by an overview of the key federal laws and regulations that attempt to address this corporate involvement.

A. The Role of Multinational Corporations

There are many factors that contribute to the continued prevalence of forced labor, but the role of business as a root cause is perhaps less well-understood and appreciated by policymakers and the public.[25] In a recent report, the International Labor Organization highlighted three categories of root causes of forced labor, child labor, and human trafficking in global supply chains—the role of business was one of those root causes.[26] The first category was the inability of the domestic regulatory environment to protect citizens due to inadequate laws or insufficient resources for regulators and enforcement officials.[27] The second category of root causes was the multitude of socio-economic factors—such as poverty, discrimination, and lack of social services and educational opportunities—that individually reinforce the others and collectively place individuals at risk for various forms of exploitation.[28] The third category was "business conduct and business environment."[29]

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22. Forced Labour Convention (No. 29) art. 2, ¶ 2, June 28, 1930, 39 U.N.T.S. 55.

23. Lee Swepston, Forced and Compulsory Labor in International Human Rights Law 3 (Feb. 5, 2015) (Int'l Labour Org., Working Paper), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_342966.pdf [https://perma.cc/22GP-J6WY]. Fraudulently obtained consent can also lead to forced labor. *Id.* In addition, some people, such as children, do not have the capacity to give valid consent to work. *Id.* It is important to recognize that in practice, it can be difficult to apply these definitions to distinguish between "free" labor and "unfree" labor. Genevieve LeBaron, *Wages: An Overlooked Dimension of Business and Human Rights in Global Supply Chains*, 6 BUS. & HUM. RTS. J. 1, 4 –5 (2021).

24. Modern slavery "includes but is not limited to issues such as: traditional slavery, forced labour, debt bondage, serfdom, children working in slavery or slavery-like conditions, domestic servitude, sexual slavery, and servile forms of marriage." Office of the High Commissioner, *Special Rapporteur on Contemporary Forms of Slavery*, U.N., https://www.ohchr.org/en/special-procedures/sr-slavery [https://perma.cc/U5GJ-5U7T] (last visited Jan. 14, 2024).

25. As Professor LeBaron states, forced labor is often seen "as something that arises from criminal perpetrators who infiltrate supply chains, rather than linked to core commercial practices within those chains." LeBaron, *supra* note 23, at 3. Instead, LeBaron argues, forced labor is the "logical, predictable outcome of the ways in which contemporary supply chains are set up . . . and governed." *Id.* at 4.

26. INT'L LAB. ORG., ORG. FOR ECON. COOP. & DEV., INT'L ORG. FOR MIGRATION & UNITED NATION'S CHILD'S FUND, ENDING CHILD LABOUR, FORCED LABOUR AND HUMAN TRAFFICKING IN GLOBAL SUPPLY CHAINS 17–18 (2019).

27. *Id.* at 18.

28. *Id.* at 19–20.

29. *Id.* at 25.

The ILO report cites research showing that suppliers in certain industries face significant pressures from entities further downstream in the supply chain (that is, entities closer to the finished product, such as the product's retailer) that increase the risk of the suppliers becoming involved with forced labor.[30] Primary factors include excessive pressures on price, cost, and time to deliver the product.[31] For example, downstream actors may pressure suppliers to maintain or reduce prices while those suppliers are simultaneously facing higher costs of production due to increased input costs or similar external influences.[32] Suppliers are also more likely to engage in exploitive labor practices when they face pressures due to downstream buyers' late changes to orders, delays in payments, or lack of consistent business relationships (that is, the buyers favor short-term relationships and constantly change the timing and volume of orders).[33] The ILO report clearly states that these pressures "do not lead inevitably" to the use of forced labor but that "where these pressures are sufficiently severe, and where there is a supply of vulnerable workers and there are weaknesses in the rule of law . . . a growing body of evidence indicates that such pressures can incentivize the use of child labour and forced labour."[34]

Within the business community, the impact of downstream buyer behavior on labor abuses by suppliers is well known. For example, 20 years ago the *Harvard Business Review* published an article describing Nike's realization that its procurement practices were driving labor abuses by suppliers and outlining Nike's efforts to correct the problem through operational changes.[35] Overall, businesses have known of the risks of forced labor in their supply chains, their role in the problem, and the mechanisms to attempt to address the risk since the global expansion of supply chains in the 1990s.[36]

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30. *Id.* at 26.
31. *Id.*
32. *Id.*
33. *Id.* at 26, 29.
34. *Id.* at 26. For example, Crane argues these pressures are more likely to lead to forced labor in labor intensive industries "where margins are narrow and where value is captured further downstream by larger and more powerful interests." Andrew Crane, *Modern Slavery as a Management Practice: Exploring the Conditions and Capabilities for Human Exploitation*, 38 ACAD. MGMT. REV. 45, 54 (2013); *see also* LeBaron, *supra* note 23, at 15–16 (reporting research findings that low margins in the tea and cocoa industries and price pressures from downstream buyers creates the risk for forced labor and other forms of exploitation). "[F]ar from an ingenious strategy by criminal entrepreneurs to amass huge profits, forced labor is merely a practice that producers invoke to balance the books and stay afloat in cutthroat, competitive supply chains." Genevieve LeBaron, *The Role of Supply Chains in the Global Business of Forced Labour*, 57 J. SUPPLY CHAIN MGMT. 29, 34 (2021).
35. Simon Zadek, *The Path to Corporate Responsibility*, HARV. BUS. REV., Dec. 2004, at 125, 129–31.
36. *See* Jennifer Green, *Closing the Accountability Gap in Corporate Supply Chains for Violations of the Trafficking Victims Protection Act*, 6 BUS. & HUM. RTS. J. 449, 459, 467–81 (2021) (noting that the ILO specifically raised issues of forced labor in supply chains starting in the early 1990s and listing a variety of mechanisms to help address the problem, such as codes of conduct, contractual mechanisms, risk assessments, and human rights audits).

Despite this longtime awareness, the problems of forced labor persist and seem to be getting worse.[37] Corporations are not bystanders called upon to help; they are often beneficiaries of the abuse as well as key supporting factors in the cycle of exploitation.[38] To date, businesses have not been sufficiently incentivized to find ways out of this cycle.

B. Federal Law and Regulations

This Section sets out the legislative and regulatory approaches that demonstrate the United States' strong commitment to eradicating forced labor, even if the implementation and enforcement of those pieces of legislation and regulations have not produced results matching that commitment. The primary focus of this Article, the TVPRA—a federal law that makes corporations civilly or criminally liable for benefiting from forced labor—is discussed in Part III.[39]

For over 90 years, the United States has banned the import of goods made with forced labor under the Tariff Act of 1930. Section 307 of the Tariff Act prohibits the entry into the United States of any goods "mined, produced or manufactured wholly or in part in any foreign country" by forced or indentured labor.[40] In the past, this section was significantly limited by the Act's "consumptive demand" clause, which permitted the import of otherwise banned goods when the demand for those goods exceeded businesses' ability to produce those goods domestically.[41] In 2016, the Trade Facilitation and Trade Enforcement Act of 2015 repealed the "consumptive demand" clause[42] and enforcement of § 307 began to increase.[43]

Between 2000 and 2016, Customs and Border Protection ("CBP") did not issue any withhold release orders ("WROs"),[44] which are the mechanisms used to

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37. *See supra* notes 2–4 and accompanying text.

38. In recognition of the role of multinational corporations in labor exploitation in supply chains, some use the terms "poverty chains" or "supply chain capitalism." LeBaron, *supra* note 34, at 34; Anna Tsing, *Supply Chains and the Human Condition*, 21 RETHINKING MARXISM 148, 148–49 (2009). Rather than viewing lead corporations' relationship with their suppliers as a series of market transactions, these commentators often emphasize the control lead corporations have over the entire process to ensure they obtain the efficiency gains from such disaggregated and geographically dispersed supply chains but avoid legal responsibility. Dan Danielsen, *Trade, Distribution and Development Under Supply Chain Capitalism*, *in* WORLD TRADE AND INVESTMENT LAW REIMAGINED: A PROGRESSIVE AGENDA FOR WORLD TRADE AND INVESTMENT 121, 121–23 (Alvaro Santos, Chantal Thomas & David Trubek eds., 2019).

39. *See infra* Section III.B (describing the liability provisions in the TVPRA).

40. 19 U.S.C. § 1307 (2016).

41. From 1930 until the mid-1980s, there were approximately ten instances of goods being banned from entering the United States. CHRISTOPHER A. CASEY ET AL., CONG. RSCH. SERV., IF11360, SECTION 307 AND IMPORTS PRODUCED BY FORCED LABOR 1–2 (2023), https://crsreports.congress.gov/product/pdf/IF/IF11360 [https://perma.cc/N4T5-C2W2].

42. Pub. L. No. 114-125, tit. IX, § 910, 130 Stat. 122, 239 (2016) (amending 19 U.S.C. § 1307).

43. *See infra* notes 46-48 and accompanying text.

44. CASEY ET AL., *supra* note 41, at 2.

prevent the entry of goods made with forced labor into the United States.[45] After Congress removed the "consumptive demand" clause, however, the CBP issued 37 WROs through July 2022.[46] For example, in 2021, the CBP published a finding of forced labor used in the production of disposable gloves, such as those used by medical professionals, manufactured in Malaysia by the company Top Glove.[47] The finding required CBP personnel to "begin seizing shipments of those gloves."[48] Several months later, the CBP decided to begin allowing the importation of these gloves because Top Glove had addressed all indicators of forced labor at its facilities and paid over "$30 million in remediation payments to workers and improv[ed] labor and living conditions at the company's facilities."[49] Thus, § 307 can also be used as a tool for remediation.

In 2019, as CBP's enforcement of § 307 was starting to increase, the public's attention was drawn to reports that members of Muslim minority groups—including Uyghurs—were subject to forced labor in the Xinjiang region of China.[50] Goods tainted by this human rights violation were potentially connected to U.S. retail markets.[51] In response, the CBP issued WROs related to certain products originating from Xinjiang, including silica-based products, cotton, and tomatoes.[52] Then, in December 2021, President Biden signed the Uyghur Forced Labor Prevention Act[53] into law. In brief, this law creates a rebuttable presumption that

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45. Under the implementing regulations, CBP may issue a WRO, which prevents the merchandise from entering the United States, whenever it has information that reasonably indicates that the merchandise is in violation of § 307. 19 C.F.R. § 12.42(e) (2017). Any individual may report a possible violation to the CBP, and the Commissioner may initiate an investigation as warranted. 19 C.F.R. § 12.42(b), (d) (2017). After a final determination that the goods are subject to § 307, the Commissioner will publish such a finding in the Customs Bulletin and the Federal Register, and the goods will be prohibited from entering the United States unless the importer can establish "by satisfactory evidence that the merchandise was not mined, produced, or manufactured in any part with the use of a class of labor specified in the finding." 19 C.F.R. § 12.42(f)–(g) (2017).

46. CASEY ET AL., *supra* note 41, at 2.

47. Press Release, CBP Modifies Forced Labor Finding on Top Glove Corporation Bhd., U.S. Customs & Border Prot. (Sept. 9, 2021), https://www.cbp.gov/newsroom/national-media-release/cbp-modifies-forced-labor-finding-top-glove-corporation-bhd [https://perma.cc/M42C-QYZZ]. The CBP had issued a WRO against Top Glove in 2020. *Id.*

48. *Id.*

49. *Id.*

50. Chris Buckley & Austin Ramzy, *Inside China's Push to Turn Muslim Minorities into an Army of Workers*, N.Y. TIMES, https://www.nytimes.com/2019/12/30/world/asia/china-xinjiang-muslims-labor.html [https://perma.cc/ZQ2L-5BVQ] (July 1, 2020).

51. *See id.*

52. Press Release, Fact Sheet: New U.S. Government Actions on Forced Labor in Xinjiang, The White House (June 24, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/24/fact-sheet-new-u-s-government-actions-on-forced-labor-in-xinjiang/ [https://perma.cc/JQ9C-A4X6].

53. Uyghur Forced Labor Prevention Act, Pub. L. No 117-78, 135 Stat. 1525 (2021).

goods produced, wholly or in part, in the Xinjiang region are prohibited from entering the United States under § 307 of the Tariff Act.[54]

The post-2016 enforcement of § 307 has spurred additional changes. For example, for the first time in a U.S. free trade agreement,[55] the United States–Mexico–Canada Agreement includes a ban on the import of goods made with forced labor.[56] The European Union is in the process of developing its own ban on goods made with forced labor.[57] Some argue that the E.U. ban is necessary because corporations have already reacted to U.S. laws. These commentators claim that "[g]oods made without forced labor are going to the U.S., while goods made with forced labor are shipped to the EU."[58] The E.U. ban, however, is not expected to come into force for several years.[59]

Although there have been noteworthy accomplishments, the enforcement and overall effectiveness of import bans are limited by many factors. For § 307 of the Tariff Act, the CBP's enforcement challenges include difficulties in tracking the use of forced labor through complex supply chains, lack of enforcement staff, and challenges related to coordinating enforcement with other federal agencies and embassies relevant to the countries in question.[60] Nongovernmental organizations ("NGOs") have raised the concern that companies will "cut-and-run" from high-risk countries to avoid the risk of a WRO rather than staying and attempting to remediate problems.[61] The private sector has raised concerns that the impact of any ban will be limited because companies will be unwilling to share information on forced labor risks or their efforts to address them due to fear of then receiving a WRO.[62] There are also questions of how broadly to enforce a ban. For example, an NGO made a

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54. U.S. CUSTOMS AND BORDER PROTECTION, PUB. NO. 1793–0522, OPERATIONAL GUIDANCE FOR IMPORTERS 9 (2022), https://www.cbp.gov/sites/default/files/assets/docu ments /2022-Jun/CBP_Guidance_for_Importers_for_UFLPA_13_June_2022.pdf [https://perma.cc/TW9R-GLBF].

55. M. ANGELES VILLARREAL & CATHLEEN D. CIMINO-ISAACS, CONG. RSCH. SERV., IF11308, USMA: LABOR PROVISIONS 1 (2023), https://crsreports.congress.gov/product/pdf/IF/IF11308 [https://perma.cc/55S7-NULU].

56. Article 23.6 of the USMCA states, "each Party shall prohibit the importation of goods into its territory from other sources produced in whole or in part by forced or compulsory labor, including forced or compulsory child labor." Agreement Between the United States of America, the United Mexican States, and Canada, art. 23.6, Nov. 30, 2018, https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/23%20Labor.pdf [https://perma.cc/9JJ4-LCGG].

57. *See* Press Release, Commission Moves to Ban Products Made with Forced Labour on the EU Market, Eur. Comm'n (Sept. 14, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5415 [https://perma.cc/ZC9T-QXLH].

58. Richard Vanderford, *EU Looks to Follow Tough U.S. Action on Forced Labor*, WALL ST. J. (Oct. 31, 2022, 5:30 AM), https://www.wsj.com/articles/eu-looks-to-follow-tough-u-s-action-on-forced-labor-11667208602 [https://perma.cc/53L4-Y8YM].

59. *Id.*

60. CASEY ET AL., *supra* note 41, at 2. U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-259, FORCED LABOR: CBP SHOULD IMPROVE COMMUNICATION TO STRENGTHEN TRADE ENFORCEMENT 30–33 (2021), https://www.gao.gov/assets/gao-21-259.pdf [https://perma.cc/R4HR-B5G8].

61. *Id.* at 32.

62. *Id.* at 32–33.

submission to the CBP requesting a ban on the importation of cocoa produced in Côte d'Ivoire.[63] Because Côte d'Ivoire produces approximately 45% of cocoa worldwide and 6 million of its citizens rely on the cocoa industry,[64] such a ban could have wide-ranging and undesired impacts.[65]

Not surprisingly, due to such concerns, academic research has produced only limited evidence that import bans can be an effective tool to reduce forced labor.[66] Because an import ban is "unlikely on its own to be effective at reducing forced labour in a sustainable way," such bans should be just one part of a regulatory response.[67] In addition, if not used carefully, there is the risk of unintended consequences, including actually increasing the risk of forced labor.[68]

The United States' strong commitment to fighting forced labor is also seen in public procurement regulations. Under Federal Acquisition Regulations ("FAR"), government contractors (including their agents) are prohibited from "using forced labor in the performance of a contract."[69] Most contractors are also required to maintain a compliance plan,[70] which must include "[p]rocedures to prevent agents and subcontractors at any tier and at any dollar value from engaging" in forced labor.[71] The relevant government agencies, however, have not been effective in

63. *CAL and IRAdvocates Provide New Evidence of Forced Child Labor in the Cocoa Sector in Wake of Supreme Court Decision in* Nestlé v. Doe, CORP. ACCOUNTABILITY LAB (June 25, 2021) [hereinafter ACCOUNTABILITY LAB], https://corpaccountabilitylab.org/calblog/2021/6/24/cal-and-iradvocates-provide-new-evidence-of-forced-child-labor-in-the-cocoa-sector-in-wake-of-supreme-court-decision-in-nestle-v-doe [https://perma.cc/XRN2-NNA6].

64. Elian Peltier, *Ivory Coast Supplies the World with Cocoa. Now It Wants Some for Itself*, N.Y. TIMES (Aug. 13, 2022), https://www.nytimes.com/2022/08/13/world/africa/ivory-coast-chocolate.html [https://perma.cc/9PN3-7S5V].

65. It is important to note that the NGO filing this petition did request that the CBP allow the companies the opportunity to remediate the situation. ACCOUNTABILITY LAB, *supra* note 63.

66. IRENE PIETROPAOLI ET AL., POLICY BRIEF: EFFECTIVENESS OF FORCED LABOUR IMPORT BANS 1 (2021), https://modernslaverypec.org/assets/downloads/PEC-Policy-Brief-Effectiveness-Forced-Labour-Import-Bans.pdf [https://perma.cc/5AHT-AU2H].

67. *Id.* at 1, 8.

68. *Id.* at 7. Although there is no direct evidence of a ban increasing forced labor, the report authors were concerned that an overly broad ban in a region or business sector might reduce profits, which would reduce wages and then increase the risk of forced labor. *Id.*

69. FAR 52.222-50(b)(1), (3) (2018). Contractors are also prohibited from engaging in actions that are well-known indicators of forced labor, such as denying an employee access to their immigration documents or charging employees recruitment fees. 52.222-50(b)(4)–(6).

70. 52.222-50(h)(2).

71. 52.222-50(h)(3)(v).

enforcing these requirements.[72] In fact, there is evidence that many of the officials responsible for these matters are not even aware they have this responsibility.[73]

Although these laws and regulations demonstrate a commitment to fighting forced labor, additional approaches are also required. One such approach is a private right of action for victims of forced labor. The next Part discusses supply chain civil liability under the Alien Tort Statute, which has gone from being a potentially critical tool for plaintiffs to a dead letter.

II. THE ALIEN TORT STATUTE

The Alien Tort Statute ("ATS") is a short statute—just one sentence—that has had an outsized influence on business and human rights litigation.[74] It was passed by the First Congress in 1789 but then mostly ignored for almost 200 years.[75] The ATS states that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[76] Starting in the 1980s, human rights defenders believed that the ATS would become a valuable tool to hold corporations accountable for their complicity in human rights abuses and to provide remedies to victims.[77] This Part briefly traces the case law history of the ATS from the 1980s through the U.S. Supreme Court's 2021 decision in *Nestlé v. Doe*,[78] the fifth and most recent U.S. Supreme Court ruling on the ATS.[79] This ruling was significant because it severely limited the use of the ATS for holding corporations accountable for human rights violations committed abroad. As stated by Ewell and colleagues, "the ATS may no longer be viable post-*Nestlé*."[80]

The potential of the ATS to reach human rights abuses abroad was first recognized with *Filartiga v. Pena-Irala* in 1980.[81] There, the Second Circuit granted ATS jurisdiction based on a claim of torture.[82] This ruling inspired lawyers to bring further claims,[83] starting first with suits against governments and officials (both U.S. and foreign)[84] and then moving on to corporations.[85]

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72. U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-546, HUMAN TRAFFICKING: DOD SHOULD ADDRESS WEAKNESSES IN OVERSIGHT OF CONTRACTORS AND REPORTING OF INVESTIGATIONS RELATED TO CONTRACTS 29–30 (2021), https://www.gao.gov/assets/gao-21-546.pdf [https://perma.cc/6UXZ-TQXV].

73. *Id.* at 13–14.

74. Christopher Ewell et al., *Has the Alien Tort Statute Made a Difference?: A Historical, Empirical, and Normative Assessment*, 107 CORNELL L. REV. 1205, 1207 (2022).

75. *Id.*

76. 28 U.S.C. § 1350.

77. Ewell et al., *supra* note 74, at 1218.

78. 141 S. Ct. 1931 (2021).

79. Ewell et al., *supra* note 74, at 1208.

80. *Id.* at 1210.

81. 630 F.2d 876 (2d Cir. 1980).

82. *Id.* at 878.

83. *See* Ewell et al., *supra* note 74, at 1216.

84. *Id.* at 1221.

85. *Id.* at 1230. Some ATS attorneys believed that a shift towards suing corporations brought in attorneys more focused on obtaining large settlements from corporations than on defending human rights and developing a long-term strategy to most

Soon, however, a line of cases started placing limits on the ATS. First, in *Kiobel v. Royal Dutch Petroleum Co*., the Supreme Court established the requirement that any ATS cause of action must "touch and concern" the United States "with sufficient force to displace the presumption against extraterritorial application."[86] After *Kiobel*, a "foreign cubed" case—which involves a "foreign plaintiff su[ing] a foreign defendant for conduct and injuries that occurred in a foreign nation"—was essentially beyond the reach of federal courts' ATS jurisdiction.[87] In addition, the lower courts adopted different ways to determine if *Kiobel*'s "touch and concern" test was satisfied, and the selected method could significantly restrict the viability of the claim.[88]

Then, in *Jesner v. Arab Bank, PLC*,[89] the Supreme Court held that foreign corporations could not be sued under the ATS.[90] Some commentators believed that *Jesner* would end the ATS's role as a "human rights watchdog" for the world and was a "deathblow to United States human rights litigation."[91] If *Jesner* was the deathblow, then *Nestlé*[92] was the final nail in the coffin for ATS liability for supply chain abuses abroad.

In *Nestlé*, the plaintiffs were six individuals from Mali who claimed they were trafficked into Côte d'Ivoire to work as child slaves on cocoa farms.[93] The defendants were two U.S. corporations, Nestlé USA and Cargill, that did not own or operate cocoa farms in Côte d'Ivoire but were sued under the ATS for aiding and abetting child slavery.[94] The defendants not only purchased cocoa from the farms where the plaintiffs were forced to work but were alleged to have "provided those farms with technical and financial resources—such as training, fertilizer, tools, and cash—in exchange for the exclusive right to purchase cocoa."[95] To further support their aiding and abetting claims, the plaintiffs argued that the defendants "knew or should have known" of the child slavery but continued to do business with the farms and that the defendants "had economic leverage over the farms but failed to exercise it to eliminate child slavery."[96]

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effectively use the ATS. *Id.* at 1232. In addition, the risk of significant liability caused corporations to utilize "the best lawyers that money could pay for" in order to challenge the applicability of the ATS. *Id.* at 1232–33.

86. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013).

87. STEPHEN P. MULLIGAN, CONG. RSCH. SERV., R44947, THE ALIEN TORT STATUTE: A PRIMER 14 (2022) https://crsreports.congress.gov/product/pdf/R/R44947/6 [https://perma.cc/48BX-S449].

88. *Id.* at 14–15.

89. 138 S. Ct. 1386 (2018).

90. *Id.* at 1389.

91. Gerlinde Berger-Walliser, *Reforming International Human Rights Litigation Against Corporate Defendants After* Jesner v. Arab Bank, 21 U. PA. J. BUS. L. 757, 758–60 (2019).

92. Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021).

93. *Id.* at 1935.

94. *Id.*

95. *Id.*

96. *Id.*

The Ninth Circuit held that the plaintiffs had satisfied the domestic application of the ATS requirements of *Kiobel*, but the Supreme Court reversed.[97] *Kiobel* was satisfied, the Ninth Circuit held, because even though the defendants' "resource distribution and [plaintiff's] injuries occurred outside the United States," the defendants' decision making on financing and operations occurred in the United States.[98] The Supreme Court disagreed with that analysis and stated that "allegations of general corporate activity—like decisionmaking—cannot alone establish domestic application of the ATS."[99]

To reach this conclusion, the Court applied the "two-step framework" from *RJR Nabisco, Inc. v. European Community*[100] to determine the extraterritoriality issue.[101] As applied here, step one of the test asks if the ATS clearly indicated it was meant to apply extraterritorially.[102] The Court in *Kiobel* found that the ATS did not meet this requirement.[103] Thus, the Court moved to step two, which required that "the conduct relevant to the statute's focus occurred in the United States."[104] Importantly, with this statement, the Court adopted the more restrictive "focus" test for extraterritoriality instead of the "touch and concern" test.[105] Thus, conduct that is the focus of the ATS must have occurred in the United States.[106] Although the parties disputed what conduct was the focus of the ATS, the Court characterized the defendants' domestic conduct (decision making on financing and operations) as "general corporate activity" and therefore not sufficient for extraterritorial application of the ATS under either party's contentions.[107] Thus, post-*Nestlé*, a plaintiff is unlikely to be successful in bringing a claim under the ATS that involves forced labor in a supply chain that occurred abroad.[108]

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97. *Id.* at 1935–36. The plaintiffs originally filed their class action suit on July 14, 2005. Doe v. Nestlé, S.A., 748 F. Supp. 2d 1057, 1063 (C.D. Cal. 2010). At that time, the Trafficking Victims Protection Act (TVPA) allowed for a private cause of action but only against the perpetrator. *Nestlé USA, Inc.*, 141 S. Ct. at 1939. It was not until the reauthorization of the TVPA in 2008 that victims of forced labor and human trafficking had a private cause of action against those indirectly involved in those offenses. *Id.*; *see also infra* note 130 and accompanying text (discussing 1595(a) of the TVPRA, which allows a private right of action against those who benefit from forced labor or human trafficking).

98. *Nestlé USA, Inc.*, 141 S. Ct. at 1935, 1937.

99. *Id.* at 1936–37.

100. RJR Nabisco, Inc. v. European Cmty., 579 U.S. 325 (2016).

101. *Nestlé USA, Inc.*, 141 S. Ct. at 1936.

102. *Id.*

103. *Id.*

104. *Id.* at 1936 (quoting *RJR Nabisco, Inc.*, 579 U.S. at 337).

105. MULLIGAN, *supra* note 87, at 22.

106. *Nestlé USA, Inc.*, 141 S. Ct. at 1936.

107. *Id.* at 1937.

108. Ewell et al., *supra* note 74, at 1277. Plaintiffs may still be able to bring other types of ATS cases related to business and human rights issues, but even those possibilities post-*Nestlé* are very limited. For example, in *Doe v. Cisco Systems*, the plaintiffs adequately alleged sufficient domestic conduct by the corporation, Cisco, to meet the "focus" test for extraterritoriality. 73 F.4th 700, 737 (9th Cir. 2023). The plaintiffs were members of the Falun Gong religious organization in China. *Id.* at 708. They alleged that Cisco aided and abetted Chinese government officials in committing human rights abuses, which was in violation of the ATS. *Id.* Cisco's involvement related to the development of an online tool (known as the

III. THE TVPRA: AN UNCERTAIN FUTURE

In response to the Court's decisions limiting the reach of the ATS, several commentators have considered the TVPRA as a possible replacement for holding corporations accountable for human rights violations abroad.[109] The TVPRA would be only a partial replacement for the ATS, however, as it does not cover the full range of human rights that commentators had envisioned for ATS litigation. As discussed in the following Sections, the TVPRA has evolved significantly since its initial adoption in 2000.[110] Those changes broadened the scope of application of the TVPRA, but they also resulted in various drafting flaws that leave considerable uncertainty as to the civil and criminal liability of corporations for forced labor in their supply chains.[111]

A. The History of the TVPRA

Support for federal government action on human trafficking and forced labor increased in the mid-1990s with the discovery of a garment factory in California where over 70 Thai women were forced to work 18-hour days and live in a camp under armed guard.[112] The Trafficking Victims Protection Act ("TVPA") was passed as part of the Victims of Trafficking and Violence Protection Act.[113] Due to the repulsion of modern day slavery,[114] it is not surprising that the congressional votes for the Victims of Trafficking and Violence Protection Act resulted in no senators and only one member of Congress voting against the bill.[115] Although the TVPA's primary focus was on sex trafficking, it also criminalized forced labor.[116] Because certain portions of the TVPA required appropriations which were authorized only for a limited number of years, Congress was required to reauthorize the law on a regular basis.[117] These reauthorizations made significant substantive

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"Golden Shield") to identify Falun Gong members and monitor their behavior. *Id.* at 710. Cisco's domestic conduct was not simply general corporate activity but involved designing and developing the software specifically for the Golden Shield project, manufacturing hardware for Golden Shield, and "provid[ing] ongoing maintenance and support." *Id.* at 738.

109. *See generally* Lindsey Roberson & Johanna Lee, *The Road to Recovery After* Nestlé*: Exploring TVPA as a Promising Tool for Corporate Accountability*, 6 COLUM. HUM. RTS. L. REV. ONLINE 1 (2021); Sara Sun Beale, *The Trafficking Victim Protection Act: The Best Hope for International Human Rights Litigation in the U.S. Courts?*, 50 CASE W. RSRV. J. INT'L L. 17, 46 (2018).

110. *See infra* Section III.A.

111. *See* Beale, *supra* note 109, at 19 (noting flaws in the TVPRA and stating that the added provisions "seem to have received little scrutiny").

112. *Id.* at 23; Mariana C. Minaya, *American Dreams, Trafficking Nightmares*, 2 TENN. J. RACE, GENDER & SOC. JUST. 64, 67–68 (2014).

113. Pub. L. No. 106-386, 114 Stat 1464 (2000).

114. David Hess, *Modern Slavery in Global Supply Chains: Towards a Legislative Solution*, 54 CORNELL INT'L L.J. 245, 251 (2021) [hereinafter Hess, *Modern Slavery*].

115. Beale, *supra* note 109, at 24 n.33.

116. Briana Beltran, *The Hidden 'Benefits' of the Trafficking Victim Protection Act's Expanded Provisions for Temporary Foreign Workers*, 41 BERKELEY J. EMP. & LAB. L. 229, 245–47 (2020).

117. *Id.* at 248.

changes to the law,[118] but due to the piecemeal nature of the changes, over time the law came to include significant ambiguities in its provisions.[119]

The first reauthorization in 2003 created a private right action for victims of forced labor.[120] More significant changes occurred in 2008 with the TVPRA—officially known as the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008.[121] Discussed further in the following Section, these amendments included clarification that forced labor includes not just physical coercion but also coercion by non-physical means (e.g., psychological or financial) and by abuse of the legal process.[122] In addition, it provided for extraterritorial jurisdiction for certain causes of action.[123] Finally, the amendments significantly expanded those individuals and entities subject to liability by including not just the preparators of the violation but also those that benefit from the violation.[124]

B. Overview of Liability Under the TVPRA

This Section provides an overview of the TVPRA as it currently stands. As a reminder, the primary focus of this Section and the following Section on open questions in the liability provisions is on enforcement against corporations located further downstream in the supply chain for forced labor violations committed by an actor further upstream in the supply chain.

The TVPRA defines forced labor as providing or obtaining a person's labor or service through such means as the use or threat of use of force, physical restraint, or serious harm to that person or someone else.[125] The term "serious harm" includes not just physical harm but also "psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm."[126]

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118. *Id.*

119. Beale, *supra* note 109, at 19.

120. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(a), 117 Stat. 2875, 2878 (2003). Beltran notes that the private right of action received almost no mention in the legislative history. Beltran, *supra* note 116, at 248.

121. Pub. L. No. 110-457, § 223(a), 122 Stat. 5044, 5071–72 (2008).

122. Beltran, *supra* note 116, at 251–52.

123. *See id.* at 252.

124. *Id.* at 253.

125. 18 USC § 1589 (a). This section states:

> (a) Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means—
> (1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
> (2) by means of serious harm or threats of serious harm to that person or another person;
> (3) by means of the abuse or threatened abuse of law or legal process; or
> (4) by means of any scheme, plan, or pattern intended to cause the person to believe that if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint, shall be punished as provided under subsection (d).

126. § 1589(c)(2).

Forced labor also includes other means of coercion, such as abuse of the law or legal process.[127]

Section 1589(b) establishes criminal liability for anyone benefiting from forced labor, as that term is defined in § 1589(a).[128] This section states:

> Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of [forced labor], knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means, shall be punished as provided in subsection (d).[129]

Section 1595(a) creates a private right of action. This section is similar to § 1589(b) and states that a victim of forced labor may bring a civil action against the perpetrator "or whoever knowingly benefits, or attempts or conspires to benefit, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter."[130] It is important to note that for the TVPRA cases discussed below,[131] the language "or attempts or conspires to benefit" was not included in § 1595.[132] This language was added in response to the Ninth Circuit's ruling in *Ratha v. Phatthana*, which is discussed below.[133]

Congress added § 1596 to create extraterritorial jurisdiction for U.S. courts if the alleged offender is a "national of the United States" or is "present in the United States."[134] Extraterritorial jurisdiction applies to "any offense (or any attempt or conspiracy to commit an offense)" under certain listed sections.[135] Importantly,

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127. § 1589(a)(3).

128. § 1589(b).

129. *Id.* Subsection (d) provides for financial penalties and/or imprisonment of up to 20 years (or for life imprisonment if a death results or the violation includes kidnapping, aggravated sexual assault, or an attempt to kill or kidnap). § 1589(d). Section 1593A provides for criminal liability for knowingly benefiting from other violations of the TVPRA. This section states:

> Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in any act in violation of this chapter, knowing or in reckless disregard of the fact that the venture has engaged in such violation, shall be fined under this title or imprisoned in the same manner as a completed violation of such section.

§ 1593A. In § 1594, attempt or conspiracy to violate § 1589 is punishable "in the same manner as a completed violation" of that section. § 1594(a)–(b).

130. 18 U.S.C. § 1595(a). This civil proceeding "shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim." § 1595(b)(1).

131. *See infra* Section III.C.

132. *See* Abolish Trafficking Reauthorization Act of 2022, Pub. L. No. 117-347, § 102, 136 Stat. 6199, 6200 (codified as amended at 18 U.S.C. § 1595(a)).

133. *See infra* notes 179–85 (discussing the court's ruling on attempting to benefit under the TVPRA in Ratha v. Phatthana Seafood Co., 35 F.4th 1159 (9th Cir.), *cert. denied*, 143 S. Ct. 491 (2022)).

134. 18 U.S.C. § 1596(a)(1)–(2).

135. § 1596(a).

although the list of sections includes § 1589 (criminal liability), this subsection does not list an offense under § 1595, which is the civil liability provision.[136]

Section 1593 provides for mandatory restitution to the victims for any offense under the TVPRA.[137] With respect to the focus of this Article (the liability of multinational corporations), it is well accepted that the TVPRA applies to corporations even though it is not explicitly stated in the Act.[138] The TVPRA's use of the term "whoever" in the criminal and civil liability sections is commonly interpreted to include corporations,[139] as evidenced by the Dictionary Act.[140] In addition to domestic corporations, a foreign corporation may be sued if it is "present in the United States."[141]

C. Legal Uncertainties in the TVPRA

This Section describes the challenges in using the TVPRA to hold corporations accountable for forced labor in their supply chains. The first Subsection sets out the facts of three recent TVPRA cases involving forced labor in foreign countries that was connected to the United States through supply chains. The subsequent Subsections use these cases and other TVPRA cases to explain the hurdles that plaintiffs face in bringing forced labor claims and the open legal questions that remain.

1. Recent TVPRA Supply Chain Cases

Three recent cases illustrate how plaintiffs' attorneys are attempting to use the TVPRA to hold lead corporations accountable for forced labor in their supply chains: *Ratha v. Phatthana Seafood Co*. from the Ninth Circuit Court of Appeals[142] and *Doe v. Apple, Inc.*[143] and *Coubaly v. Cargill, Inc.*,[144] both from the District Court for the District of Columbia.

Ratha v. Phatthana involved a civil suit under § 1595 of the TVPRA for claims of forced labor at seafood processing plants in Thailand.[145] The plaintiffs were Cambodian villagers who were recruited to work in factories in Thailand.[146] The recruiters had promised them free living accommodations and decent wages.[147] Once in Thailand, however, the plaintiffs "were paid less than promised, charged for accommodations, charged for other unexpected expenses, unable to leave

136. *Id.*
137. § 1593(a).
138. Roberson & Lee, *supra* note 109, at 24.
139. Beale, *supra* note 109, at 37–38.
140. 1 U.S.C. § 1 (2011) ("[T]he words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.").
141. 18 U.S.C. § 1596(a)(2).
142. 35 F.4th 1159, 1164 (9th Cir.), *cert. denied*, 143 S. Ct. 491 (2022).
143. No. 1:19-cv-03737 (CJN), 2021 U.S. Dist. LEXIS 237710 (D.D.C. Nov. 2, 2021).
144. 610 F. Supp. 3d 173 (D.D.C. 2022).
145. Ratha v. Phatthana Seafood Co., 35 F.4th 1159, 1164 (9th Cir.), *cert. denied*, 143 S. Ct. 491 (2022).
146. *Id.* at 1164–65.
147. *Id.* at 1165.

without their passports, which they were told would not be returned until 'recruitment fee[s]' and other amounts were paid, and subjected to harsh conditions."[148]

The plaintiffs worked at either Phatthana or S.S. Frozen, which were both Thai companies that operated seafood processing plants.[149] A U.S. company, Rubicon, contracted with Phatthana to import shrimp into the United States for sale at Walmart.[150] Rubicon visited and audited Phatthana's factories prior to placing an order.[151] In October 2011, Rubicon ordered and received 14 containers of shrimp.[152] However, Rubicon's intended buyer, Walmart, "rejected the shipment because it had concerns about working conditions in the factory," and Rubicon returned the containers to Phatthana in Thailand.[153] Another Thai company, Wales, was also included as a defendant in the suit because it conducted a quality control inspection of the containers before they were shipped to the United States.[154]

Doe v. Apple involved cobalt mining in the Democratic Republic of the Congo ("DRC").[155] The plaintiffs were 16 men and women who worked as child laborers in artisanal mines.[156] Artisanal mines are informal, small-scale mining operations conducted with "primitive tools, and often without safety equipment."[157] While working in the mines, hazardous conditions, such as tunnel collapses, caused the death of some plaintiffs, and others suffered severe injuries.[158] The plaintiffs typically started working in the mines when their families could no longer afford to send them to school, with at least one child starting work at age nine.[159] The cobalt mined by these plaintiffs typically became mixed with cobalt from formal, large-scale mines as it moved from the mines to intermediary companies and then to the company Umicore, which is engaged in processing and refining cobalt.[160] Umicore

148. *Id.*
149. *Id.* at 1165–66.
150. *Id.* at 1166.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 1165–66.
155. Doe v. Apple, Inc., No. 1:19-cv-03737, 2021 U.S. Dist. LEXIS 237710, at *3 (D.D.C. Nov. 2, 2021). An additional issue, not discussed in this Article, is the defendants' claim that the plaintiffs were not victims of forced labor. The defendants claimed that the plaintiffs worked in the mines not due to force but due to economic necessity. *Id.* at *34.
156. *Id.* at *2–6.
157. *Id.* at *4. For further background on artisanal cobalt mining and their human rights issues, see generally SIDDHARTH KARA, COBALT RED: HOW THE BLOOD OF THE CONGO POWERS OUR LIVES (2023) (describing the hazards of cobalt mining in the DRC and including the authors' interviews with miners); AMNESTY INT'L, "THIS IS WHAT WE DIE FOR": HUMAN RIGHTS ABUSES IN THE DEMOCRATIC REPUBLIC OF THE CONGO POWER THE GLOBAL TRADE IN COBALT (2016), https://www.amnesty.org/en/documents/afr62/3183/2016/en/ [https://perma.cc/NP68-NN4C] (presenting evidence of hazardous work conditions and child labor at artisanal mines in the DRC).
158. *Doe*, 2021 U.S. Dist. LEXIS 237710, at *6–13.
159. *Id.* The court also ruled that the plaintiffs did not meet the definition of forced labor under § 1589 of the TVPRA because they were not coerced into working in the mines due to actual harm or threat of serious harm. *Id.* at *33–37.
160. *Id.* at *5.

supplied cobalt to the defendants: Apple, Alphabet, Microsoft, Dell, and Tesla.[161] The plaintiffs' TVPRA claims were based on the defendants benefiting from forced labor.[162]

In *Coubaly*, the defendants were well-known U.S. chocolate companies, including Mars, Nestlé USA, Cargill, Hershey, and Mondelez.[163] The plaintiffs, as with the plaintiffs in the *Nestlé v. Doe* ATS case discussed earlier,[164] were Malian children who were trafficked into Côte d'Ivoire and forced to work on cocoa farms.[165] The defendants were not simply buyers of the cocoa—like the defendant purchasers of cobalt in *Doe v. Apple*—but had managers present in Côte d'Ivoire, provided local training to farmers, and had exclusive buying arrangements with some farmers.[166] The plaintiffs alleged that these exclusive arrangements allowed the defendants to exercise control over the farms, including how "farms produce and supply cocoa to them, including specifically the labor conditions under which the beans are produced."[167] In addition, through these actions, the plaintiffs alleged, the defendants witnessed child labor on the farms and therefore had direct knowledge of what was occurring.[168]

2. Challenges in Applying the TVPRA to Global Supply Chains

This Subsection sets out the challenges facing plaintiffs in bringing TVPRA claims. First, under both §§ 1589 and 1595(a), there are questions about what it means to benefit from a violation. Second, there are questions about what it means to participate in a venture. Third, under § 1589 on criminal liability, the corporation must have known or been in reckless disregard "that the venture has engaged in the providing or obtaining of [forced] labor or services."[169] Under § 1595(a) for civil suits, however, there is a negligence standard. The corporation is liable if it "knew or should have known [the venture] has engaged in an act in violation . . . " of the TVPRA.[170] Applying the negligence standard to the supply chain context raises a third set of significant questions. Fourth, the failure of the TVPRA's extraterritorial section to include private claims under § 1595 has created questions on the use of civil suits for supply chain harms abroad. Finally, following the Supreme Court's more rigorous interpretation of Article III standing requirements, TVPRA claims are at risk of being dismissed on those grounds.

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161. *Id.* at *5–6.

162. *Id.* at *13, *30. The plaintiffs also included "claims of unjust enrichment, negligent supervision, and intentional infliction of emotional distress." *Id.* at *13.

163. Coubaly v. Cargill, Inc., 610 F. Supp. 3d 173, 176–79 (D.D.C. 2022).

164. *See supra* notes 92–97 and accompanying text.

165. *Coubaly*, 610 F. Supp. 3d at 176–77.

166. *Id.* at 176–79, 181–82.

167. *Id.* at 176.

168. *Id.* at 177–78.

169. 18 U.S.C. § 1589(b).

170. § 1595(a) (alteration in original).

a. Benefiting from Forced Labor

Both the civil and criminal liability provisions of the TVPRA require that the defendant "knowingly benefits, financially or by receiving anything of value."[171] Determining a sufficient benefit in the supply chain context is not a straightforward task. Professor Beale argues that a chocolate company, such as Nestlé, that can purchase cocoa at a lower price than competitors due to their direct supplier using forced labor to reduce costs is likely receiving a benefit under the TVPRA.[172] If there is an intermediary between the cocoa farmer and Nestlé, then Nestlé still benefits from the forced labor but is slightly distanced from the labor abuse.[173] If we continue to add intermediaries and create a multi-tiered supply chain, then the question of determining the benefit for purposes of the TVPRA becomes less clear.

For instance, is it appropriate to say that a downstream retailer has knowingly benefited from forced labor that occurred multiple tiers of suppliers away at the raw materials stage? As an example, consider a retailer of cotton garments. The process starts at the raw materials stage and the farming of the cotton used in the garment.[174] This is followed by ginning mills processing the cotton.[175] Next, spinning and textile mills spin the cotton into yarn and then process the yarn into dyed fabric.[176] Those factories then send the fabric to another factory to be cut and sewn into the final garment and prepared for shipping to the retailer.[177] If forced labor exists at any of those stages, at which stages can we identify a clear benefit that the garment retailer knowingly obtains? Professor Beale proposes a very broad approach and argues that the benefit should be defined by whether the cotton garment retailer gains a competitive advantage in the consumer marketplace, such as through lower costs of production.[178] The courts, however, have sought more specific evidence of a benefit.

In *Ratha*, which involved Thai seafood processing factories, the court granted summary judgment to the defendants Rubicon and Wales because there was no evidence that those companies knowingly benefited from human trafficking and forced labor.[179] To maintain a claim under § 1595, the court stated that the plaintiffs needed to provide facts showing that the companies "(1) knowingly benefitted, (2) from participation in a venture (in this case with Phatthana), (3) which they knew or

171. § 1589; § 1595(a). Although the Statute does not define "anything of value," Beale argues that—in line with other federal criminal laws using the phrase "thing of value"—it would include any tangible or intangible benefit. Beale, *supra* note 109, at 31 n.91.

172. Beale, *supra* note 109, at 31–32.

173. *Id.* at 32.

174. FAIR LAB. ASS'N, CHILD LABOR IN COTTON SUPPLY CHAINS: ACTION-BASED COLLABORATIVE PROJECT TO ADDRESS HUMAN RIGHTS ISSUES IN TURKEY 3 (June 2017), https://www.unicef.nl/files/child_labor_in_cotton_supply_chains_june_2017.pdf [https://perma.cc/JA7J-DS4G].

175. *Id.*

176. *Id.*

177. *Id.* at 3–4.

178. *See* Beale, *supra* note 109, at 32.

179. Ratha v. Phatthana Seafood Co., 35 F.4th 1159, 1165–66, 1175 (9th Cir.), *cert. denied*, 143 S. Ct. 491 (2022).

should have known was engaged in conduct that violated the TVPRA."[180] For Rubicon, the court found no evidence that the company knowingly benefited from any TVPRA violations.[181] Rubicon did not own any of Phatthana's factories and was not involved in production at those factories.[182] At most, Rubicon engaged in marketing for Phatthana.[183] Thus, the court appeared to be looking for a clear, direct benefit from the violation.

The court also rejected an argument from the plaintiffs that was similar to the broad definition of benefits Professor Beale articulated.[184] The plaintiffs' rejected argument was that Rubicon benefited by gaining a competitive advantage over other shrimp producers, such as those in the United States, that did not use forced labor.[185] Finally, the court rejected the argument that there was a cause of action for attempting to benefit under § 1595(a).[186] Whereas other sections of the TVPRA provide for attempt liability, such as § 1594(a), § 1595(a) did not at the time of this case.[187] Thus, Rubicon's attempt to sell the containers of shrimp to Walmart did not satisfy the knowingly benefit requirement because Walmart returned the containers.[188]

In summary, plaintiffs may face significant challenges in demonstrating that a corporation knowingly benefits from a TVPRA violation. When forced labor occurs in lower tiers of the supply chain or the corporation is otherwise distanced from the violation, plaintiffs may struggle to show the necessary benefit.

b. Participation in a Venture

The civil and criminal liability sections both require that the defendant's benefit results from "participation in a venture" that has engaged in forced labor or another violation of the TVPRA.[189] This raises questions of what qualifies as a "venture" and what level of activity by the defendant is needed to show "participation" in that venture. Unfortunately, the courts have struggled to interpret and apply these terms.

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180. *Id.* at 1175 (citing 18 U.S.C. § 1595(a)).
181. *Id.*
182. *Id.*
183. *Id.*
184. *See generally supra* note 171 and accompanying text.
185. *Ratha*, 35 F.4th at 1176.
186. *Id.*
187. *Id.* (citing 18 U.S.C. § 1594(a)). For the post-*Ratha* changes to § 1595(a), see *supra* note 132–36 and accompanying text. After the legislative change, the plaintiffs filed a motion for relief under Federal Rule of Civil Procedure 60(b)(6). Ratha v. Phatthana Seafood Co., No. CV 16-4271-JFW, 2023 U.S. Dist. LEXIS 60833, at *2–3 (C.D. Cal. Mar. 3, 2023). The court denied the motion because the change to § 1595(a) would not apply to the court's decision that there was no evidence that "Rubicon knowingly participated in a human trafficking venture" or "knew or should have known about Phatthana's alleged human trafficking." *Id.* at *11–12. In addition, the court held that the amendments cannot be applied retroactively. *Id.* at *14–16.
188. *Ratha*, 35 F.4th at 1166, 1176.
189. 18 U.S.C. §§ 1589(b), 1595(a).

The term "venture" is defined in § 1591(e)(6) as "any group of two or more individuals associated in fact, whether or not a legal entity."[190] However, § 1591—which covers sex trafficking—explicitly states that the definitions it provides only apply "[i]n this section."[191] On the one hand, one could argue that the limitation of "in this section" clearly indicates that this definition should not apply to the other sections of the TVPRA.[192] On the other hand, the Supreme Court itself has looked at other sections of a piece of legislation to define a term found in a different section.[193] However, even if a court uses the § 1591(e)(6) definition of venture for a civil action, that definition itself has an unclear application in the supply chain context.

In non-supply chain cases, some courts have used the § 1591(e)(6) definitions for the other sections of the TVPRA. The first to do so was the First Circuit in *Ricchio v. McLean*.[194] The plaintiff, Ricchio, was held against her will by McLean at a hotel operated by the Patels.[195] The facts showed that the Patels were aware of McLean's treatment of Ricchio and that Mr. Patel had expressed to McLean his excitement about getting their relationship going again (they had a past commercial relationship).[196] The benefit that the Patels received from this relationship was rent for the hotel room.[197] In its discussion of the claims under §§ 1589 and 1595, the court utilized the § 1591 definition and, without full explanation,[198] stated that the relationship between the Patels and McClean was an association and therefore a venture.[199]

Next, in *Bistline v. Parker*, the Tenth Circuit also used the § 1591 definition of venture for claims under §§ 1589 and 1595.[200] In that case, the plaintiffs alleged that they were abused in various ways by the leader of their church, Mr. Jeffs.[201] The plaintiffs claimed that the defendants, who were Mr. Jeffs's lawyers and their law firm, had assisted Mr. Jeffs in this abuse.[202] The defendants' assistance included

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190. § 1591(e)(6).

191. § 1591(e).

192. Beale, *supra* note 109, at 33.

193. *Id.* at 33 (discussing H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 239–40 (1989) and the Supreme Court's efforts to define "pattern" under the RICO statute).

194. 853 F.3d 553, 555–56 (1st Cir. 2017). Other courts have not used those definitions, however. For example, in a case involving a TVPRA suit against hotel franchisors for benefiting from human trafficking occurring at their franchisee hotels, the Eleventh Circuit refused to use the § 1591(e)(6) definition and defined a venture as "undertaking or enterprise involving risk and potential profit." Doe v. Red Roof Inns, Inc., 21 F.4th 714, 718–20, 724 (11th Cir. 2021).

195. *Ricchio*, 853 F.3d at 555.

196. *Id.*

197. *Id.*

198. *See* Beltran, *supra* note 116, at 256 (criticizing the opinion for not explaining why it was appropriate to use that definition and for not further explaining the definition).

199. *Ricchio*, 853 F.3d. at 556. Note that the court is using a previous numbering of the subsections. The subsections were renumbered in 2018. Abolish Human Trafficking Act of 2017, Pub. L. No. 115-392, § 11, 132 Stat. 5250, 5255 (2018).

200. 918 F.3d 849, 873–76 (10th Cir. 2019).

201. *Id.* at 871.

202. *Id.* at 854–59.

structuring the church trust in a manner to give Mr. Jeffs control over the church assets (including homes, possessions, and funds) that he could use to "control" the church members.[203] The plaintiffs alleged that on multiple occasions the defendants provided legal assistance and representation "to enable and facilitate Jeffs' reign of terror over plaintiffs."[204] Amongst other causes of action, the plaintiffs alleged the defendants violated the TVPRA by benefiting from a venture engaged in forced labor.[205]

The court cited *Ricchio* and utilized the § 1591(e)(6) definition of a venture.[206] Then, in ruling that the defendants and Jeffs were in a venture for purposes of the motion to dismiss, the court stated that the "plaintiffs allege facts supporting their claims that defendants were well aware of the crimes being committed against plaintiffs, did nothing to expose these atrocities, tacitly approved of the conduct by constructing a scheme for the purpose of enabling it, and benefited for years from plaintiffs' payments of a considerable amount of attorney fees."[207] Professor Beltran criticized this ruling for "conflat[ing] facts getting at the other key elements of the provision—'knowledge' and financial or other 'benefits'—all under the umbrella of 'venture.'"[208] Overall, in both *Ricchio* and *Bistline*, the court did not provide a clear analysis of how to apply the definition of venture.[209] The next case, *Gilbert v. United States Olympic Committee*,[210] provided some clarity but still left many open questions.

In *Gilbert*, the plaintiffs were taekwondo athletes who competed for the United States at international sporting events.[211] They claimed that the head coach of the team and his brother were perpetrators of forced labor and sex trafficking.[212] They sued the United States Olympic Committee and USA Taekwondo (referred to as the "institutional defendants") for benefiting from participation in this venture.[213] The plaintiffs claimed that the institutional defendants protected the perpetrators from being removed as coaches and from legal action for their behavior.[214]

In denying the institutional defendants' motions to dismiss, the court clarified that a venture does not itself need to be "engaged in obtaining the labor or services by force."[215] Following that, the court stated that participation in a venture does not "require a member of a venture to have committed overt acts in furtherance

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203. *Id.* at 855–57 (quoting Complaint and Jury Demand at 31, Bistline v. Parker, 918 F.3d 849, 857 (10th Cir. 2019) (No. 2:16-cv-00788-EJF)).

204. *Id.* at 858.

205. *Id.* at 870–71.

206. *Id.* at 873.

207. *Id.* at 876.

208. Beltran, *supra* note 116, at 257–58 n.153 (alteration in original).

209. Beltran noted that the courts in both *Bistline* and *Ricchio* provided only limited analyses of how the definition applied to the facts. *Id.* at 255–56, 258.

210. 423 F. Supp. 3d 1112 (D. Colo. 2019).

211. *Id.* at 1121.

212. *Id.* at 1121–22.

213. *Id.* at 1122–23.

214. *Id.* at 1122.

215. *Id.* at 1138.

of obtaining forced labor or services."[216] Overall, the court held that the perpetrators and institutional defendants were in a venture because they were "associated in fact"[217] and that the defendants benefitted from that venture through "sponsorships, licensing, grants, publicity, [and] for medals achieved at competitions."[218]

Some aspects of this line of cases provide support for corporate liability for forced labor in the supply chain. The cases support using the "associated in fact" definition of a venture. In addition, the venture does not need to have forced labor as its purpose, and the venture members do not need to take overt action to assist in obtaining forced labor. Thus, depending on how broadly a court interprets "associated in fact," a corporation with forced labor in its supply chain could meet the participation in a venture requirement.

On the other hand, in *Ricchio*, *Bistline*, and *Gilbert*, the defendants were in direct contact with the perpetrator and had a relationship with the perpetrator over a period of time, which are factors that may not exist in supply chain cases. In a supply chain example consistent with those cases, such as in the *Nestlé* ATS suit discussed above, the plaintiffs did allege that the chocolate companies were working directly with cocoa farmers.[219] Thus, the *Nestlé* facts potentially could meet the definition of a venture arising out of these cases.[220] However, if the lead corporation is distanced from the violation due to the different tiers in its supply chain, then there is a question of where to draw the boundaries around the venture. Is the entire supply chain from raw materials to finished goods a venture? If not, then the TVPRA provides no incentives for a corporation to monitor its supply chain beyond perhaps its tier one suppliers. And in fact, the TVPRA could create an incentive for corporations to add intermediaries to their supply chains and seek to avoid long-term relationships where possible for purposes of avoiding liability.

The first court to look at these types of questions in the context of a supply chain did not follow the above line of cases, however. Instead, the court in *Doe v. Apple* utilized the dictionary definition of venture and held that "a 'global supply chain' is not a venture."[221] The court noted that § 1595 did not define "venture," and rather than following *Ricchio*, the court turned to the dictionary definition of that word.[222] Because the dictionary refers to undertakings involving risk, such as businesses, the court defined a venture as a "commercial enterprise."[223] The court then stated that although the companies Glencore and Umicore may have been in a venture where they attempted to conceal artisanal mined cobalt involving child labor by combining it with cobalt from large scale mines, the defendants, as end-product

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216. *Id.* at 1138–39.

217. *Id.* at 1138.

218. *Id.* at 1139 (alteration in original).

219. *See supra* notes 93–95 and accompanying text.

220. Note, however, that in a case with similar facts to *Nestlé*, the court in *Coubaly* questioned whether the plaintiffs could provide evidence of the defendants' connections to specifically identified cocoa farms. *See infra* notes 265–71 and accompanying text.

221. Doe v. Apple Inc., No. 1:19-cv-03737, 2021 U.S. Dist. LEXIS 237710, at *31 (D.D.C. Nov. 2, 2021).

222. *Id.*

223. *Id.* at *31–32. "Plaintiffs fail to allege that Defendants are involved in a commercial enterprise encompassing the entirety of the cobalt industry." *Id.* at *32.

buyers, were not part of that venture.[224] In a footnote, the court noted that the plaintiff's specific allegations against Tesla came the closest to being a venture.[225] Tesla had entered into an agreement with Glencore to obtain exclusive rights to a portion of its cobalt.[226] The court stated that this was close to meeting the definition of a venture because that agreement "at least alleges some form of business relationship."[227] However, the claim fell short because the plaintiffs did not "allege that Tesla had any control over the mining practices of Glencore or its subsidiaries, or that it ran any of the mines at issue itself."[228]

In summary, plaintiffs face significant potential challenges in demonstrating that a corporation's supply chain qualifies that corporation as a participant in a venture. Under the *Ricchio* line of cases, the unknown issue is how a court will treat a supply chain where the defendant corporation is several steps removed from the use of forced labor. Under the approach of *Doe v. Apple*, plaintiffs must allege that the corporation is in a "commercial enterprise" with the perpetrator, which would dismiss many supply chain claims.

c. Knew or Should Have Known

A plaintiff filing a private action under § 1595(a) must show that the defendant "knew or should have known" that the venture was engaged in forced labor.[229] In TVPRA cases involving the liability of hotels for human trafficking occurring on their premises, most courts have applied a negligence standard; that is, the hotel does not need actual knowledge of human trafficking but will be liable if it should have known human trafficking was occurring.[230] Commenting on the use of the TVPRA in global supply chains, Professor Green argued that the "should have known" standard "recognizes the duty to inquire; that is, not just to act once information about the practices comes to the attention of companies."[231] Furthermore, Professor Green argued, corporations have long had access to information on the mechanisms necessary to detect the presence of forced labor, such as human rights audits.[232] Thus, corporations have a legal duty to monitor their supply chains for forced labor.[233] Courts have yet to adopt Professor Green's approach, however.

In *Ratha*, the court gave a much narrower interpretation of the "should have known" standard than Professor Green's interpretation. For the quality control company defendant, Wales, the *Ratha* court distinguished between two time periods

224. *Id.* at *32.
225. *Id.* at *33 n.4.
226. *Id.*
227. *Id.*
228. *Id.* In addition, this agreement occurred after the plaintiffs' injuries. *Id.*
229. 18 U.S.C. § 1595(a).
230. Hannah Muller, Note, *Dismissive: How Trafficking Survivors Are Held to an Unlawfully High Standard in Seeking Civil Liability Against Hotels and a Proposed Solution*, 83 OHIO ST. L.J. 157, 162–63 (2022).
231. Green, *supra* note 36, at 450.
232. *Id.* at 452.
233. *See id.* at 450.

when applying this standard.[234] First, prior to February 23, 2012, the Company did not meet the knew or should have known requirement because it was not aware of allegations of forced labor at the specific seafood processing factories in the case.[235] The court held that it was not sufficient that Wales was, or should have been, generally aware of labor abuses in the Thai shrimp industry.[236] Thus, even awareness of a U.S. Department of Labor report that identified the Thai shrimp industry as having "significant incidence" of child and forced labor was not sufficient.[237] Likewise, other reports on labor abuses were not sufficient because they did not contain allegations of labor abuse at Phatthana factories or state that *all* factories in Thailand have these issues.[238] Thus, "generalized evidence of country conditions" is not sufficient to meet the should have known standard.[239]

In the second time period, however, Wales admitted that it was made aware of possible TVPRA violations at Phatthana factories.[240] Wales acquired this knowledge through news articles of a whistleblower report at Phatthana.[241] However, although the "knew or should have known" standard was met, Wales did not meet the knowingly benefit requirement because any inspection services it provided Phatthana occurred prior to that date.[242]

Overall, the court established a significantly more stringent negligence standard than that proposed by Professor Green.[243] A court following the *Ratha* lead creates a high hurdle for plaintiffs, as the plaintiffs would need to show that the corporation knew or should have known of violations at the specific location where the forced labor occurred; general knowledge of forced labor in that region or industry is not sufficient and does not initiate a duty to investigate.

d. Extraterritoriality

Courts have a strong presumption against applying statutes extraterritorially. In *RJR Nabisco, Inc. v. European Community*, the Court stated, "[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application."[244] Section 1596 explicitly provides

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234. Ratha v. Phatthana Seafood Co., 35 F.4th 1159, 1176–77 (9th Cir.), *cert. denied*, 143 S. Ct. 491 (2022).

235. *Id.* at 1177–78.

236. *Id.* at 1177.

237. *Id.* (quoting U.S. DEP'T OF LAB., THE DEPARTMENT OF LABOR'S LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR 24 (2009)).

238. *Id.* at 1177–78.

239. *Id.* at 1179. In addition, the plaintiffs did not provide sufficient evidence that there were industry standards for audits and inspections of the factory that Wales failed to conduct. *Id.* (citation omitted).

240. *Id.* at 1176–77, 1180.

241. *Id.* at 1176.

242. *Id.* at 1180.

243. *See supra* notes 231–33 and accompanying text.

244. RJR Nabisco, Inc., v. Eur. Cmty., 579 U.S. 325, 335 (2016). The Court set out a two-step process to determine if the presumption against extraterritoriality has been rebutted:

> At the first step, we ask . . . whether the statute gives a clear, affirmative indication that it applies extraterritorially. We must ask this question

for extraterritorial jurisdiction for criminal violations.[245] This section, however, is silent as to its applicability in civil liability cases. Some courts have still allowed plaintiffs to use § 1596 for civil actions under § 1595 and stated that it would be "illogical" not to.[246] The supply chain cases, however, demonstrate the limits of trying to rely on § 1596.

In *Ratha*, the court dismissed the claims against Phatthana and S.S. Frozen—the Thai companies alleged to have trafficked the plaintiffs and subjected them to forced labor[247]—for lack of jurisdiction.[248] This was a difficult claim for the plaintiffs to make, as this was a "foreign cubed" situation[249] involving foreign plaintiffs suing foreign companies for conduct and harm that occurred in a foreign country.[250] In this case, the court held that even presuming § 1596 applied to civil cases, Phatthana and S.S. Frozen were not "present in the United States" as required by § 1596(a)(2).[251] The court rejected the argument that "minimum contacts" sufficient for personal jurisdiction would be sufficient for § 1596.[252] Furthermore, the court stated, those defendants would not have met the "minimum contacts" requirement necessary for a tort claim anyway.[253] Phatthana's and S.S. Frozen's only contacts with the United States were sales, and attempted sales, to businesses in the United States, which is not sufficient for general or specific jurisdiction.[254]

> regardless of whether the statute in question regulates conduct, affords relief, or merely confers jurisdiction. If the statute is not extraterritorial, then at the second step we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute's "focus." If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.

Id. at 337.

245. 18 U.S.C. § 1596(a).

246. Adhikiri v. Daoud & Partners, 697 F. Supp. 2d 674, 683 (S.D. Tex. 2009) (stating that "[t]o hold that the jurisdictional grant of Section 1596 excludes the remedies provided in Section 1595 would be both illogical and in contravention of the purpose of the statute").

247. *Ratha*, 35 F.4th at 1167–68.

248. *Id.* at 1169.

249. *See supra* note 87 and accompanying text.

250. *Ratha*, 35 F.4th at 1167.

251. *Id.* at 1167–69.

252. *Id.* at 1169–70.

253. *Id.* at 1171–72. The court stated that the tort claim standard was the appropriate standard because a TVPRA's civil claim "sounds in tort." *Id.* at 1171 (quoting Ditullio v. Boehm, 662 F.3d 1091, 1096 (9th Cir. 2011)). *Id.*

254. *Id.* at 1172. For specific jurisdiction, the defendant would need to know that the sale of their product to an entity in the United States could cause harm in the United States. *Id.* The plaintiffs also argued that Phatthana and S.S. Frozen were present in the United States because they had either an agency or joint venture relationship with Rubicon, a U.S. company. *Id.* at 1172–74. The court rejected those arguments because the facts did not support the creation of such relationships. *Id.*

More damaging for plaintiffs' claims in supply chain cases, the court in *Doe v. Apple* held that, even though it was a "close call,"[255] § 1595 did not apply extraterritorially.[256] In addition to the failure of § 1596 to explicitly mention § 1595, the court held that the wording of § 1596, which states that extraterritoriality applies to "any offense," shows that it was meant to apply to criminal offenses only and not civil actions.[257] Moreover, it would have also failed the second step of *Nabisco* because the "focus" of the TVPRA is where the violations occurred (in Thailand) and not where the defendants may have benefitted.[258]

e. Article III Standing Issues

Article III of the United States Constitution limits federal courts' jurisdiction to "cases" and "controversies."[259] A "core component" of this limitation on justiciability is that the plaintiff has standing, which the Supreme Court has established to have three requirements.[260] First, the plaintiff must have suffered an "injury in fact."[261] Second, "there must be a causal connection between the injury and the conduct complained of."[262] Third, it must be "likely" that a decision in the plaintiff's favor will redress the injury.[263] A plaintiff seeking federal jurisdiction over a claim bears the burden of establishing these elements.[264] In both *Doe v. Apple* and *Coubaly*, the D.C. District Court dismissed the plaintiff's TVPRA claims for failing to meet the second requirement: that the injury be traceable to the complained of action of the defendant.[265]

In *Doe v. Apple*, involving child labor in cobalt mines, the court relied on the fact that the defendants did not employ any of the plaintiffs, own or operate any of the mines where the plaintiffs were injured, or oversee or control the plaintiffs' supervisors or employers.[266] In addition, between the defendant corporations and the child miners were multiple parties: the supplier Umicore, its supplier Glencore, the company that supplied Glencore with cobalt from artisanal mines, and the operators of the artisanal mines.[267] Due to this long chain of actors, the court stated that the

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255. Doe v. Apple Inc., No. 1:19-cv-03737, 2021 U.S. Dist. LEXIS 237710, at *44 (D.D.C. Nov. 2, 2021).

256. *Id.* at *38–39.

257. *Id.* at *40–41.

258. *Id.* at *42–44. For the *Nabisco* test, *see supra* note 244.

259. Lujan v. Defs. of Wildlife, 504 U.S. 555, 559–60 (1992).

260. *Id.* at 560.

261. *Id.* (citations omitted).

262. *Id.*

263. *Id.* at 561 (quoting Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 38 (1976)).

264. *Id.* (citing FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231 (1990); Warth v. Seldin, 422 U.S. 490, 508 (1975)).

265. Doe v. Apple Inc., No. 1:19-cv-03737, 2021 U.S. Dist. LEXIS 237710, at *17–22 (D.D.C. Nov. 2, 2021); Coubaly v. Cargill, Inc., 610 F. Supp. 3d 173, 180–81 (D.D.C. 2022) (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992); Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 663–64 (1996)).

266. *Doe*, 2021 U.S. Dist. LEXIS 237710, at *18–19.

267. *Id.* at *7–8 (citing First Amended Complaint at 28–29, *Doe*, 2021 U.S. Dist. LEXIS 237710 (No. 1:19-cv-03737-CJN), *21–22.

plaintiffs were relying on speculation instead of fairly tracing their harm to the defendants.[268]

Unlike *Doe v. Apple*, the defendants in *Coubaly* were alleged to have exercised some degree of control over the cocoa plantations where the TVPRA violations occurred.[269] However, the court still found that the standing requirement of causation was not met.[270] The plaintiffs failed to link specific defendants to specific cocoa plantations.[271] Thus, the plaintiffs' allegations were different from the TVPRA hotel cases, where the plaintiffs were able to specifically name the hotels where the violations occurred.[272] The court held that it was not sufficient to allege that the "defendants purchased cocoa from the regions in which plaintiffs labored" or that the defendants generally "knew that their cocoa suppliers employed children."[273] In addition, the plaintiffs' complaint did not "adequately explain what role intermediaries played in the supply chain."[274] In fact, the complaint stated that the defendants were often unable to trace where the cocoa beans came from, which the court found created "uncertainty in the chain of causation."[275] The court in *Coubaly* further held that the TVPRA's venture liability provisions were not sufficient to meet the standing requirements without supporting facts.[276] The court stated that Congress's ability to "create new forms of liability . . . cannot eliminate the constitutional causation requirement."[277]

Overall, these courts' analyses of the role of corporations in influencing the behavior of other entities in their supply chain stand in contrast to developments in the field of business and human rights, which provide a more nuanced understanding of how corporations motivate, incentivize, and facilitate supply chain abuses.[278] The next Part provides an overview of the developments in the business and human rights area. This is followed by a discussion of how these business and human rights concepts can help litigants and courts better understand these causation issues in the

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268. *Id.* at *21–22. In reference to standing on the plaintiffs' claims for injunctive relief, the court stated:

> [I]t takes many analytical leaps to say that the end-purchasers of a fungible metal are responsible for the conditions in which that metal might or might not have been mined, especially when that mining took place thousands of miles away and flowed through many independent companies before reaching Defendants. At the very least, Plaintiffs would need to allege specific facts laying out each Defendants' role in this protracted causal chain.

Id. at *24–25.

269. *Coubaly*, 610 F. Supp. 3d at 176–79.

270. *Id.* at 180–81. In fact, the court found this situation to be similar to *Doe v. Apple* in terms of the causation analysis. *Id.* at 182.

271. *Id.* at 180–81.

272. *Id.* at 183.

273. *Id.* at 181.

274. *Id.*

275. *Id.* at 181–82.

276. *Id.* at 182–83.

277. *Id.*

278. *See infra* note 420 and accompanying text.

supply chain context, as well as provide a better model of liability than the TVPRA's current provisions.

IV. BUSINESS AND HUMAN RIGHTS: SOFT LAW AND HARD LAW

The prior Part outlined the challenges plaintiffs face when bringing supply chain forced labor TVPRA cases against corporations. Further below, this Article makes a reform proposal to attempt to address those challenges with the TVPRA.[279] To help understand that proposal, this Part presents the latest thinking and activity on businesses' responsibility to respect human rights. It traces how this responsibility to respect human rights started in soft law and is now appearing more often in hard law, especially in the European Union.

A. UNGPs and Human Rights Due Diligence

Due to challenges with holding states accountable for human rights violations within their jurisdictions, human rights advocates turned to holding corporations accountable, such as for being complicit in human rights violations committed by states.[280] These advocates also did not believe that existing voluntary corporate social responsibility initiatives were working to change corporate behavior.[281] Moreover, due to certain corporations' size, power, and ability to select "permissive" environments in which to operate, the advocates focused on multinational corporations.[282]

This pressure led to the United Nations' first major effort in this area: the United Nations Global Compact.[283] The Global Compact required corporations to make voluntary commitments to avoid complicity in human rights abuses, including working to eliminate forced labor and child labor.[284] However, due to the Global Compact's voluntary nature, critics believed that it allowed corporations to make public commitments to respect human rights without having to actually follow through with those commitments.[285] The United Nations' next major initiative was the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, which was approved by resolution of the

279. *See infra* Part V.

280. Michael A. Santoro, *Business and Human Rights in Historical Perspective*, 14 J. HUM. RTS. 155, 156–57 (2015).

281. Anita Ramasastry, *Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability*, 14 J. HUM. RTS. 237, 238 (2015).

282. JOHN GERARD RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS, at xxiii (2013) ("Multinational corporations became the central focus of business and human rights concerns because their scope and power expanded beyond the reach of effective public governance systems, thereby creating permissive environments for wrongful acts by companies without adequate sanctions or reparations.").

283. David Hess, *Business, Corruption, and Human Rights: Towards a New Responsibility for Corporations to Combat Corruption*, 2017 WIS. L. REV. 641, 648–49 (2017).

284. *See generally id.*

285. *See* Surya Deva, *Global Compact: A Critique of the U.N.'s "Public-Private" Partnership for Promoting Corporate Citizenship*, 34 SYRACUSE J. INT'L L. & COM. 107, 130 (2006).

United Nations Sub-Commission on the Promotion and Protection of Human Rights in 2003.[286] Controversially, these Norms placed an affirmative obligation on corporations to protect and promote human rights.[287] Although the full United Nations Commission on Human Rights did not act to approve those Norms, that Commission did establish a Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises and appointed John Ruggie to that position.[288]

In this role, Professor Ruggie created the leading frameworks on business and human rights: the 2008 United Nations Protect, Respect, and Remedy Framework (the "Framework")[289] and the 2011 United Nations Guiding Principles on Business and Human Rights (the "UNGPs").[290] The Framework established three pillars: the state has the responsibility to protect human rights,[291] business has a responsibility to respect human rights,[292] and both have responsibilities to provide access to remedies for those who suffer adverse human rights impacts.[293] The UNGPs provide detailed implementation guidance on those three pillars from the Framework.

For business, the responsibility to respect human rights means to "[a]void causing or contributing to adverse human rights impacts through their own activities" and "prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."[294] Based on that description, for a corporation to "cause" or "contribute" to an adverse human rights impact, the impact

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286. UN Sub-Comm'n on the Promotion & Prot. of Hum. Rts., Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003), https://digitallibrary.un.org/record/501576?ln=en [https://perma.cc/U98G-CGFM].

287. Article A.1 of the Norms states, "[w]ithin their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law." *Id.* at 4.

288. Angela N. Aneiros & Jamie Darin Prenkert, *In the Best Interest of Children: A Proposal for Corporate Guardians Ad Litem*, 26 UCLA J. INT'L L. & FOR. AFFS. 1, 14–15 (2021).

289. John Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Protect, Respect and Remedy: A Framework for Business and Human Rights, ¶ 17, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) [hereinafter UN Framework].

290. John Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter Guiding Principles].

291. *See* UN Framework, *supra* note 289, at 9–14.

292. *See id.* at 14–21.

293. *See id.* at 22–27.

294. Guiding Principles, *supra* note 290, at 14 (Principle 13).

must be related to the corporation's own actions.[295] "Directly linked," on the other hand, simply requires a connection between the party causing the adverse human rights impact and the focal corporation. For example, a supplier of a corporation—or even a subcontractor of that supplier—that utilizes forced labor would make that corporation, at a minimum, directly linked to that adverse impact.[296]

To meet their responsibilities, businesses must adopt "due diligence process[es] to identify, prevent, mitigate and account for how they address their impacts on human rights."[297] This human rights due diligence ("HRDD") process involves "assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed."[298] This process should cover any connection between the corporation and the adverse impact, including impacts caused by, contributed to, or directly linked to the corporation.[299] Once an adverse impact or risk of such an impact is identified, depending on the nature of the corporation's connection to the harm, the corporation should take action, such as ceasing the violation or using any leverage it has over the actor causing the harm to stop the behavior.[300] Other key aspects of HRDD include internal organizational responses (e.g., assigning responsibility for human rights risks to the appropriate business function, allocating resources, and implementing oversight mechanisms),[301] engagement with relevant stakeholders,[302] tracking effectiveness of its efforts,[303] and communicating these efforts to external stakeholders.[304]

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295. For example, a business can cause an adverse impact by having hazardous conditions at its factories. *See* OFF. HIGH COMM'R HUM. RTS., U.N. DEP'T HUM. RTS., THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS: AN INTERPRETIVE GUIDE, U.N. Doc. HR/PUB/12/02, at 15 (2012) [hereinafter INTERPRETIVE GUIDE]. A business can contribute to an adverse impact caused by another by, for example, incentivizing another party to cause an adverse human rights impact. *Id.* at 17. For a more detailed discussion of these terms, see *infra* Section V.C.

296. *See* INTERPRETIVE GUIDE, *supra* note 295, at 17.

297. Guiding Principles, *supra* note 290, at 15 (Principle 15).

298. *Id.* at 16 (Principle 17). The Interpretive Guidance states that a company's due diligence requirements will depend on its size, industry, and other factors, but that "the key elements of human rights due diligence—assessing, integrating and acting, tracking, and communicating—when taken together with remediation processes, provide the management of any enterprise with the framework it needs in order to know and show that it is respecting human rights in practice." INTERPRETIVE GUIDE, *supra* note 295, at 32.

299. Guiding Principles, *supra* note 290, at 15–16 (Principle 17).

300. *Id.* at 22 (commentary to Principle 19). In addition, for cause and contribute connections to the harm, the corporation should "should provide for or cooperate in their remediation through legitimate processes." *Id.* at 24 (Principle 22). For a complete discussion of cause and contribute, see *infra* Sections V.A and V.C.

301. Guiding Principles, *supra* note 290, at 18, 20–21 (Principle 19).

302. *Id.* at 19 (Principle 18).

303. *Id.* at 19 (Principle 20).

304. *Id.* at 20 (Principle 21). The commentary to this principle indicates that some form of formal reporting, as opposed to in-person meetings for example, "is expected where risks of severe human rights impacts exist." *Id.* at 24.

Although the UNGPs have been in existence for over ten years and are a widely accepted standard for business and human rights,[305] there are concerns that corporations' implementation of HRDD has been inadequate.[306] Thus, to ensure that corporations adopt appropriate HRDD practices and to hold them accountable when they do not, governments moved toward a legislative approach.

B. Human Rights Due Diligence Through Disclosure

The first legislative attempts to encourage corporations to adopt HRDD practices with respect to forced labor focused on transparency: requiring corporations to disclose information on their efforts to fight forced labor. Governments have used mandatory disclosures to attempt to improve corporate behavior on a wide range of issues, including securities fraud, vehicle rollovers, toxic chemicals, and many other areas.[307] For more complex matters related to corporate social responsibility, it has become the default approach.[308] Policymakers often rely on transparency-based regulation because there is a common belief that disclosure (often referred to as "sunlight") works.[309] In addition, transparency legislation is relatively easy for a legislature to pass because it is an acceptable policy regardless of political beliefs, and passing such legislation—that places most of the burdens on the corporate discloser—allows legislatures to tout an accomplishment on addressing the social issue at hand.[310] Despite this popularity, however, the transparency approach to regulation often has little impact on corporate behavior.[311] In the area of forced labor, that is also the case.

For forced labor, the three primary legislative transparency attempts are the California Transparency in Supply Chains Act of 2010,[312] the U.K. Modern Slavery Act of 2015 ("UK MSA"),[313] and the Australian Modern Slavery Act of 2018.[314] With some differences, these laws require corporations to disclose what efforts, if any, they have taken to ensure that forced labor is not present in their supply

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305. For example, the OECD modified its Guidelines for Multinational Enterprises to include a HRDD requirement based on the UNGPs. *See* OECD, *OECD Guidelines for Multinational Enterprises*, at 31 (2011).

306. David Hess, *The Management and Oversight of Human Rights Due Diligence*, 58 AM. BUS. L.J. 751, 760–61 (2021).

307. *See generally* ARCHON FUNG ET AL., FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY (2007) (reviewing a variety of different transparency programs).

308. *See* David Hess, *The Transparency Trap: Non-Financial Disclosure and the Responsibility of Business to Respect Human Rights*, 56 AM. BUS. L.J. 5, 6–7 (2019).

309. *Id.*

310. *Id.*

311. *See* OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 3 (2014) (stating that mandatory disclosure "may be the most common and least successful regulatory technique in American Law").

312. California Transparency in Supply Chains Act, CAL. CIV. CODE § 1714.43 (2021).

313. Modern Slavery Act 2015 c. 30 (UK), https://www.legislation.gov.uk/ukpga/2015/30/contents/enacted [https://perma.cc/Q423-ZAC8].

314. Modern Slavery Act 2018 (Cth) No. 153 (Austl.).

chains.[315] These efforts may include, for example, risk assessments, supplier audits, and internal training.[316]

Beyond raising awareness of the issue of forced labor, however, these laws have not had a significant impact on changing corporate behavior.[317] Empirical research on the disclosures shows that companies are generally producing generic statements with little useful information.[318] In other words, rather than using the disclosure process to evaluate internal practices and seek areas of improvement, companies are treating disclosure as an end in itself.[319] The reasons for the ineffectiveness of these attempts include the legislation's focus only on disclosures as opposed to coupling it with a requirement that corporations implement HRDD practices, vague standards on the required disclosures, and limited or nonexistent enforcement mechanisms.[320] In response, as discussed in the next Section, governments are experimenting with adopting mandatory HRDD ("mHRDD") legislation.

C. Mandatory Human Rights Due Diligence

In the past few years, a variety of European countries have passed mHRDD legislation, which can vary significantly from country to country. In addition, at the European Union level, significant progress has been made on the Corporate Sustainability Due Diligence Directive, which would require member states to adopt legislation mandating that corporations conduct human rights (and environmental) due diligence and establish liability for harm resulting from the failure to do so.[321]

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315. Hess, *Modern Slavery*, *supra* note 114, at 260.
316. *Id.* at 260–64.
317. *Id.* at 258–60.
318. *Id.* at 266–67.
319. *Id.*
320. *Id.* at 261–62.
321. In June 2023, the European Parliament adopted amendments to the European Commission's proposed Corporate Sustainability Due Diligence Directive ("CSDDD"), which pushes forward the negotiation process. Press Release, *MEPs Push Companies to Mitigate Their Negative Social and Environmental Impact*, NEWS: EUR. PARLIAMENT (June 1, 2023, 12:10 AM), https://www.europarl.europa.eu/news/en/press-room/20230524IPR91907/meps-push-companies-to-mitigate-their-negative-social-and-environmental-impact [https://perma.cc/MV7S-368M]. Articles 6 through 8 of the European Commission's proposal require companies to conduct due diligence, and Article 22 provides for civil liability for harm due to inadequate due diligence. *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive* (EU) 2019/1937, arts. 6–8, 22, COM (2022), at 71 final, (Feb. 23, 2022), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0071 [https://perma.cc/G5YZ-LU6A]. On the issue of liability generally, the European Parliament's Amendment 74 to the European Commission's recitals states that a "company should be liable for damages if they failed to comply with the obligations to prevent and mitigate potential adverse impacts . . . and as a result of this failure the company caused or contributed to an adverse impact that should have been identified, prioritised, prevented, mitigated, brought to an end, remediated or its extent minimised through the appropriate measures, and led to damage." EUR. PARL. CORPORATE SUSTAINABILITY DUE DILIGENCE, DOC. (P9_TA(2023)0209), at 74 (2023), https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.pdf [https://perma.cc/Q9X9-BDZR].

The following brief review provides an overview of some of these approaches and their differences, especially as they relate to corporate liability for adverse human rights impacts in their supply chains.

In France, Norway, and Germany, corporations are required to conduct HRDD, which should cover risks to all fundamental human rights.[322] In Norway the obligation is broad and includes the entire supply chain, starting at the raw materials stage and including a supplier's use of sub-contractors.[323] In Germany the due diligence obligation is restricted to the corporation's own activities and direct suppliers unless the corporation has "substantiated knowledge" that an indirect supplier may have committed a human rights violation.[324] In France the obligation covers a corporation's own activities, the activities of any company under its control (i.e., under the decision-making power of the corporation), or those companies "with whom they have an established business relationship."[325] All three laws include a requirement for the corporation to publicly report on its HRDD efforts.[326] Lacking in the Norway and German laws is a provision on civil liability or government enforcement of remedies.[327] In France, the law provides for tort liability based on a victim's harm resulting from the company's failure to conduct adequate HRDD.[328]

In the Netherlands, the mHRDD law is limited to child labor.[329] In brief, a company must investigate the risks of child labor in its supply chain, and if there is a reasonable suspicion that child labor is present, the corporation must develop and implement an action plan to address that risk.[330] This obligation covers the entire supply chain.[331] Like the laws in Norway and Germany, the law does not provide for potential civil liability to those adversely impacted.[332]

In 2020, Swiss citizens voted on a constitutional amendment that would require mHRDD and impose corporate liability for human rights abuses.[333] Referred

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322. Markus Krajewski et al., *Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?*, 6 BUS. & HUM. RTS. J. 550, 553–55 (2021). The Norway law applies to corporations meeting two of three size conditions, including 50 or more employees and revenue above 70 million Norwegian *kroner* (which is less than 7 million U.S. dollars). *Id.* at 553. The German law applied to corporations with over 3,000 employees when it went into effect in 2023, and then 1,000 employees from January 1, 2024 forward. *Id.* The French law applies to French companies that have 5,000 or more employees in France or 10,000 or more employees worldwide. Claire Bright et al., *Toward a Corporate Duty for Lead Companies to Respect Human Rights in Their Global Value Chains?*, 22 BUS. & POL. 667, 685 n.123 (2020).

323. Krajewski et al., *supra* note 322, at 556.

324. *Id.*

325. Bright et al., *supra* note 322, at 685 (quoting the French legislation).

326. Krajewski et al., *supra* note 322, at 556–57; Bright et al., *supra* note 322, at 685.

327. *Id.* at 558.

328. Bright et al., *supra* note 322, at 685–86.

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. Nicolas Bueno & Christine Kaufmann, *The Swiss Human Rights Due Diligence Legislation: Between Law and Politics*, 6 BUS. & HUM. RTS. J. 542, 542 (2021).

to as the Responsible Business Initiative ("RBI"), this law would require corporations to conduct HRDD.[334] In addition, and different from the prior mHRDD examples, the RBI established strict liability for human rights violations.[335] This provision included violations caused by companies controlled by the Swiss corporation but allowed the corporation to avoid liability by showing that it had attempted to avoid the adverse human rights impact by conducting adequate due diligence.[336] Ultimately, the RBI failed in the national vote[337] and a more limited law was adopted by the Swiss Parliament.[338]

At the same time as these developments on mHRDD legislation, there were negotiations underway at the United Nations on a business and human rights treaty. In 2014, the United Nations Human Rights Council adopted a resolution to establish a working group to develop such a treaty.[339] The third revised draft of the Legally Binding Instrument ("LBI") was released in 2021.[340] On the topic of mHRDD, the draft requires states to mandate that their businesses conduct HRDD.[341] In addition, states are required to provide for extraterritorial legal liability[342] when corporations "conducting business activities have caused or contributed to human rights abuses."[343] For secondary liability in supply chain activities, the LBI would create two categories of potential liability. First, a corporation could be liable for failing to prevent someone "with whom they have had a business relationship, from causing

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334. *Id.* at 543.

335. *See id.*

336. *Id.*

337. Although a majority of Swiss citizens voted in favor of the constitutional amendment, it failed to win approval in a majority of the Swiss cantons. *Id.* at 542.

338. *See id.* at 542–43. Under the adopted law, large corporations have general disclosure obligations on non-financial matters and due diligence obligations in more limited situations. *Id.* at 545. The due diligence obligations apply to companies importing or processing a certain amount of conflict minerals and to companies that have reasonable grounds to believe that child labor may be present in their supply chain. *Id.* at 545–46. If a company's supply chain is only connected to countries that are low-risk for child labor, then the company does not need to comply with child labor due diligence obligations. *Id.* at 545. Commentators, however, have criticized the enforcement provisions because they are limited to an auditing requirement and penalties for failing to disclose implementation efforts. *Id.* at 547. One set of commentators referred to the enforcement mechanisms as "quite lacunary." *Id.*

339. Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, G.A. Res. 26/9, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014), https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9 [https://perma.cc/2T4Z-ESD6].

340. OEIGWG Chairmanship Third Revised Draft 17.08.2021, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, at 7 (OEIGWG Chairmanship Draft 2021) [hereinafter Legally Binding Instrument], https://www.ohchr.org/sites/default/files/LBI3rd DRAFT.pdf [https://perma.cc/GGV7-CR8U].

341. Article 6.3 states that "States Parties shall require business enterprises to undertake human rights due diligence, proportionate to their size, risk of human rights abuse or the nature and context of their business activities and relationships." *Id.* at art. 6.3.

342. *Id.* at art. 8.4.

343. *Id.* at art. 8.3.

or contributing to human rights abuses," but only if the corporation "controls, manages or supervises such person or the relevant activity that caused or contributed to the human rights abuse."[344] The second category of liability covers when the corporation "should have foreseen risks of human rights abuses in the conduct of their business activities . . . or in their business relationships, but failed to take adequate measures to prevent the abuse."[345]

This brief overview shows how quickly respect for human rights has moved from voluntary soft law to hard law. It also shows the varied approaches and disagreement on when corporations should be held liable for adverse human rights impacts in their supply chains. Due to the newness of these laws, their effectiveness is untested. However, there are significant concerns that the laws as passed do not go far enough to hold corporations accountable and, if not drafted and enforced appropriately, may provide corporations with tools for avoiding accountability.[346]

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344. *Id.* at art. 8.6.

345. *Id.* In October 2022, for the eighth LBI session, the working group chair submitted "Suggested Chair Proposals," which removed Article 8.3's mention of cause and contribute and stated that State Parties should establish corporate liability for "(a) conspiring to commit human rights abuse; and (b) aiding, abetting, facilitating and counselling the commission of human rights abuse." Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, Suggested Chair Proposals for Select Articles of the LBI, A/HRC/WG.16/8/CRP.1, at 5 (Oct. 6, 2022), https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/wgtranscorp/session8/2022-10-06/igwg-8th-suggested-chair-proposals.pdf [https://perma.cc/7NFN-698B]. Under Article 6 on prevention—as opposed to Article 8 on legal liability—the Suggested Chair Proposals states:

> Each Party shall take such measures as may be necessary, and consistent with its domestic legal and administrative systems, to ensure that business enterprises take appropriate steps to prevent human rights abuse by third parties where the enterprise controls, manages or supervises the third party, including through the imposition of a legal duty to prevent such abuse in appropriate cases.

Id. at 3. Commentators suggested that the Chair made these, and other, changes in response to divisions between the states on the treaty and to "reduce [the] granularity" of the liability provision in order to potentially move towards a framework convention approach. Antony Crockett & Jefferi Hamzah Sendut, *UN Business and Human Rights Treaty Negotiations Continue: One Step Forward, Two Steps Back?*, HERBERT SMITH FREEHILLS INSIGHTS (Nov. 8, 2022), https://www.herbertsmithfreehills.com/insights/2022-11/un-business-and-human-rights-treaty-negotiations-continue-one-step-forward-two-steps [https://perma.cc/9Y7P-SSYH]. A framework convention establishes only more general obligations and allows for the adoption of supplemental protocols for more detailed obligations. *See generally* Claire Methven O'Brien, *Transcending the Binary: Linking Hard and Soft Law Through a UNGPS-Based Framework Convention*, 114 AJIL UNBOUND 186, 186 (2020), https://www.cambridge.org/core/journals/american-journal-of-international-law/article/transcending-the-binary-linking-hard-and-soft-law-through-a-ungpsbased-framework-convention/9EC58B32613692F38BD4ACC3581E44F6 [https://perma.cc/9Y7P-SSYH] (arguing for "business and human rights treaty modelled as a framework convention").

346. *See* Gabriela Quijano & Carlos Lopez, *Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?*, 6 BUS. & HUM. RTS. J. 241, 254 (2021) (stating that mHRDD laws may create "the risk of inadvertently providing companies with a tool that they hitherto did not have to show respect for human rights and rebut charges

On the assumption that the United States is unlikely to adopt mHRDD legislation any time soon, and due to the currently outstanding questions on the effectiveness (and potential negative consequences) of any mHRDD law that is passed, the next Part makes a proposal to amend the TVPRA to cover the specific challenges of liability for forced labor in supply chains. This proposal seeks to make the TVPRA consistent with key aspects of the UNGPs and to draw on insights from the business and human rights field. Furthermore, this proposal seeks to ensure that the TVPRA's liability provisions are consistent with what the drafters of the TVPRA's amendments were likely seeking to accomplish.

In a brief in the *Nestlé USA, Inc. v. Doe* ATS case,[347] members of Congress outlined the history of the TVPRA and Congress's strong desire to launch a multipronged attack against forced labor and human trafficking, including providing for liability for those that knowingly benefit from forced labor.[348] One goal was to prevent corporations from using intermediaries in a supply chain to create a "liability shield" for their knowing benefit from forced labor.[349] Congress recognized that "myriad actors besides the principal traffickers indirectly facilitate the victims' terror."[350] Thus, Congress sought to ensure that the legal tools it created were used "vigorously to hold accountable those who enable and benefit from trafficking as well as to provide a remedy for its victims."[351]

The amendments to the TVPRA sought to achieve these goals, in part, by encouraging civil lawsuits and ensuring that enforcement reaches actions beyond the borders of the United States.[352] "Congressional policy . . . supports civil redress to victims of trafficking abroad and holding American corporations accountable for their complicity in global trafficking."[353] Further, "[s]hielding American corporations from liability for aiding and abetting trafficking abroad would undermine Congress' efforts to establish the United States' leadership on this critical issue."[354] In addition, "the TVPRA's venture liability is necessarily broader than aiding and abetting" in order to better hold accountable those that benefit from

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of liability with little bearing on effective respect for human rights on the ground"); Hess, *supra* note 302, at 771–73 (discussing the potential risk of "decoupled due diligence," whereby ineffective government enforcement of mHRDD may allow corporations to avoid liability by adopting HRDD practices on paper that are not fully implemented (referred to as paper programs or cosmetic compliance), and perhaps, then exercise even less care in seeking to avoid adverse human rights impacts).

347. *See supra* notes 91–104 (providing an overview of Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021)).

348. Brief of Members of Congress Senator Blumenthal, Representative Smith, et al., as *Amici Curiae* Supporting Respondents, *Nestlé USA, Inc.*, 141 S. Ct. 1931, at 15–26 (2021) (Nos. 19-416, 19-453) [hereinafter Brief of Members of Congress].

349. *Id.* at 20.

350. *Id.*

351. *Id.* at 21.

352. *Id.* at 23–26.

353. *Id.* at 29.

354. *Id.* at 28.

forced labor.[355] The proposal below allows the TVPRA to better meet these objectives.

V. THE TVPRA: A PROPOSAL FOR REFORM

This Article's reform proposal focuses on the TVPRA's civil liability provisions[356] and moving away from the language of "knowingly benefiting" from participation in a venture by using the "cause," "contribute," and "directly linked" terminology of the UNGPs.[357] Civil liability is necessary for providing victims with a remedy for their harms, but—according to lawyers bringing claims under the ATS—receiving financial compensation is only one of the goals of litigation.[358] There are also normative goals of exposing wrongdoing, restoring dignity, holding perpetrators accountable, stopping the wrongful behavior, and preventing the behavior in the future.[359] In addition, there are broader collective normative goals of social change;[360] the ATS plaintiffs hoped to raise public awareness of the problem, encourage development of the law, and ensure all corporations comply with their human rights obligations.[361] Even though ATS lawsuits had only minor financial implications for the corporate defendants and generated little expected long-term reputational damage, these litigation efforts raised the visibility of human rights issues to the top of the defendant organizations.[362] In addition, some commentators credit the public awareness raised by the ATS suits with helping push Congress to pass the Torture Victims Protection Act and add the civil liability provisions to the TVPRA, as well as advancing the business and human rights movement more generally.[363] This Article's proposal should help drive similar change, at least with respect to forced labor and human trafficking. The proposal is based on the UNGP

355. *Id.* at 31–32.

356. For a discussion of potential public enforcement, see *infra* notes 449–55 and accompanying text.

357. *See supra* notes 289–91 and accompanying text.

358. Ewell et al., *supra* note 74, at 1244.

359. *Id.* at 1253. Based on interviews with various ATS lawyers, the authors concluded that "[e]ven if the court does not ultimately rule for the plaintiffs, the ATS has offered thousands of survivors of human rights abuse the opportunity to expose the truth of their experiences through discovery and testimony and to have a measure of agency and dignity restored through the act of publicly asserting their rights." *Id.* at 1255.

360. *See id.* at 1256, 1259–60.

361. *Id.* at 1256, 1260–61.

362. *Id.* at 1256, 1267–68. These authors state that whether that C-Suite level awareness resulted in meaningful change in corporate practices and improved human rights performance is uncertain. *Id.* at 1270. One study—involving both ATS cases and cases filed outside the U.S.—finds that litigation does impact corporate practices, such as the adoption of new human rights policies and employee trainings. Judith Schrempf-Stirling & Florian Wettstein, *Beyond Guilty Verdicts: Human Rights Litigation and Its Impact on Corporations' Human Rights Policies*, 145 J. BUS. ETHICS 545, 548–49 (2017). Of course, the adoption of these practices does not prove that those corporations improved their human rights performance. *Id.* at 559–60.

363. Christopher Ewell & Oona A. Hathway, *Why We Need the Alien Tort Statute Clarification Act Now*, JUST SECURITY BLOG (Oct. 27, 2022), https://www.justsecurity.org/83732/why-we-need-the-alien-tort-statute-clarification-act-now/ [https://perma.cc/FQ4Q-B7AW].

terms used to describe a corporation's connection to an adverse human rights impact, which are discussed in the next Section.

It is important to note that this Article's proposed amendments to the TVPRA would not bring U.S. legislation into full compliance with the UNGPs. Under the UNGPs, corporations are expected to respect all internationally recognized human rights.[364] In Europe, legislation in Germany,[365] Norway,[366] and France,[367] for example, covers all human rights. That stated, there is widespread support for fighting forced labor and modern slavery more generally,[368] which increases the likelihood of Congress adopting these reforms. Successful litigation under the new terms could then lay the groundwork for future, more expansive legislation.[369]

A. The UNGP's Participation Terms & Corporate Responsibility

As stated earlier, the UNGPs use the terms "cause," "contribute," and "directly linked," to determine a corporation's connection to the adverse human rights impact and the necessary corporate response.[370] Collectively, these terms can be referred to as the "participation terms."[371] These terms first appear in the UNGPs in Principle 13, which sets out the basic obligation to respect human rights and states that respecting human rights requires corporations to "[a]void causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur" and "[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."[372] For "cause" and "contribute," the term "activities" is defined "to include both actions and omissions."[373]

If the corporation "causes," or may "cause," an adverse impact, "it should take the necessary steps to cease or prevent the impact."[374] If the corporation "contributes," or may "contribute," to an adverse impact, "it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate

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364. Guiding Principles, *supra* note 290, at 13 (Principle 12).

365. *See* Krajewski et al., *supra* note 322, at 553.

366. *Id.* at 554.

367. *See* Sandra Cossart et al., *The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All*, 2 BUS. & HUM. RTS. J. 317, 320 (2017).

368. Members of Congress have stated that fighting forced labor and human trafficking is an issue that unites conservatives, moderates, and liberals. Brief of Members of Congress, *supra* note 344, at 8–9. In addition, they stated that fighting forced labor and human trafficking requires "strong American leadership." *Id.* at 17.

369. *See* Ewell & Hathaway, *supra* note 363 and accompanying text (noting how ATS suits helped lead to the liability provisions of the TVPRA).

370. *See, e.g.*, Guiding Principles, *supra* note 290, at 18 (Principle 19), 20 (Principle 22).

371. Tara Van Ho, *Defining the Relationships: "Cause, Contribute, and Directly Linked to" in the UN Guiding Principles on Business and Human Rights*, 43 HUM. RTS. Q. 625, 627 (2021).

372. Guiding Principles, *supra* note 290, at 14 (Principle 13).

373. *Id.* at 14.

374. *Id.* at 18.

any remaining impact to the greatest extent possible."[375] The UNGPs use "leverage" to refer to a corporation's power to induce change in another entity.[376] In addition, for the "cause" and "contribute" situations, the corporation "should provide for or cooperate in [the] remediation [of the adverse impact] through legitimate processes."[377]

For "directly linked" situations, by contrast, the corporation is required to use its leverage to prevent or mitigate the adverse impact,[378] but "the responsibility to respect human rights does not require that the enterprise itself provide for remediation, though it may take a role in doing so."[379] If the corporation is not able to effect change in the entity causing the adverse impact, then the corporation should terminate the relationship (if it can be done in a manner that does not lead to further adverse impacts).[380] However, "for as long as the abuse continues and the enterprise remains in the relationship, it should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences—reputational, financial or legal—of the continuing connection."[381]

B. A BHR-Based Proposal

Following the UNGPs, this Article proposes that the TVPRA be amended to state that victims of forced labor have a cause of action to hold corporations liable whenever they cause or contribute to TVPRA violations in their supply chains. In addition, the proposed amendment to the TVPRA should allow for secondary liability by following the approach of the third revised draft of the LBI.[382] The amendment should also include explicit extraterritorial jurisdiction for these causes of action to correct the omission of civil actions in § 1596 of the TVPRA.

The explicit use of the UNGPs' participation terms provides significant advantages over the current TVPRA wording. Unlike the TVPRA's terms, these terms—although not originally intended for use in determining legal liability (and

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375. *Id.*

376. *Id.*

377. *Id.* at 20 (Principle 22).

378. *Id.* at 18. If the organization does not have sufficient leverage, then it should seek to develop it. *Id.*

379. *Id.* at 20–21.

380. *Id.* at 19.

381. *Id.* The *Interpretive Guide* states:

> If an enterprise is at risk of involvement in an adverse impact solely because the impact is linked to its operations, products or services by a business relationship, it does not have responsibility for the impact itself: that responsibility lies with the entity that caused or contributed to it. The enterprise therefore does not have to provide remediation (although it may choose to do so to protect its reputation or for other reasons). However, it has a responsibility to use its leverage to encourage the entity that caused or contributed to the impact to prevent or mitigate its recurrence. This may involve working with the entity and/or with others who can help.

INTERPRETIVE GUIDE, *supra* note 295, at 18.

382. *See supra* notes 344–45 and accompanying text (discussing the LBI's secondary liability provisions).

opposed for such use by some commentators)[383]—were developed specifically for determining corporate responsibility for adverse human rights impacts in supply chains (and other business relationships).[384] Professor Ruggie, the architect of the UNGPs, likely rejected transplanting existing legal concepts such as complicity into the UNGPs because such terms bring various understandings with them (which may differ significantly from jurisdiction to jurisdiction) that may distort what the UNGPs were attempting to accomplish.[385]

Because the participation terms were developed for these business and human rights situations, they focus litigants and judges on the defendant corporation's role in influencing behavior in the supply chain. Rather than viewing downstream corporations as simply buyers on an open market, the participation terms require litigants and judges to explore how corporations' actions and omissions impact forced labor. It is not a question of whether a venture existed and if the corporation was a participant in it, but whether the corporation motivated, facilitated, incentivized, or otherwise contributed to the adverse human rights impact. As discussed in the following Section, the determination of when a corporation causes or contributes to forced labor uses a dynamic, multifactor approach that better captures the nature of a corporation's influence in its supply chain and how that corporation's responsibility can change over time based on its actions or omissions. This approach will also allow a more in-depth analysis of Article III standing issues on causation, as the participation terms highlight the correct factors to identify the causal connection between the harm and corporate action or omission.

C. Understanding and Applying the Participation Terms: Contribution Versus Directly Linked

The Interpretive Guide to the UNGPs explains the participation terms through the use of examples.[386] For instance, "cause" would include the corporation exposing its "factory workers to hazardous working conditions without adequate safety equipment."[387] "Contributing" could involve "[c]hanging product requirements for suppliers at the eleventh hour without adjusting production deadlines and prices, thus pushing suppliers to breach labour standards in order to deliver."[388] An example of being "directly linked," but not "contributing," to a

383. Nicolas Bueno & Claire Bright, *Implementing Human Rights Due Diligence Through Corporate Civil Liability*, 69 INT'L & COMPAR. L. Q. 789, 817 (2020) (arguing "that the distinction between contributing to and being directly linked to an adverse human rights impact is not sufficiently legally defined to draw consequences for the determination of legal liability").

384. *See* Van Ho, *supra* note 371, at 631–34.

385. *Id.*

386. INTERPRETIVE GUIDE, *supra* note 295, at 17.

387. *Id.*

388. *Id.* Likewise, as an example of "contributing to" a human rights violation, John Ruggie gave the example of Apple CEO Steve Jobs changing the screen requirements for an iPhone model one month before the phones were due to be available to consumers. RUGGIE, *supra* note 282, at 1, 98. The new requirements imposed an "assembly-line overhaul and production schedule on the supplier that simply could not be met without violating already weak workplace standards." *Id.*

violation could be "[e]mbroidery on a retail company's clothing products being subcontracted by the supplier to child labourers in homes, counter to contractual obligations."[389]

In response to the UNGPs, the OECD updated its Guidelines for Multinational Enterprises to make them consistent with the UNGPs, including the use of the participation terms.[390] In the chapter on "Human Rights," corporations are required to "[w]ithin the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur."[391] The Guidelines defined contributing as "a substantial contribution, meaning an activity that causes, facilitates or incentivises another entity to cause an adverse impact and does not include minor or trivial contributions."[392] Consistent with that idea, in the context of discussing the banking sector, the U.N. Office of the High Commissioner on Human Rights ("OHCHR") stated that "contribute" contains an element of causality, such that a "bank's actions and decisions influenced the client in such a way as to make the adverse human rights impact more likely."[393] As an illustration, the OHCHR stated that "a bank that provides financing to a client for an infrastructure project that entails clear risks of forced displacements may be considered to have facilitated—and thus contributed to—any displacements that occur, if the bank knew or should have known that risks of displacement were present, yet it took no steps to seek to get its client to prevent or mitigate them."[394]

The OHCHR further described "incentivizing" and "facilitating" as two different ways a business could contribute to an adverse human rights impact, again in the context of banking.[395] For "incentivizing," the "mere existence of a business relationship" is not typically sufficient, but there must be "a specific action or decision by the bank that provides motivation or incentives for the client to act in a

389. INTERPRETIVE GUIDE, *supra* note 295, at 17.

390. *See* OECD, *supra* note 305, at 31.

391. *Id.* at 23. In addition, corporations must "[s]eek 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." *Id.* at 31. Following the UNGPs, the Commentary states that the term activities "can include both actions and omissions." *Id.* at 33.

392. *Id.* at 23. This definition is found in commentary to the chapter "General Policies." *Id.* at 21–23. Paragraph A.11 in this chapter states an obligation broader than avoiding adverse human rights impacts and requires corporations to "[a]void causing or contributing to adverse impacts on matters covered by the Guidelines." *Id.* at 20. The commentary to the "Human Rights" chapter refers to General Policies paragraph A.11 and related commentary as providing "[c]omplementary guidance." *Id.* at 34. Thus, it is reasonable to use the definition for "contributing to" for the Human Rights chapter.

393. United Nations Office of the High Commissioner for Human Rights (OHCHR), OHCHR Response to Request from BankTrack for Advice Regarding the Application of the UN Guiding Principles on Business and Human Rights in the Context of the Banking Sector, at 5 (June 12, 2017), https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf [https://perma.cc/E6GX-HA4L].

394. *Id.* at 6.

395. *Id.* at 8. It is important to note that these are not terms that appear in the UNGPs. *Id.* at 8 n.29.

way that results in human rights harm."[396] This could include advising the client on taking actions that would increase the likelihood of an adverse impact.[397] For "facilitation," simply providing funding to a client is not sufficient for the contribution participation term, but "a bank may facilitate a client or other entity to cause harm if it knows or should have known that there are human rights risks associated with a particular client or project, but it omits to take any action to require, encourage or support the client to prevent or mitigate these risks."[398]

OECD's guidance on due diligence provides further development of the participation terms.[399] This guidance first defines the participation terms consistent with the OECD Guidelines[400] and then adds the following factors for consideration:

- the extent to which an enterprise may encourage or motivate an adverse impact by another entity, i.e. the degree to which the activity increased the risk of the impact occurring.
- the extent to which an enterprise could or should have known about the adverse impact or potential for adverse impact, i.e. the degree of foreseeability.
- the degree to which any of [an] enterprise's activities actually mitigated the adverse impact or decreased the risk of the impact occurring.[401]

The OECD guidance also notes that a corporation's relationship to an adverse impact can change over time, but it does not clearly specify how to evaluate when that occurs.[402] In general, the guidance indicates that a corporation that conducts adequate due diligence and addresses potential risks of adverse impacts could move from the "contributing" category to the "directly linked" category with respect to any harm that does occur.[403] Likewise, the relationship can move in the

396. *Id.* at 8.

397. *Id.*

398. *Id.* If the bank in this situation had taken sufficient measures to prevent and mitigate the risk, then its connection to the harm would be directly linked. *Id.*

399. *See generally* OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (2018), http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf [https://perma.cc/L2PU-DU78].

400. *See supra* notes 390–92 and accompanying text. Here, a corporation causes an adverse impact if its "activities on their own are sufficient to result in the adverse impact." OECD, *supra* note 399, at 70. A corporation contributes to an adverse impact if "its activities, in combination with the activities of other entities cause the impact, or if the activities of the enterprise cause, facilitate or incentivise another entity to cause an adverse impact. Contribution must be substantial, meaning that it does not include minor or trivial contributions." *Id.*

401. *Id.* The guidance further states that "[t]he mere existence of a business relationship or activities which create the general conditions in which it is possible for adverse impacts to occur does not necessarily represent a relationship of contribution. The activity in question should substantially increase the risk of adverse impact." *Id.*

402. *Id.* at 71.

403. *See id.* (stating that the relationship to the adverse impact "may change, for example as situations evolve and depending upon the degree to which due diligence and steps taken to address identified risks and impacts decrease the risk of the impacts occurring").

opposite direction. That is, a corporation "directly linked" to a harm could move to the contribute category due to a failure to "[u]se leverage to influence the entity causing the adverse impact to prevent or mitigate the impact."[404]

In a discussion paper on the participation terms for the OECD, two consulting organizations on business and human rights sought to define "cause" and "contribute" in terms of the risk arising from a company's activities or omissions.[405] They used their definitions of "cause" and "contribute" to create the following three questions:

1. Is there an actual or potential adverse human rights impact?
2. If so, do the company's activities (including omissions) materially increase the risk of that impact?
3. If so, would the company's activities (including omissions) in and of themselves be sufficient to result in that impact?[406]

If the answer is "yes" to all three questions, then the business has caused the adverse impact.[407] If the answer is "yes" to the first two questions and "no" to the third question, then the business is contributing to the impact.[408] Importantly, the discussion draft also noted that "a business may contribute to an adverse impact even if the business itself does not have the ability to 'ease or prevent the impact' as long as its activities have a material bearing on 'the chance of the impact occurring.'"[409]

Professor Ruggie stated his disagreement with a bright-line test approach,[410] and in the process he provided additional clarity on his views of the

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404. *See id.* at 72 (stating the general response required of a corporation that is directly linked to an adverse impact).

405. Debevoise Business Integrity Group & Enodo Rights, *Practical Definitions of Cause, Contribute, and Directly Linked to Inform Business Respect for Human Rights: Discussion Draft*, at 8 (Feb. 9, 2017), https://media.business-humanrights.org/media/documents/files/documents/Debevoise-Enodo-Practical-Meaning-of-Involvement-Draft-2017-02-09.pdf [https://perma.cc/7Q53-E5K5].

406. *Id.* Cause included any activities that "materially increase the risk of the specific impact which occurred and would be sufficient, in and of themselves, to result in that impact." *Id.* Contribute to changes the definition above after the first use of the word "and" to read "even if [the activity or omission] would not be sufficient, in and of themselves, to result in that impact." *Id.*

407. *Id.*

408. *Id.*

409. *Id.* at 30 (quoting INTERPRETIVE GUIDE, *supra* note 295). They defined directly linked to be when a business "has established a relationship for mutual commercial benefit with" the entity increasing the risk of the negative impact. *Id.* at 13–14. The relationship for "mutual commercial benefit" includes a supply chain. Thus, a buyer of cocoa from an intermediary that sources cocoa from farms using child labor is directly linked to the child labor. *Id.* at 17–18.

410. Letter from John G. Ruggie, Affiliated Professor in International Legal Studies, Harvard Law School, to Roel Nieuwenkamp, Chair, Working Party on RBC, OECD (Mar. 6, 2017), https://media.business-humanrights.org/media/documents/files/documents/OECD_Workshop_Ruggie_letter_-_Mar_2017_v2.pdf [https://perma.cc/7ZK7-GAUQ]. For example, for directly linked, he rejected the restriction to only "mutual commercial benefit" relationships. *Id.*

terms. Overall, Ruggie rejected the idea that a test, such as the three-part test above based on "binary distinctions," could work to distinguish between the situations.[411] Instead, he favored a multifactor approach. For example, for the challenging distinction between "contribute" and "directly linked," Ruggie stated:

> What is needed is greater understanding of the factors that can drive a situation towards one or the other category. A variety of factors can determine this. They include the extent to which a business enabled, encouraged, or motivated human rights harm by another; the extent to which it could or should have known about such harm; and the quality of any mitigating steps it has taken to address it. Moreover, a company's involvement may not be static, but can change over time. These factors should not be considered in isolation from each other, but as part of a totality of circumstances.[412]

Likewise, the OHCHR's statements related to banks stated that the distinction between "contribute" and "directly" linked exists on a "continuum" and can change over time.[413] The OHCHR illustrated these ideas with an example:

> [I]f a bank identifies or is made aware of an ongoing human rights issue that is directly linked to its operations, products or services through a client relationship, yet over time fails to take reasonable steps to seek to prevent or mitigate the impact – such as bringing up the issue with the client's leadership or board, persuading other banks to join in raising the issue with the client, making further financing contingent upon correcting the situation, etc. – it could eventually be seen to be facilitating the continuance of the situation and thus be in a situation of 'contributing.'[414]

Professor Van Ho builds upon these dynamic, multifactor analyses and emphasizes the factors of "power, independence, and mitigation efforts of the business; and the predictability and severity of the harm."[415] Under her approach, a company like Apple could be viewed as contributing to forced labor if it used suppliers located in the Xinjiang region of China.[416] The relevant factors are the severity of the violation, the predictability that it would occur with a supplier located in that region, and the corporation's power to insist that suppliers undertake stronger protections against the use of forced labor.[417] Thus, if Apple had not taken sufficient precautions against the use of forced labor by a supplier—which Professor Van Ho does not believe that Apple did—then Apple contributed to forced labor.[418] If Apple does take sufficient precautions at some point, then from that time period forward its participation level could shift to directly linked (though, in this example, Apple

411. *Id.*
412. *Id.*
413. OHCHR, *supra* note 393, at 6–7.
414. *Id.* at 7.
415. Van Ho, *supra* note 371, at 630.
416. *Id.* at 655–56.
417. *Id.*
418. *Id.* at 656.

should still be responsible for reparations for its past contributions to the adverse impact).[419]

As shown by the above discussion, the business and human rights community has substantially developed the participation terms since they first appeared in the UNGPs. For purposes of liability under a modified TVPRA as proposed here, the key issue will be distinguishing between "contribute" and "directly linked." For "contribute," it is clear that the contribution must be "substantial," which means being sufficient to motivate, incentivize, or facilitate that action.[420] In other words, it "make[s] the adverse human rights impact more likely."[421] This definition also includes omissions: the failure to act to "require, encourage or support the [other entity] to prevent or mitigate these risks."[422] This does not mean that the corporation must have had the ability to prevent the harm, but is determined by whether the omission had a material impact on "the chance of the impact occurring."[423]

This is a dynamic, not a static, analysis.[424] Thus, a corporation that is directly linked to forced labor could later be found to have contributed to a violation if it fails to exercise adequate HRDD over time. The recognition of the dynamic nature of these terms should encourage HRDD without having to pass a mandatory HRDD law.[425] Of course, a corporation that is contributing to forced labor could—through adequate HRDD including remediation—move to the directly linked category.[426] This further encourages the adoption of HRDD practices.

Because determining participation term categories requires a multifactor analysis, the factors discussed above must be considered together "as part of a totality of circumstances."[427] Thus, there is not always a clear division between the "contribute" to and "directly linked" categories. Over time, litigation will further

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419. *Id.*

420. *See supra* notes 384, 388 and accompanying text.

421. *See supra* note 385 and accompanying text.

422. *See supra* note 390 and accompanying text.

423. *See supra* notes 401–05 and accompanying text.

424. *See supra* note 406 and accompanying text.

425. *See supra* Section IV.C (discussing mHRDD laws in Europe). It is also important to note that "contribution" does not require a corporation to have actual knowledge of the human rights impact but uses a "could or should have known" standard. *See supra* notes 392, 403 and accompanying text. By using terms from the UNGPs, which also require corporations to undertake HRDD as part of their responsibilities, courts should interpret this aspect of the "contribution" term consistent with Professor Green's interpretation of the "should have known" standard for the TVPRA. *See supra* Subsection III.C.2.c. Additional measures may also be necessary, such as those discussed in the next Section or placing the burden of proof on corporations to demonstrate they undertook adequate HRDD. Dalia Palombo, *The Duty of Care of the Parent Company: A Comparison Between French Law, UK Precedents and the Swiss Proposals*, 4 BUS. & HUM. RTS. J. 265, 284 (2019) (arguing that placing the burden of proof on corporations "is an innovative approach allowing corporations, which should have the relevant information concerning their business activities, to defend themselves against nuisance lawsuits, while at the same time, not overburn human rights victims with a high standard of proof that they are unlikely to meet").

426. *See supra* notes 393, 406, 411 and accompanying text.

427. *See supra* note 404 and accompanying text.

develop these determinations. In the process, this approach will focus litigants and courts on the appropriate factual questions in a manner more consistent with the UNGPs than the current TVPRA approach.

D. Failing to Respond to Direct Links

To further align the TVPRA with the UNGPs, the TVPRA should seek to ensure corporate accountability for failing to respond appropriately to "direct links" to forced labor. As stated earlier, the UNGPs do not require a corporation to provide for remediation when they are only "directly linked" to the adverse impact. However, that does not end the corporation's responsibility to respect human rights. Under the UNGPs, corporations should "[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."[428] In a "directly linked" situation, the corporation should undertake efforts to prevent or mitigate the negative impact and then potentially terminate the relationship if positive change does not occur.[429]

To hold corporations accountable for these responsibilities, the Legally Binding Instrument provides for legal liability for "failure to prevent" another entity "from causing or contributing to human rights abuses" in two situations.[430] First, a corporation is liable for a third party causing or contributing to a human rights abuse if the corporation "controls, manages or supervises" that third party.[431] This provision covers the "corporate veil" problem; typically, a parent corporation would not be liable for the human rights abuses of its subsidiary because the parent and the subsidiary are two separate legal entities.[432] Critics, however, argue that if the parent exercises sufficient influence and control over the subsidiary, then upholding the corporate veil inappropriately allows the parent corporation to avoid accountability.[433]

Second, corporations are liable when they "should have foreseen risks of human rights abuses in the conduct of [their] business activities . . . or in their business relationships but failed to take adequate measures to prevent the abuse."[434] This is a broader provision and includes all directly linked situations. For example,

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428. Guiding Principles, *supra* note 290, at 14 (Principle 13(b)).

429. *Id.* at 21–22 (commentary to Principle 19).

430. Legally Binding Instrument, *supra* note 340, at art. 8.6.

431. *Id.* at art. 8.6.

432. Rachel Chambers, *Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the U.K. Supreme Court*, 42 U. PA. J. INT'L L. 519, 528–29 (2021). The LBI provision covers other control situations beyond the parent–subsidiary relationship, but for simplicity, this Article only refers to that relationship.

433. *Id.* at 533–34; *see also* Gwynne Skinner, *Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law*, 72 WASH. & LEE L. REV. 1769, 1807–13 (2015) (providing reasons why a parent corporation that benefits from a subsidiary's activities should be liable for the subsidiary's human rights violations even if the parent corporation does not control the subsidiary).

434. Legally Binding Instrument, *supra* note 340, at art. 1.5.

the LBI defines "business relationships" to include those business activities conducted through many different actors, including suppliers.[435]

Some have criticized these two provisions for mixing strict liability with fault-based liability in confusing ways.[436] Professor Cassel has suggested two modifications to ensure that the LBI's civil liability system is a fault-based one, which he argues is not only fairer but is more "likely to encourage prevention of business-related human rights abuse."[437] First, in the parent–subsidiary situation, the parent corporation should only be liable for "reasonably foreseeable" human rights abuses.[438] Without this modification, the provision would make a parent corporation strictly liable for the subsidiary's actions.[439] For the second provision, Professor Cassel recommends that corporations are only liable for failing to take measures "reasonably within their capability" to prevent the abuse.[440] The goal of the addition is to make it clear that a defendant corporation would not be liable for a third party's actions if the corporation took reasonable measures to attempt to prevent the abuse, but those measures did not in fact prevent the abuse.[441] However, if those efforts did not work, then the corporation should adopt new or additional measures and investigate whether (and how) to terminate the relationship without worsening the human rights situation. The corporation should be engaged in a continuous process of evaluation, review, and improvement of HRDD practices,[442] including engaging with affected stakeholders and credible experts.[443] Without these efforts towards improvement, and instead continuing with efforts that are not producing results, the corporation may be "contributing" to the human rights abuse.

The above proposals are, of course, based on the ongoing negotiations of a business and human rights treaty and mHRDD proposals in the European Union.[444] Whether these proposals can provide meaningful incentives for corporations to adopt practices to prevent forced labor in their supply chains is uncertain. It is also uncertain whether the proposals will create unintended or perverse incentives, such as corporations cutting-and-running from high-risk countries in a manner inconsistent with UNGPs. In addition to these uncertainties in encouraging

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435. *Id.*

436. Carlos Lopez, *The Third Revised Draft of a Treaty on Business and Human Rights: Modest Steps Forward, But Much of the Same*, OPINIO JURIS (Sept. 3, 2021), http://opiniojuris.org/2021/09/03/the-third-revised-draft-of-a-treaty-on-business-and-human-rights-modest-steps-forward-but-much-of-the-same/ [https://perma.cc/C4Z6-NFL7].

437. Douglass Cassel, *Civil Liability of Business for Human Rights Abuses in Value Chains: Fault-Based or Strict?*, DROITS FONDAMENTAUX (2022), https://www.crdh.fr/revue/n-20-2022/civil-liability-of-business-for-human-rights-abuses-in-value-chains-fault-based-or-strict/ [https://perma.cc/LCD3-ED6Z].

438. *Id.*

439. *Id.*

440. *Id.*

441. *Id.*

442. Guiding Principles, *supra* note 290, at 22–23 (Principle 20 and its commentary).

443. *Id.* at 21 (commentary to Principle 18).

444. *See supra* Section IV.C.

preventative measures, it is uncertain if the proposals will work to avoid the pitfalls of the current TVPRA to provide a remedy to victims.

But there are reasons to be optimistic. Unlike the LBI and E.U. Corporate Sustainability Due Diligence Directive, which seek to address a broad range of human rights abuses, the TVPRA is focused only on issues of modern slavery. Modern slavery is a gross human rights abuse, and under the UNGPs, corporations should already be addressing the avoidance of complicity with it as a matter of legal compliance.[445] It is a supply chain issue that corporations have known about for decades.[446] In addition, for many years, the U.S. government has been issuing reports on forced labor risks with specific products and regions.[447] A statute with a limited scope, focused on a well-understood issue, provides an ideal situation in which to implement and further develop the UNGPs' participation terms in the context of civil liability. In addition, increased enforcement of the Uyghur Forced Labor Prevention Act[448] and § 307 of the Tariff Act[449] can complement the TVPRA's incentives for corporations to conduct due diligence.

This Article's proposals are intentionally limited to following only the LBI's civil liability provisions. It is an action that Congress can take swiftly to further the fight against forced labor and correct the problems with applying the TVPRA in the supply chain context. A more complete approach would require mandating the use of HRDD,[450] public disclosure of those efforts,[451] government oversight of those efforts, and penalties for inadequate HRDD (even when there is no evidence of forced labor).[452] In addition, as briefly discussed in the next Section, criminal enforcement of the TVPRA may be necessary to motivate meaningful change on this issue.

E. Public Law Enforcement

It is beyond the scope of this Article to fully discuss, but at a minimum, similar changes are necessary to the TVPRA's sections on criminal liability. To date, the Department of Justice ("DOJ") has not been active in enforcing the TVPRA for violations in corporate supply chains. Active criminal and civil enforcement by the DOJ, however, has the potential to drive significant change. In fact, several commentators have proposed legislative approaches that would enforce human

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445. Guiding Principles, *supra* note 290, at 25–26 (Principle 23); INTERPRETIVE GUIDE, *supra* note 291, at 6, 79–80.

446. Green, *supra* note 36, at 450.

447. *See supra* notes 9–10 and accompanying text.

448. *See supra* notes 50–51 and accompanying text.

449. *See supra* notes 40–45 and accompanying text.

450. Legally Binding Instrument, *supra* note 340, at art. 6.3, 6.4.

451. *Id.* at art. 6.4.

452. *See generally* Shift & United Nations High Commissioner for Human Rights, *Enforcement of Mandatory Due Diligence: Key Design Considerations for Administrative Supervision* (Oct. 2021), https://shiftproject.org/resource/enforcement-mhrdd-design/ [https://perma.cc/2Q7K-FQ7F] (discussing best practices for administrative agency oversight of corporations' HRDD under mandatory HRDD laws); Rachel Chambers & Anil Yilmaz Vastardis, *Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability*, 21 CHI. J. INT'L. L. 323 (2021) (arguing for regulatory oversight of human rights related corporate disclosures).

rights obligations in a manner similar to enforcement of the Foreign Corrupt Practices Act ("FCPA").[453]

A potential key benefit of an FCPA approach is the use of settlement agreements. The DOJ typically resolves FCPA cases against corporations with deferred prosecution agreements.[454] In these agreements, corporations agree to implement specific changes in return for the DOJ agreeing not to prosecute the company if the company satisfactorily meets its obligations in the given time frame.[455] The requirements focus primarily on the corporation improving its compliance program.[456] In addition, the DOJ may impose an independent corporate monitor to oversee and assist with those changes.[457] Thus, the DOJ could use a similar approach to ensure that a corporation implements changes necessary to improve its human rights performance.[458] In addition, unlike FCPA enforcement where there is not typically an identified victim, the DOJ could require restitution and remediation.[459]

CONCLUSION

The problem of forced labor in global supply chains does not appear to be improving and is possibly getting worse.[460] This is occurring despite legislative and regulatory efforts in the United States, Europe, and elsewhere to address the role of corporations in incentivizing or facilitating the use of forced labor in their supply chains. A potentially powerful tool to assist in these efforts is granting the victims of forced labor a cause of action against not just the perpetrators of that human rights violation but also those corporations that benefit from it and contribute to it by

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453. *See generally* Rachel Chambers & Jena Martin, *Reimagining Corporate Accountability: Moving Beyond Human Rights Due Diligence*, 18 N.Y.U. J. L. & BUS. 773 (2022) (advocating for a mHRDD law that is based on the FCPA); Pierre-Hugues Verdier & Paul B. Stephan, *International Human Rights and Multinational Corporations: An FCPA Approach*, 101 B.U. L. REV. 1359 (2021) (using the FCPA as a model for a criminal law approach to hold corporations liable for human rights violations overseas); Hannah Harris & Justine Nolan, *Learning from Experience: Comparing Legal Approaches to Foreign Bribery and Modern Slavery*, 4 CARDOZO INT'L & COMPAR. L. REV. 603, 638–44 (2021) (arguing that the fight against modern slavery could benefit from adopting some of the practices used in enforcing anti-bribery legislation, such as the FCPA).

454. David Hess & Cristie L. Ford, *Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem*, 41 CORNELL INT'L L.J. 307, 308–10 (2008).

455. U.S. Dep't of Justice Crim. Div. & Sec. & Exch. Comm'n Enforce. Div., *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, at 75–76 (July 2020), https://www.justice.gov/criminal-fraud/file/1292051/download [https://perma.cc/6A7S-P9XZ].

456. Hess & Ford, *supra* note 454, at 333.

457. *Id.*

458. Verdier & Stephan, *supra* note 453, at 1379*; see also* Caroline Kaeb, *A New Penalty Structure for Corporate Involvement in Atrocity Crimes: About Prosecutors and Monitors*, 57 HARV. INT'L L.J. 20, 23–25 (2016) (using the experience of independent monitors in FCPA settlements as a model for the use of such monitors in a regime with criminal penalties for corporations involved in human rights violations).

459. Verdier & Stephan, *supra* note 453, at 1408.

460. *See supra* notes 2–4 and accompanying text (discussing increasing trends in the ILO estimates on the incidence of forced labor).

encouraging or motivating its use by supply chain actors. Recent Supreme Court decisions have severely limited the viability of an ATS suit in this context. Likewise, the TVPRA, which was amended in an attempt to cover such situations, has civil liability provisions that are problematic when applied to corporate supply chains. As a result, due to the issues identified in this Article, plaintiffs under the TVPRA face significant challenges going forward.

To address these issues, this Article makes a proposal to amend the TVPRA for supply chain situations. This proposal utilizes the terminology of the leading business and human rights instrument—the United Nations Guiding Principles on Business and Human Rights—to create civil liability provisions that are adapted to the problems of forced labor and human trafficking in global supply chains and holding downstream corporations accountable when they have contributed to the adverse impact. This proposal results in a dynamic, multifactor analysis that better captures the nature of corporations' influence in their supply chains. In addition, this proposal encourages corporations to adopt human rights due diligence processes to avoid liability, as well as to seek continuous improvement of those practices. Fighting forced labor requires a multipronged approach. Civil liability is only one part of the solution. But in addition to providing a remedy to victims, litigation under this proposal can also spur future legislative and regulatory changes.