THE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT (TVPRA) AND CIVIL LIABILITY FOR FORCED LABOR IN GLOBAL SUPPLY CHAINS

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Human trafficking and forced labor are serious crimes that violate the human rights of millions around the world. They also generate substantial profit for multinational corporations that purchase inputs at forced labor prices. This Note discusses how the Trafficking Victims Protection Reauthorization Act (TVPRA) can be used to establish civil liability for U.S. corporations benefiting from forced labor in their supply chains. Despite excitement in the human rights literature about the TVPRA, recent TVPRA claims involving international supply chains have failed to survive motions for dismissal and summary judgment. This article aims to provide insight into the recent decisions and to determine if they were correctly decided.

While civil liability could help combat global forced labor, recent TVPRA claims have failed because courts interpret the statute narrowly when adjudicating cases involving international supply chains. These restrictive interpretations are incorrect, especially because Congress intended the TVPRA to be a robust response to the global problems of trafficking and forced labor.

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Introduction

In 2010, several formerly enslaved children brought a civil action in U.S. federal court. They sought justice and compensation for being trafficked from Mali and forced to work on cocoa plantations in Côte d'Ivoire.[1] The plaintiffs alleged that they had been forced to work fourteen hours per day, fed only scraps, and beaten by their overseers. One of the plaintiffs claimed to have witnessed guards "cut open the feet of children who attempted to escape."[2]

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[1] *See* Doe v. Nestlé S.A., 748 F. Supp. 2d 1057, 1063–64 (C.D. Cal. 2010).

[2] Doe I v. Nestlé USA, Inc., 766 F.3d 1013, 1017 (9th Cir. 2014), *rev'd sub nom.* Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021).

The defendants in the case were not the children's captors. They were multi-national corporations (MNCs) Nestlé, Cargill, and the Archer-Daniels-Midland Company. For decades, the chocolate industry has profited from the ability to purchase cocoa at forced labor prices.[3] While the chocolate sector faces especially severe forced labor challenges,[4] it is not the only industry where forced labor permeates global supply chains.[5] MNCs in many sectors rely on materials, component parts, and labor from countries where a combination of insufficent regulation, poverty, and discrimination "create opportunities for worker exploitation."[6] The ability to purchase inputs at forced labor prices[7] generates immense profit for MNCs. One study estimates that nearly $170 billion of products imported into the U.S. annually are at risk of being produced with forced labor.[8]

Establishing civil liability for forced labor in supply chains would win compensation for survivors and disincentivize MNCs from purchasing inputs produced with gross human rights violations. In the long term, civil liability could lessen the financial incentive that perpetuates the use of forced labor.[9]

However, lawsuits over MNCs' role in global forced labor have largely come up empty handed.[10] In *Nestlé USA, Inc. v. Doe*, the aforementioned group of formerly enslaved child plaintiffs sued Nestlé and other MNCs under the Alien Tort Statute (ATS),[11] a 1789 law that gives federal district courts "original jurisdiction of any civil action by

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3 *See* Peter Whoriskey & Rachel Siegel, *Cocoa's Child Laborers*, Wash. Post, June 5, 2019, at A1 (noting that despite the fact that "the world's largest chocolate companies promised to eradicate" child labor from the farms providing cocoa, these companies have repeatedly "missed deadlines to uproot child labor from their cocoa supply chains").

4 *See id.* (noting that labor and environmental problems are common throughout many industries, but that the chocolate industry is unique because "the evidence of objectionable practices [is] so clear, the industry's pledges to reform [are] so ambitious and the breaching of those promises [is] so obvious").

5 Ashley Feasley, *Eliminating Corporate Exploitation: Examining Accountability Regimes as Means to Eradicate Forced Labor from Supply Chains*, 2 J. Hum. Trafficking 15, 17 (2016) (discussing several industries associated with forced labor, especially those involving the sale of illegal products, dangerous activities, or private environments).

6 *Id.* at 17–18.

7 By "forced labor prices," I mean prices that are lower because companies are paying their workers no wages or very little wages.

8 Walk Free, The Global Slavery Index 2023, at 171 (2023), https://cdn.walkfree.org/content/uploads/2023/05/17114737/Global-Slavery-Index-2023.pdf [https://perma.cc/MXS5-5QGD].

9 *See* Int'l Lab. Org. [ILO], Profits and Poverty: The Economics of Forced Labour 15 (2014), https://www.ilo.org/media/449791/download [https://perma.cc/8AY2-ABUX] (calculating the existing large financial incentives of forced labor by identifying differences in value added through forced labor minus wages without civil liability).

10 *See* discussion *infra* Section I.A.3.

11 Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1935 (2021).

an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[12] The plaintiffs asserted the international chocolate companies had "aided and abetted" a violation of the law of nations by facilitating and profiting from the plaintiffs' enslavement.[13]

The ATS was once a promising avenue for bringing international human rights cases in U.S. courts.[14] However, more recent decisions have limited the statute's utility for international supply chain cases. In *Kiobel v. Royal Dutch Petroleum Co.*, the Supreme Court limited the ATS to claims which "touch and concern" the U.S.[15] The Court subsequently held in *Jesner v. Arab Bank* that the ATS does not apply to foreign corporations.[16] In *Nestlé*, the Court found that the ATS did not reach the formerly enslaved children's allegations because, inter alia, "the conduct relevant to the statute's focus" did not occur in the United States.[17]

The Supreme Court's restrictive interpretation of the ATS[18] has led scholars to turn their attention to a different statute that might help bring accountability for human rights violations in MNCs' global supply chains: the Trafficking Victims Protection Reauthorization Act (TVPRA). Congress first passed the Trafficking Victims Protection Act (TVPA) in 2000[19] as the first comprehensive federal law to address both sex and labor trafficking.[20] Congress has subsequently reauthorized[21] the

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12 Alien Tort Statute, 28 U.S.C. § 1350.

13 *Nestlé*, 141 S. Ct. at 1935–36.

14 *See The Alien Tort Statute: Protecting the Law that Protects Human Rights*, Ctr. for Const. Rts. (Apr. 17, 2013), https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/alien-tort-statute-protecting-law-protects [https://perma.cc/U5YH-863J] (describing how the ATS has been used "to bring claims for human rights violations against government officials, private actors and multi-national corporations").

15 569 U.S. 108, 124–25 (2013) (finding that the conduct in question took place outside of the United States, and even where the claims did "touch and concern" the U.S., they did not overcome the presumption against extraterritorial application).

16 584 U.S. 241, 265 (2018).

17 *Nestlé*, 141 S. Ct. at 1936 (quoting RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 337 (2016)).

18 For an overview of the decline in the utility of the Alien Tort Statute for international human rights plaintiffs, see generally Lindsey Roberson & Johanna Lee, *The Road to Recovery After* Nestlé*: Exploring the TVPA as a Promising Tool for Corporate Accountability*, 6 Colum. Hum. Rts. L. Rev. Online 1, 3–15 (2021). *See also infra* note 180.

19 Victims of Trafficking and Violence Protection Act, Pub. L. No. 106-386, §§ 101–13, 114 Stat. 1464, 1466–91(2000).

20 *Federal Law*, Nat'l Hum. Trafficking Hotline, https://humantraffickinghotline.org/en/human-trafficking/federal-law [https://perma.cc/P38K-SA4G].

21 The initial Trafficking Victims Protection Act only authorized the appropriation of funds for two years. *See id.* § 113 (authorizing appropriations for only fiscal years 2001 and 2002). This required Congress to "extend the life of a program by passing legislation commonly referred to as a reauthorization." Cong. Budget Off., Unauthorized Appropriations and Expiring Authorizations 2 (1998), https://www.cbo.gov/sites/default/

law numerous times, with the most recent Trafficking Victims Protection Reauthorization Act (TVPRA) becoming law in 2023.[22]

At first glance, the TVPRA seems like a promising path forward. In addition to criminal penalties, the TVPRA allows forced labor survivors[23] to sue those who trafficked them or forced them to work. Crucially, survivors can also sue "whoever knowingly benefits, or attempts or conspires to benefit" from "participation in a venture which that person knew or should have known" engaged in human trafficking or forced labor.[24] In theory, this private right of action would allow a forced labor survivor to sue an MNC that has (1) received a benefit by purchasing inputs at forced labor prices; (2) "participated in a venture" from doing business with the direct perpetrator; and (3) knew, or "should have known" the forced labor was taking place.[25] The statute also contains language that expressly grants courts extraterritorial jurisdiction over forced labor "offense[s]."[26] This language suggests plaintiffs can bring TVPRA suits for forced labor that took place overseas—a crucial aspect of international supply chain cases. As will be discussed in Section I.B, these features suggest the TVPRA could have been used (perhaps more successfully) by the plaintiffs in *Nestlé v. Doe*.[27]

Yet, courts have ruled against plaintiffs in several TVPRA cases involving forced labor in companies' supply chains.[28] The literature

files/105th-congress-1997-1998/reports/unauth98-h.pdf [https://perma.cc/M47L-FHNU]. Congress has repeatedly reauthorized the TVPA and has used the reauthorization process to substantively amend the law. *See Human Trafficking, Key Legislation*, Dep't of Just. (Aug. 23, 2023), https://www.justice.gov/humantrafficking/key-legislation [https://perma.cc/86PJ-F4PB] (providing an overview of the evolution of successive TVPRAs until 2018).

22 Abolish Trafficking Reauthorization Act of 2022, Pub. L. No. 117-347, 136 Stat. 6199 (2023) (reauthorizing the TVPRA through 2027).

23 This Note generally refers to people who have experienced trafficking and/or forced labor as "survivors," rather than "victims." However, I sometimes use the word "victim" when discussing statutory language or judicial decisions, as this is the language used by those sources.

24 18 U.S.C.A. § 1595 (West 2024).

25 *Id.*

26 18 U.S.C. § 1596.

27 *See infra* text accompanying notes 92–106.

28 *See* Ratha v. Phatthana Seafood Co., No. CV 16-4271-JFW (ASx), 2017 WL 8293174 (C.D. Cal. Dec. 21, 2017), *aff'd*, 26 F.4th 1029 (9th Cir. 2022) (finding insufficient evidence to hold that defendants participated in, knew about, should have known about, or benefited from human trafficking); Doe I v. Apple Inc., No. 1:19-CV-03737 (CJN), 2021 WL 5774224 (D.D.C. Nov. 2, 2021), *aff'd*, 96 F.4th 403 (D.C. Cir. 2024); Coubaly v. Cargill, Inc., 610 F. Supp. 3d 173 (D.D.C. 2022) (holding plaintiffs did not establish Article III standing); *see also Policy as a One-Legged Stool: U.S. Actions Against Supply Chain Forced Labor Abuses*, 136 Harv. L. Rev. 1700, 1708 (2023) [hereinafter *One-Legged Stool*] (describing how international "victims of industrial rights violations have been unable to tie their abuses to the conduct or knowledge of U.S. corporations or entities," resulting in the defeat of their TVPRA cases).

has acknowledged these setbacks, but scholars remain generally[29] (although not uniformly)[30] optimistic about the TVPRA's international human rights potential. Why have recent cases failed? Were these cases correctly decided?

I argue that while civil liability could help combat global forced labor, recent TVPRA claims have failed because courts interpret the statute narrowly when adjudicating cases involving international supply chains. These restrictive interpretations are incorrect, especially because Congress intended the TVPRA to be a robust response to the global problems of trafficking and forced labor.

My Note proceeds in three Parts. Part I draws on the existing literature to demonstrate why we should care about the TVPRA's application to forced labor in global supply chains. MNCs' market power over global supply chains puts them in a unique position to combat international forced labor. But, securing inputs at forced labor prices is very profitable, giving businesses little financial incentive to change their behavior. Civil liability could provide this missing incentive by introducing litigation and reputational costs for MNCs that benefit from forced labor in their supply chains. Since the Supreme Court limited the ATS in *Nestlé v. Doe*, there are few paths to establishing civil liability. The TVPRA is one of the last remaining avenues for international supply chain plaintiffs. The TVPRA's plain text—in particular its actus reus ("participate in the venture"), scienter ("knew or should have

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[29] *See* Roberson & Lee, *supra* note 18, at 4 (describing the TVPA as a "promising, yet underutilized, statute in the realm of foreign forced labor cases"); 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, 17 (2018) ("[F]or a narrow but important class of human rights violations—those involving forced labor, sex and forced labor trafficking, and knowingly benefitting from any of these offenses—the TVPA offers a firm footing for both civil and criminal cases."); Charity Ryerson, Dean Pinkert & Avery Kelly, *Seeking Justice: The State of Transnational Corporate Accountability*, 132 Yale L.J.F. 787, 806 (2022) ("[T]he Trafficking Victims Protection Reauthorization Act (TVPRA) is currently the most promising avenue in the United States for imposing civil liability on corporations for forced labor and human trafficking."(footnote omitted)); Jonathan S. Tonge, Note, *A Truck Stop Instead of Saint Peter's: The Trafficking Victims Protection Reauthorization Act Is Not Perfect, but It Solves Some of the Problems of* Sosa *and* Kiobel, 44 Ga. J. Int'l & Compar. L. 451, 456 (2016) ("[T]he TVPRA, amended in significant ways in 2008, [is] a better path in combatting a broad array of human rights violations in light of the hurdles now apparent in litigation under the ATS."); Abigail N. Burke, Note, *A Third-Party Beneficiary Theory of Corporate Liability for Labor Violations in International Supply Chains*, 108 Va. L. Rev. 1449, 1459 (2022) (describing the TVPRA's beneficiary liability theory as "thus far the clearest route to accountability for MNCs").

[30] *See, e.g.*, *One-Legged Stool*, *supra* note 28, at 1708–11 (explaining potential challenges of bringing a civil cause of action under the TVPRA, including the difficulty of proving actus reus and mens rea, as well as a narrow scope of extraterritorial applications).

known"), and extraterritoriality provisions—make it appear perfectly suited for international supply chain cases.

Parts II and III make new contributions to the TVPRA literature. Previous studies focus on whether the TVPRA remains a viable tool for international supply chain cases after setbacks in the lower courts.[31] In Part II, I analyze *why* international supply chain plaintiffs have had little success by comparing cases involving international supply chains and purely domestic cases. Courts evaluating international supply chain cases have interpreted the TVPRA's scienter and actus reus requirements more narrowly than courts adjudicating similar, purely domestic cases. Part II also discusses how some courts have questioned whether the TVPRA's private right of action applies extraterritorially.

But, have recent decisions correctly applied the TVPRA to international supply chain claims? Previous scholarship has obliquely criticized these decisions, describing them as "outlier[s]"[32] that are inconsistent with other statutory prohibitions on forced labor[33] and stating that plaintiffs have "raised credible concerns."[34] This Note is the first to take recent high-profile decisions head on by arguing in Part III that recent international supply chain cases have been wrongly decided. Contrary to these decisions, I suggest: (1) an international supply chain can fulfill the statute's "participate in a venture" requirement; (2) MNCs are negligent if they fail to conduct adequate human rights due diligence of suppliers; and (3) the statute's private right of action applies extraterritorially.

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[31] Some authors reviewing TVPRA setbacks conclude that the TVPRA is nevertheless a viable tool for international supply chain plaintiffs. *See* Roberson & Lee, *supra* note 18, at 18, 22–23, 25–30, 33 (noting lower court decisions against TVPA plaintiffs, but concluding "[r]egardless of possible litigation hurdles, advocates should seriously consider bringing foreign forced labor cases under the TVPA, which could help pave the path for increased corporate accountability and justice for victims"); Ryerson, Pinkert & Kelly, *supra* note 29, at 808–09 ("Despite these restrictive rulings, . . . the TVPRA remains a promising, if uncertain, option for plaintiffs seeking a civil remedy for transnational human-rights violations."). Others reviewing the same cases reach the opposite conclusion. *See One-Legged Stool*, *supra* note 28, at 1710–11 ("While the path through U.S. courts is not completely foreclosed—especially for those whose rights abuses or trafficking occurred within or into the United States—the ability for victims of labor abuses in supply chains to bring claims in the United States has all but disappeared . . . .").

[32] Ryerson, Pinkert & Kelly, *supra* note 29, at 807 (deeming *Doe v. Apple* an "outlier" decision reading a narrower intended scope of the TVPRA).

[33] *Id.* at 808 (describing how "the ruling in *Ratha* is out of step with various U.S. forced-labor laws, including the Tariff Act of 1930 (specifically section 307), the Uyghur Forced Labor Prevention Act (UFLPA), and the Countering America's Adversaries Through Sanctions Act" (footnotes omitted)).

[34] Roberson & Lee, *supra* note 18, at 27.

This Note does not provide an exhaustive analysis of issues facing international supply chain plaintiffs under the TVPRA.[35] Rather it focuses on the key actus reus, scienter, and extraterritoriality provisions that generated excitement about the statute in the human rights literature.[36] By discussing these issues, I hope to clarify the law surrounding a statute that has been described as the "[r]oad to [r]ecovery"[37] for U.S. human rights litigation and is only now being addressed by courts of appeal in the international supply chain context.

I
Why Should We Care About the TVPRA? The Problem of Forced Labor and the TVPRA as a Potential Solution

Part I highlights the stakes of the TVPRA debate. Human trafficking and forced labor are severe human rights violations that affect millions around the world. Establishing civil liability for MNCs that benefit from forced labor in their supply chains could help to address this global challenge. But, legal setbacks, including the Supreme Court's recent curtailment of the ATS, have left few options for civil suits. The TVPRA stands as one of the last hopes for litigating the issue of forced labor in global supply chains. The TVPRA's plain text—in particular its actus reus ("participat[e] in the venture"), scienter ("knew or should have known"), and extraterritoriality provisions—make it appear perfectly suited for international supply chain cases.

A. Forced Labor in Global Corporate Supply Chains

1. Forced Labor and Human Trafficking: Global Human Rights Challenges

The prohibition against forced labor is a cornerstone of international human rights law.[38] The International Labour Organization (ILO) defines forced or compulsory labor as "all work or service which is exacted from any person under the menace of any penalty and for which the said

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[35] *See infra* text accompanying notes 118–20 (discussing how TVPRA plaintiffs have also faced difficulties establishing personal jurisdiction and Article III standing).

[36] *See* Roberson & Lee, *supra* note 18, at 25–29 (describing how the TVPA's actus reus and scienter requirements are well suited to international human rights cases).

[37] *Id.* at 1.

[38] For an overview of the international legal prohibition against forced labor, see generally Marley S. Weiss, *Human Trafficking and Forced Labor: A Primer*, 31 ABA J. Lab & Emp. L. 1 (discussing existing prohibitions against forced labor enacted by various international actors, including the UN, United States, and European Union).

person has not offered himself voluntarily."[39] Forced labor is prohibited by the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and International Covenant on Economic, Social, and Cultural Rights, which collectively form the "International Bill of Human Rights."[40] Two ILO conventions,[41] three regional human rights instruments,[42] and the multilateral Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol) also proscribe forced labor.[43] Because nearly every state has ratified at least one international agreement forbidding forced labor, and most have ratified the Palermo Protocol, the prohibition on forced labor has likely achieved the status of customary international law.[44]

International law requires that states "respect, protect, and fulfill" their international human rights obligations.[45] The "respect" prong forbids states from subjecting their own citizens to forced labor. States must also "protect" their citizens by banning forced labor under their own legal systems and adequately enforcing these laws. Finally, states must "fulfill" their international human rights obligations by addressing any impediments to the "full effectuation of international [human rights] norms" within their own domestic systems.[46]

Despite these international obligations, human trafficking and forced labor remain pervasive. Essentially all countries have abolished chattel slavery—individuals can no longer buy and sell persons as legally recognized property.[47] However, modern forms of slavery have replicated some of the same conditions of the chattel slave trade. Modern slavery refers to "situations of exploitation that a person cannot refuse or leave because of threats, violence, coercion, deception, and/or abuse of power."[48] An estimated fifty million people were living

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[39] International Labour Organisation Convention Concerning Forced or Compulsory Labour art. 2, June 28, 1930, 39 U.N.T.S. 55 (entered into force May 1, 1932), https://treaties.un.org/doc/Publication/UNTS/Volume%2039/v39.pdf [https://perma.cc/TL9L-F2UT].

[40] Weiss, *supra* note 38, at 10–12.

[41] *Id.* at 17–18.

[42] *Id.* at 19–20.

[43] *Id.* at 13–17.

[44] *Id.* at 20–21 (observing that almost every country has adopted an agreement, and those that have not may still be bound under customary international law due to nearly universal prohibition).

[45] U.N. Econ. & Soc. Council, Comm'n on Econ., Soc. & Cultural Rights, *Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights*, ¶ 6, U.N. Doc. *E/C.12/2000/13* (Oct. 2, 2000).

[46] Weiss, *supra* note 38, at 9.

[47] *Id.* at 4.

[48] *What is Modern Slavery?*, Walk Free, https://www.walkfree.org/what-is-modern-slavery [https://perma.cc/8R5H-MSJG]. Modern slavery is an umbrella term that includes

under conditions of modern slavery in 2021.[49] Among them, twenty-eight million experienced forced labor, while twenty-two million were subjected to forced marriages.[50] In 2014, the ILO estimated that forced labor and commercial sexual exploitation in the private economy generated illegal profits of $150 billion per year.[51]

Global North[52] residents should care deeply about the problem of forced labor because we have become unwitting contributors to modern slavery.[53] Although much of the world's forced labor occurs in the Global

"forced labour, debt bondage, forced marriage, slavery and slavery-like practices, and human trafficking." *Id.* While some survivors are deliberately sold to traffickers, many are unwittingly ensnared by forced labor schemes. *See* Deutsche Welle (DW) Documentary, *Behind Asia's Cyber Slavery*, YouTube (Jan. 29, 2024), https://www.youtube.com/watch?v=Ti7YDegRMYE&t=1s [https://perma.cc/5XYB-3M2L] (describing how individuals travel to foreign countries on the promise of employment, and are then kidnapped and taken to forced labor facilities).

49 Walk Free, *supra* note 8, at 24.

50 *Id*. at 24 (noting women, children, and migrant workers are among the most vulnerable, and noting that forced labor and marriages occur in countries of all wealth types).

51 Int'l Lab. Org. [ILO], *supra* note 9, at 13 (recording total profits from forced sexual exploitation at $99 billion and profits from forced labor at $51.2 billion).

52 This Note uses the term "Global North" to refer to upper-income countries and the term "Global South" to refer to lower- and middle-income countries. For an overview of the definition of Global North and Global South countries, see, for example, Anne Garland Mahler, *Global South*, Oxford Bibliographies (Oct. 25, 2017), https://www.oxfordbibliographies.com/display/document/obo-9780190221911/obo-9780190221911-0055.xml?rskey=eMzKAW&result=16 [https://perma.cc/J8DU-MMMB] (providing several definitions of the Global South, including "economically disadvantaged nation-states," which emerged as a "post-Cold War alternative to 'Third World'"). There are important critiques of the North-South methodology. *See, e.g.*, Alan Beattie, Opinion, *The 'Global South' is a Pernicious Term That Needs to Be Retired*, Fin. Times (Sept. 14, 2023), https://www.ft.com/content/7f2e0026-56be-4f3d-857c-2ae3a297daab [https://perma.cc/27QE-JVRX] (arguing that the term "assumes a collective identity" which "elides a vast range of conditions and interests" among low- and middle-income countries); C. Raja Mohan, *Is There Such a Thing as a Global South?*, Foreign Pol'y (Dec. 9, 2023, 7:00 AM), https://foreignpolicy.com/2023/12/09/global-south-definition-meaning-countries-development [https://perma.cc/S4RH-MXHZ] (arguing that lumping starkly different countries like China, Peru, Qatar, and Haiti "into a single category—and then defining this category as inherently different from a global north—is a barrier to understanding a complex world"). There is no doubt that grouping nearly half the world's countries into a single category is analytically imprecise. However, many so-called "Global South" countries share "lived experiences of colonialism, deprivation, and marginalization." Nora Kürzdörfer and Amrita Narlikar, Opinion, *A Rose by Any Other Name? In Defence of the "Global South,"* Glob. Pol'y J. (Aug. 29, 2023), https://www.globalpolicyjournal.com/blog/29/08/2023/rose-any-other-name-defence-global-south [https://perma.cc/47N2-WHYT]. In the context of forced labor and global supply chains, the idea of a Global North and South is a "simplification[]," but it is also a "useful shorthand." *Id.* It reveals that much of the forced labor occurs up supply chains in Global South countries, while products are consumed by residents the Global North. *See infra* text accompanying notes 53–59.

53 *See One-Legged Stool*, *supra* note 28, at 1704 (arguing that Global North consumers have moral responsibility for global forced labor because they drive demand for cheap consumer goods).

South, demand for cheap goods creates market incentives for MNCs to procure inputs at forced labor prices. The person reading this Note has likely purchased shrimp from Thailand (which accounted for four million pounds of U.S. shrimp imports in January 2024 alone),[54] tea from India (the third largest tea exporter to the U.S.),[55] or garments from Bangladesh (the third largest garment exporter to the U.S.).[56] All three goods were included in the forced labor category of the Department of Labor's *2022 List of Goods Produced by Child or Forced Labor*.[57] Chocolate and batteries in consumer electronics (such as cell phones and computers) also contain inputs produced in sectors and industries with rampant child or forced labor.[58] Global North consumers bear at least some moral responsibility for driving global demand for goods produced at forced labor prices.[59]

2. *Civil Liability for Forced Labor in Global Corporate Supply Chains*

It is uncontroversial that forced labor is a global legal and moral challenge. But what can be done about it? While there is no silver bullet, establishing civil liability for MNCs that profit from forced labor in their supply chains is an important part of the solution.

The breadth of MNCs' international supply chains gives them indirect influence over a large proportion of the world's forced labor. The United Nations Commission on Trade and Development estimated in 2013 that around eighty percent of global trade flows through supply chains linked to multinational corporations.[60] According to one report,

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54 Bhavana Scalia-Bruce, *US Shrimp Imports Rise; Thai Union, Apex Foods Get FDA Import Alerts*, SeafoodSource (Apr. 8, 2024), https://www.seafoodsource.com/news/supply-trade/us-shrimp-imports-increase-in-february-2024 [https://perma.cc/JX96-NF7U].

55 *Tea*, Observatory of Econ. Complexity, https://oec.world/en/profile/hs/tea [https://perma.cc/6KPH-FQD6].

56 Arif Uz Zaman, *Garment Exports to US Down 21.77% in Jan-Aug 2023*, TextileToday (Oct. 9, 2023, 1:09 PM), https://www.textiletoday.com.bd/garment-exports-to-us-down-21-77-in-jan-aug-2023# [https://perma.cc/6GK6-8VSW].

57 Dept. of Lab., 2022 List of Goods Produced by Child Labor or Forced Labor 24–28 (2022), https://www.dol.gov/sites/dolgov/files/ilab/child_labor_reports/tda2021/2022-tvpra-list-of-goods-v3.pdf [https://perma.cc/DC5K-RJYV] (identifying country-specific goods made with forced or child labor).

58 *Id.* at 41 (noting the complexity of global supply chains increases the likelihood that chocolate and battery producers use forced labor); *id.* at 50–51 (highlighting how child labor contributes to the lithium-ion battery industry); *see id.* at 25–27 (identifying Nigeria and Côte d'Ivoire cocoa markets as using forced labor).

59 *One-Legged Stool*, *supra* note 28, at 1704.

60 United Nations Comm'n on Trade & Dev., World Investment Report 2013, at x (2013); *see also* Justine Nolan & Gregory Bott, *Global Supply Chains and Human Rights: Spotlight on Forced Labour and Modern Slavery Practices*, 24 Austl. J. Hum. Rts. 44, 44 (2018).

roughly sixty percent of all forced labor cases are linked to global supply chains.[61]

MNCs drive the price and logistical pressures that lead many suppliers to resort to labor practices that increase forced labor risks.[62] Suppliers operating on razor thin margins may aim to reduce their labor costs through abusive labor practices, such as illegal deductions on wages, payments and fines on employees, or not paying wages at all. When these practices are combined with other forms of coercion, they can lead to debt bondage or other forms of forced labor.[63]

Additionally, purchasers can drive forced labor up the supply chain by introducing pressures around delivery time. A study conducted by the ILO and Joint Ethical Trading Initiatives found that only 17 percent of surveyed suppliers felt that most orders had sufficient lead time.[64] Suppliers coping with time pressure turn to outsourcing and informal labor markets. Because these labor sources are ad hoc, they can remain outside of the view of auditors and inspectors, increasing the risk of forced labor.[65] Layers of subcontracting increase the likelihood that informal labor and labor intermediaries are used, both of which increase the risk of forced labor. The risk of forced labor is greatest when labor market intermediaries charge workers—especially informal workers—fees for placement in their jobs. These fees, which may be for transportation, housing, or job placement, can result in workers owing labor intermediaries a debt, and being prohibited from leaving until they have "repaid" it.[66]

But, if MNCs contribute to some of the key drivers of forced labor, why have they not done more to address it? One challenge is a lack of financial incentive. Securing inputs produced at forced labor

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61 Walk Free, *supra* note 8, at 146 (noting that forced labor extends beyond low-income countries, with nearly two-thirds connected to global supply chains).

62 *See* Int'l Lab. Org. [ILO], Org. for Econ. Coop. & Dev., Int'l Org. for Migration & United Nations Child.'s Fund, Ending Child Labour, Forced Labour, and Human Trafficking in Global Supply Chains 26–27 (2019), https://www.ilo.org/media/404146/download [https://perma.cc/CW6G-692G]. For example, one study of India's tea industry found that cost pressures were a key driver of forced labor practices, such as debt bondage, physical violence, and verbal and/or sexual abuse against workers. Plantation owners resorted to labor exploitation to compensate for the low prices they received for their tea relative to rising costs. *Id.* at 27.

63 *Id.* at 26–27.

64 *Id.* at 28.

65 *Id*. at 28–29. One study of more than 21,000 workers that had been released from enslaved labor in Brazil found that forced labor tended to occur in outsourced parts of production processes. *Id.* at 29. Outsourcing also increases the risk of additional subcontracting (the company to whom a task is outsourced employs a subcontractor, or series of subcontractors, to complete the task). *Id.*

66 *See id.* at 29, 70.

prices is profitable, especially when the risk of consequences is low.[67] For example, nearly two-thirds of the world's cocoa originates from Côte D'Ivoire and Ghana, supporting an industry that is projected to be worth $200 billion by 2028.[68] Forced labor is a major problem across the two nations' cocoa farms, where approximately 16,000 children have been forced to work.[69] But with farmers only earning six percent of the retail price of a chocolate bar, and Nestlé reporting $18 billion in profit in 2021 alone, a profit-maximizing firm lacks economic incentives to change.[70]

Civil liability for forced labor in their supply chains would create additional incentive for companies to do better. First, civil liability would create direct costs associated with paying compensation to survivors of forced labor as well as legal costs for defending claims. In the same way that the U.S. relies on its tort system to ensure companies produce safe products,[71] the risk of costly civil litigation would help to regulate forced labor in international supply chains.

While companies will still put price pressure on their suppliers in order to reduce input costs, the risk of civil liability may lead them to provide more lead time for orders so that outsourcing and subcontracting are used less frequently.[72] They may also be willing to pay a premium for suppliers that have stronger documentation and verification that neither they, nor upstream suppliers, engage in forced labor.[73] As MNCs are willing to pay more for better safeguards

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67 *See* Matthew M. Higgins, Note, *Closed Loophole, Open Ports: Section 307 of the Tariff Act and the Ongoing Importation of Goods Made Using Forced Labor*, 75 STAN. L. REV. 917, 945 (2023) (noting that even after Customs and Border Patrol increased enforcement, "current enforcement levels represent a drop in the bucket" of the total goods imported into the U.S. at risk of being produced by forced labor).

68 WALK FREE, *supra* note 8, at 188.

69 *Id.* (reporting that, over the decade ending in 2023, a 62% rise in cocoa production in Côte d'Ivoire and Ghana was accompanied by a 13% rise in hazardous child labour).

70 *Id.* at 188–89.

71 *See* Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375, 380 (2007) (arguing that private civil litigation serves as a key feature of the United States's regulatory system); ROBERT A. KAGAN, ADVERSARIAL LEGALISM 149 (2d ed. 2019) (describing how "[t]he tort system thereby sent a loud normative and regulatory message to all American business executives: take affirmative steps to identify deadly hazards associated with your products and, at a minimum, warn all users about them.").

72 My argument is that if companies are liable for forced labor that occurs in their supply chains, they will avoid engaging in practices that are associated with forced labor, such as insufficient lead times for orders. *See* Int'l Lab. Org. [ILO] et al., *supra* note 62, at 26–28 (reporting that insufficient time to fulfill orders increases the risk that suppliers will resort to forced labor).

73 To the extent that the risk of legal liability is a cost, a rational firm will be willing to pay a premium to suppliers with better labor practices until this premium exceeds the expected negative value of legal liability. *See* Issacharoff, *supra* note 71, at 379–80 ("The ex

against forced labor, upstream firms will adapt, reducing practices like subcontracting and outsourcing that are associated with forced labor, and strengthening auditing and other safeguards to ensure their own suppliers do not use forced labor.[74]

Additionally, civil liability would still be a worthy cause, even if it only marginally reduced the global incidence of forced labor. Litigation would secure justice and compensation for survivors of severe human rights abuses. As one plaintiff put it after winning her TVPRA civil case, "[t]his is what justice looks like."[75] Even if one believed civil litigation does not disincentivize forced labor, its value to individual survivors alone makes it a worthwhile endeavor.

Civil liability is not a panacea. It is only one part of a multi-faceted approach to the global problem of forced labor. Other important strategies included prohibiting the import of goods produced by forced labor under Section 307 of the Tariff Act of 1930, state laws that require mandatory disclosures about MNCs' supply chains, and contractual provisions that create legal obligations for suppliers to avoid the use of forced labor.[76] Civil liability would complement these approaches by creating an additional disincentive for MNCs and securing justice for individual survivors.

3. Limited Avenues for Civil Liability

However, establishing civil liability for forced labor in supply chains is no easy task. U.S. law applies a strong presumption against

post regulatory model is premised on the idea that parties should be able to internalize the risk of liability . . . and regulate themselves accordingly.").

[74] As firms are willing to pay a premium for suppliers with better labor practices, more suppliers will adopt better labor practices. *See The Growing Importance of Supply Chain Transparency in 2023*, Redwood (Feb. 15, 2024), https://www.redwoodlogistics.com/insights/the-growing-importance-of-supply-chain-transparency-in-2023# [https://perma.cc/8CQT-2M3E] (reporting that businesses are responding to pressure for more ethical and transparent supply chains by "working closely with suppliers to ensure that they meet ethical and environmental standards."). Consumers may be willing to bear these increased costs. *See* Ella Burroughes, Jan Rys & Jan Wullenweber, *Enabling Socially Responsible Sourcing Throughout the Supply Chain*, McKinsey (June 8, 2023), https://www.mckinsey.com/capabilities/operations/our-insights/enabling-socially-responsible-sourcing-throughout-the-supply-chain# [https://perma.cc/VQ2S-ZGLX] (reporting that around 60% of surveyed consumers would be willing to pay more for products when employee safety and no child labor are guaranteed).

[75] Implementation of the Trafficking Victims Protection Act: Hearing Before H. Foreign Aff. Subcomm. on Glob. Health, Global Hum. Rts., and Int'l Orgs., H. Comm. on Foreign Affs., 118th Cong. (2023) (statement of Martina Vandenberg, Pres. of the Hum. Trafficking L. Ctr.).

[76] For an overview of other approaches to limiting forced labor in corporate supply chains, see generally Ryerson, Pinkert & Kelly, *supra* note 29.

extraterritorial claims.[77] Courts generally lack jurisdiction to hear lawsuits involving conduct that took place outside of the United States, making it difficult for plaintiffs to sue MNCs over forced labor they experienced abroad. Human rights lawyers previously overcame this problem by bringing international extraterritorial claims under the Alien Tort Statute (ATS).[78] The ATS is a 1789 statute which gives federal district courts "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."[79] Plaintiffs were able to bring ATS claims against corporations that benefited from their forced labor by suing them in lower federal courts for "aiding and abetting" the direct perpetrators.[80]

However, a series of Supreme Court decisions have raised serious questions over the ATS's utility for international human rights litigation.[81] As discussed in the Introduction, the Supreme Court in *Nestlé v. Doe* rejected an ATS claim brought by children formerly enslaved in Côte d'Ivoire against Nestlé and other chocolate companies for allegedly aiding and abetting several human rights violations, including forced child labor.[82] The Court interpreted previous decisions as establishing that Congress did not intend the ATS to apply extraterritorially.[83]

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77 *See* Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 261 (2010) (stating that courts should apply the presumption against extraterritoriality "in all cases"); RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 404 (AM. L. INST. 2018) ("Courts in the United States interpret federal statutory provisions to apply only within the territorial jurisdiction of the United States unless there is a clear indication of congressional intent to the contrary.").

78 *See* Ellen Nohle, Chris Ewell & Oona A. Hathaway, *Has the Alien Tort Statute Made a Difference?*, TRANSNAT'L LITIG. BLOG (Aug. 1, 2022), https://tlblog.org/has-the-alien-tort-statute-made-a-difference [https://perma.cc/LQJ6-8ZB7] (identifying 52 ATS cases resulting in favorable judgments for plaintiffs, although only 25 resulted in monetary awards that were not later overturned).

79 28 U.S.C. § 1350.

80 *See* Roberson & Lee, *supra* note 18, at 7 (discussing *Doe v. Unocal*, 395 F.3d 932, 936 (9th Cir. 2002), where Burmese villagers brought an ATS claim against the Unocal Corporation for aiding and abetting the Burmese Military's human rights abuses, which included forced labor).

81 After centuries of inattention, the ATS resurfaced in *Filartiga v. Pena-Irala*, the first case where plaintiffs successfully used the ATS to sue for extraterritorial human rights abuses. 630 F.2d 876 (2d Cir. 1980). However, since *Filartiga*, the Supreme Court has slowly walked back the ATS's utility for international human rights cases, holding that the ATS only addresses claims which "touch and concern" the United States, *see* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013), and that the ATS does not provide a cause of action against foreign corporations, *see* Jesner v. Arab Bank, PLC, 584 U.S. 241, 265 (2018). Most recently, the Court dismissed an ATS claim in *Nestlé v. Doe*, holding that the plaintiffs had failed to overcome the presumption against extraterritoriality. 141 S. Ct. 1931, 1936–37 (2021).

82 *Nestlé*, 141 S. Ct. at 1935.

83 *See id.* at 632 ("We presume that a statute applies only domestically, and we ask 'whether the statute gives a clear, affirmative indication' that rebuts this presumption. For

Therefore, the Court found that the case presented an impermissible, extraterritorial application of the ATS because "[n]early all the conduct that they say aided and abetted forced labor—providing training, fertilizer, tools, and cash to overseas farms—occurred in Ivory Coast."[84] The case also left unclear whether the ATS even permits an aiding and abetting theory of liability, as well as the scienter and actus reus requirements for such a theory.[85] This is crucial for international supply chain plaintiffs. Scholars have noted that the only other avenue to sue a corporation that did not directly subject the plaintiff to forced labor would be "under narrow *respondeat superior* circumstances,"[86] which "very few foreign forced labor cases are likely to meet."[87]

Other vehicles to establish civil liability for corporations with forced labor in their supply chains have fared no better. At least four recent cases have brought state or local law claims against companies for deceptive product labeling.[88] Under this theory, companies have misled consumers by claiming their products were produced in accordance with environmentally and socially responsible standards, when in fact they were produced with forced and child labor.[89] However, one group of authors has pointed out that this theory of liability suffers from a fatal flaw. While companies may face some liability for deceiving consumers, they can avoid future litigation by simply changing their advertising claims, rather than changing the labor practices in their supply chains.[90] A handful of plaintiffs have attempted other theories of liability under state contract law, but these have also had little success.[91]

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the ATS, *Kiobel* answered that question in the negative.") (internal citations omitted) (first quoting RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 337 (2016); then citing Kiobel v. Royal Dutch Petroleum, 569 U.S. 108, 124 (2013)).

84 *Id.* at 1936.

85 *See* Roberson & Lee, *supra* note 18, at 13 (discussing the lack of clarity surrounding aiding and abetting liability under the ATS, post-*Nestlé*).

86 *Id.* at 7 (quoting Beth Van Shaack, Nestlé & Cargill v. Doe *Series: In Oral Arguments, Justices Weigh Liability for Chocolate Companies*, Just Sec. (Dec. 7, 2020), https://www.justsecurity.org/73727/nestle-cargill-v-doe-series-in-oral-arguments-justices-weigh-liability-for-chocolate-companies [https://perma.cc/WU74-NTNR]).

87 *Id.* at 13.

88 *See* Ryerson, Pinkert & Kelly, *supra* note 29, at 811 (reporting that plaintiffs in at least four recent cases have brought claims under state or local law alleging deceptive product labeling with respect to human-rights standards).

89 *Id.* at 811–12.

90 *Id.* at 812.

91 For an overview of the use of state common law claims to enforce human rights in corporate supply chains, see generally Allie Robbins, Note, *Outsourcing Beneficiaries: Contract and Tort Strategies for Improving Conditions in the Global Garment Industry*, 80 U. Pitt. L. Rev. 369 (2018).

B. The TVPRA: A Potent Tool for Combatting International Trafficking and Forced Labor?

1. The TVPRA and a Potential Path to Civil Liability

Scholars have high hopes that the TVPRA will present a path forward.[92] Indeed, the TVPRA's plain text appears to establish extensive civil liability for extraterritorial TVPRA violations. Reaching this conclusion requires analyzing three of the statute's provisions: § 1595 (establishing the private right of action); § 1589 (defining forced labor); and § 1596 (providing U.S. courts with extraterritorial jurisdiction).

First, § 1595 establishes the TVPRA's private right of action. It states:

> An individual who is a victim of a violation of this chapter 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) . . . .[93]

Let us breakdown § 1595's requirements. First, a plaintiff seeking to bring a suit under § 1595 must be a "victim of a violation of this chapter," meaning that she must have been subjected to one of the TVPRA's prohibited forced labor or human trafficking activities.[94] Section 1589 defines the offense of "forced labor" as securing labor or services through (1) actual or threatened force or physical restraint; (2) actual or threatened "serious harm"; (3) actual or threatened abuse of legal process (e.g., threatening deportation); or (4) "any scheme, plan, or pattern" intended to make the victim believe that "[the victim] or another person would suffer serious harm or physical restraint."[95]

Assuming the plaintiff can establish she was a victim of a TVPRA violation, she has two paths to bringing a § 1595 claim. First, she can sue the direct "perpetrator" of the violation—the person that trafficked her or subjected her to forced labor conditions. This liability theory will usually not apply to international supply chain cases because MNCs are rarely the entities that directly engage in forced labor.[96]

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92 *See supra* note 29.

93 18 U.S.C. § 1595(a).

94 *Id.*

95 *Id.*

96 Laura Ezell, Note, *Human Trafficking in Multinational Supply Chains: A Corporate Director's Fiduciary Duty to Monitor and Eliminate Human Trafficking Violations*, 69 VAND. L. REV. 499, 516–17 (2016).

Section 1595's second path to recovery is much more promising. In addition to suing the direct perpetrator, the victim may also sue those who have benefited from her forced labor. Specifically, § 1595 establishes liability for "whoever knowingly benefits, or attempts or conspires to benefit . . . from participation in a venture which that person knew or should have known" has violated the TVPRA. As the Ninth Circuit Court of Appeals has summarized, § 1595 beneficiary liability requires that the defendant "(1) knowingly benefited, (2) from participation in a venture . . . (3) which they knew or should have known was engaged in conduct that violated the TVPRA."[97]

Consider the formerly enslaved plaintiffs in *Nestlé*, discussed in the Introduction. They alleged that they had been forced to work on plantations supplying cocoa to chocolate companies like Nestlé and Cargill. Would the TVPRA provide these individuals with a path to recovery under the facts alleged in their complaint?

First, we must consider whether the formerly enslaved individuals were victims of a TVPRA violation. The conditions described by their complaint irrefutably fall within § 1589's forced labor definition. Section 1589 prohibits obtaining labor by "force," or "threats of force."[98] The *Nestlé* plaintiffs alleged they were whipped and beaten with tree branches if their overseers felt they were working too slowly. They slept in locked shacks guarded by armed men to prevent them from escaping and reported witnessing the beating and torture of other children who had tried to flee.[99]

Because the plaintiffs sufficiently alleged a TVPRA violation (forced labor under § 1589), § 1595 enables them to sue "whoever"[100] (1) knowingly benefited; (2) from participation in a venture; (3) which they knew or should have known was engaged in conduct that violated the TVPRA. Under the first requirement, Nestlé allegedly benefited from its relationship with the Ivorian plantations, as it received a substantial amount of cocoa at prices diminished by the plantations' use of enslaved

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97 Ratha v. Phatthana Seafood Co., 35 F.4th 1159, 1175 (9th Cir. 2022). While this understanding of the TVPRA's beneficiary liability requirements is not universal, its use by a Court of Appeals makes it a persuasive interpretation. It is also increasingly accepted by U.S. district courts. *See, e.g.*, Reyes-Trujillo v. Four Star Greenhouse, Inc., 513 F. Supp. 3d 761, 793 (E.D. Mich. 2021) (adopting the same requirements); Nunag-Tanedo v. E. Baton Rouge Par. Sch. Bd., No. SACV101172AGMLGX, 2011 WL 13153646, at *8 (C.D. Cal. May 12, 2011) (same).

98 18 U.S.C. § 1989(a)(1).

99 Brief of Respondent at 3, Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021) (No. 19-416).

100 As a threshold matter, the phrase "whoever" is widely understood to include both individuals and corporate entities. *See* Roberson & Lee, *supra* note 18, at 23–24 (collecting cases in which the TVPRA has been applied to corporations).

child labor.[101] Second, Nestlé allegedly received this benefit (discounted cocoa) from its participation in ventures with the plantations subjecting the plaintiffs to forced labor and child slavery. Because Nestlé relied so heavily on Côte d'Ivoire for cocoa, it exercised an "unusual degree of control over the Ivorian cocoa sector."[102] This included "control[ling] the terms and conditions by which these plantations produce and supply cocoa," and providing financial support, farming supplies, training, and capacity building to the plantations employing enslaved children.[103] Even worse, according to the plaintiffs, Nestlé safeguarded its exploitative plantation system by spending "millions of dollars" to block U.S. legislation that would have required the company to publicly disclose the labor practices of its cocoa sources.[104] Third, Nestlé either knew, or "should have known" that its plantation partners were engaged in TVPRA violations, such as forced labor. Nestlé USA staff allegedly gained "specific knowledge" of its partner plantations' use of child labor and forced labor through "staff visits to plantations and widely circulated reports."[105]

While the TVPRA's beneficiary liability theory appears to provide a clear path for the formerly enslaved plaintiffs, § 1595 alone would be insufficient. They would also need to show that their TVPRA claim overcomes the presumption against extraterritoriality.

The linchpin of the TVPRA's utility for international forced labor claims is that the statute expressly imbues U.S. courts with extraterritorial jurisdiction over the TVPRA's forced labor provisions. Section 1596 states that, "[i]n addition to any domestic or extra-territorial jurisdiction otherwise provided by law, the courts of the United States *have extra-territorial jurisdiction* over any offense" under several of the TVPRA's sections, including § 1589 on forced labor.[106] It is difficult to imagine how Congress could give a statement that is more "clear" or "affirmative" of its intent for the statute to reach extraterritorial conduct.

In sum, § 1595's beneficiary liability theory enables a survivor of forced labor to sue a company that (1) knowingly benefits from; (2) participation in a venture; which (3) they knew, or should have known, was engaged in the forced labor. Because § 1596 grants extraterritorial jurisdiction over forced labor violations (contained

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101 *See supra* text accompanying notes 67–70.

102 Brief of Respondent at 4–5, Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021) (No. 19-416).

103 *Id*. at 5.

104 *Id.* at 5–6.

105 *Id.* at 4–5.

106 18 U.S.C. § 1596(a) (emphasis added). Section 1596 empowers U.S. courts to exert extraterritorial jurisdiction, so long as the offender is present in the U.S., a U.S. national, or a lawfully admitted "alien," admitted for permanent residence. *Id*. § 1596(a)(1)-(a)(2).

in § 1589), U.S. courts should have jurisdiction to hear claims arising from international forced labor violations. Reading all three sections (§§ 1589, 1595, and 1596) together suggests that international plaintiffs may sue companies that benefit from "ventures" with international suppliers, when the company's employees or agents knew, or should have known, the suppliers were using forced labor.

II

Why Have Recent Cases Failed? Judicial Interpretation of the TVPRA in Recent International Supply Chain Cases

Based on Part I, one would expect the TVPRA to be a strong vehicle for plaintiffs to hold corporations accountable for benefiting from the plaintiffs' forced labor. This expectation has held true for claims in which the forced labor occurred in the United States. Although these "domestic plaintiffs" are not always successful, they have achieved some impressive judgments over the past decade. For example, several groups of plaintiffs have brought successful § 1595 claims against hotel operators when sex traffickers used their hotel rooms for trafficking activities, and the operators, knew, or should have known about the trafficking.[107] In the forced labor context, incarcerated individuals have survived motions for dismissal on beneficiary liability claims against private prison companies who profit from the incarcerated individuals' forced labor.[108] Scholars have pointed to these domestic plaintiffs' success to suggest that the TVPRA can also be used to sue businesses that benefit from trafficking and forced labor occurring outside the United States.[109]

But how much success have "international plaintiffs" had using the TVPRA's beneficiary liability theory? In the past several years, a small number of plaintiffs have attempted to bring § 1595 claims against U.S. corporations that benefited from forced labor that took place internationally. Courts threw out all of these cases on motions for dismissal or summary judgment.[110]

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107 For an overview of the use of the TVPRA to sue hotels for receiving business from sex traffickers, see generally Tessa Zavislan, *Inhospitable: Third Party Liability for Sex Trafficking in the Hospitality Sector*, 71 Am. U.L. Rev. F. 137 (2022).

108 *See* Ruelas v. Cnty. of Alameda, 51 F.4th 1187, 1189 (9th Cir. 2022).

109 *See* Beale, *supra* note 29.

110 Ratha v. Phatthana Seafood Co., Ltd., No. CV 16-4271-JFW (ASx), 2017 WL 8293174 (C.D. Cal. Dec. 21, 2017), *aff'd*, 26 F.4th 1029 (9th Cir. 2022); Doe I v. Apple Inc., No. 1:19-CV-03737 (CJN), 2021 WL 5774224 (D.D.C. Nov. 2, 2021), *aff'd* 96 F.4th 403 (D.C. Cir. 2024); Coubaly v. Cargill, Inc., 610 F. Supp. 3d 173 (D.D.C. 2022).

Previous scholarship has focused on whether the TVPRA remains a viable international human rights tool after these setbacks.[111] Some authors believe the statute still has potential for international supply chain cases, while others are less optimistic.[112] Rather than evaluating the TVPRA's viability, this Note delves deeper into *why* recent international supply chain cases have failed.

Part II aims to explain international plaintiffs' lack of success by evaluating how courts have interpreted § 1595's main requirements and determining whether courts have applied different standards to international and domestic plaintiffs. While the statute's first requirement ("knowingly benefits") is rarely a barrier,[113] courts hold international plaintiffs to a higher standard than domestic plaintiffs under the statute's second prong ("participation in a venture").[114] Courts interpret the statute's third requirement (the beneficiary "should have known" about the TVPRA violation) to impose a negligence standard for both domestic and international plaintiffs.[115] However, courts have required an exceedingly low standard of care for U.S. entities in identifying and avoiding suppliers using forced labor.[116] One court has also found that the statute's extraterritoriality provision does not apply to its private right of action.[117]

I do not present an exhaustive list of all of the reasons that TVPRA claims fail in the international supply chain context. In addition to the above issues, courts have also found that international supply chain plaintiffs have failed for a lack of Article III standing[118] and personal jurisdiction over defendants.[119] By focusing on issues of statutory interpretation, I hope to clarify how courts have interpreted a statute that scholars describe as one of the most promising avenues for international human rights litigation in domestic courts.[120]

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111 *See* sources cited *supra* note 29.

112 *See* sources cited *supra* note 29.

113 *See infra* Section II.A.

114 *See infra* Section II.B.

115 *See infra* Section II.C.

116 *See id.*

117 *See infra* Section II.D.

118 *See* Coubaly v. Cargill, Inc., 610 F. Supp. 3d 173, 183 (D.D.C. 2022) ("Because the complaint does not satisfy the causation prong of Article III standing, the Court must dismiss the case without prejudice for lack of jurisdiction.").

119 *See* Ratha v. Phatthana Seafood Co., 35 F.4th 1159, 1171 (9th Cir. 2022) ("The evidence in the record here does not support either specific or general jurisdiction as a basis for finding minimum contacts.").

120 *See supra* note 29.

A. "Knowingly Benefits"

The first requirement for TVPRA liability is that the beneficiary defendant "knowingly benefits" from the TVPRA violation. The first prong has two requirements: (1) the defendant received, or attempted to receive a benefit, and (2) did so "knowingly." First, courts have consistently found that receiving goods or services below market value because they are produced by forced labor constitutes a "benefit" under § 1595.[121] Second, courts typically interpret the statute's provision that the benefit is received "knowingly" to only require that the defendant be aware that they are receiving a benefit, rather than possess actual knowledge of the underlying TVPRA violation.[122] The only way a benefit would not be received "knowingly" in the supply chain context is if the defendant was completely unaware they were purchasing a good from a particular supplier.[123] Therefore, as long as the beneficiary defendant benefited financially from the forced labor, and was aware they were receiving a benefit, the first prong is almost always satisfied.[124]

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121 *See* Ruelas v. County of Alameda, 519 F. Supp. 3d 636, 650 (N.D. Cal. 2021) (accepting that the allegation of an "economic windfall as a result of uncompensated labor of prisoners" counts as a benefit under § 1595 for the purposes of a motion to dismiss); Adhikari v. Daoud & Partners, 697 F. Supp. 2d 674, 684 (S.D. Tex. 2009) (declining to dismiss a complaint against a third-party defendant that trafficked "cheap labor to U.S. military installations in Iraq in order to *earn a profit.*") (emphasis added); Wang v. Gold Mantis Constr. Decoration, LLC, 705 F. Supp. 3d 1190, 1203 (D. N. Mar. I. May 24, 2022) ("[The third-party defendant] benefited from being able to quickly obtain foreign construction workers that could be compelled to work long hours for low wages with little to no rest."); Norambuena v. W. Iowa Tech Cmty. Coll., No. C20-4054-LTS, 2022 WL 987946, at *12 (N.D. Iowa Mar. 31, 2022) (holding that a third-party defendant was "compensated with guaranteed workers who could not, quit or leave their jobs for fear of retaliation."); *see also* Briana Beltran, *The Hidden "Benefits" of the Trafficking Victims Protection Act's Expanded Provisions for Temporary Foreign Workers*, 41 Berkeley J. Emp. & Lab. L. 229, 262–65, 263 n.178 (2020) (collecting cases on third-party liability for forced labor claims under the TVPRA and finding that "the focus tends to be on the existence and receipt of benefits themselves, rather the knowledge of such receipt. . . .").

122 *See* Reyes-Trujillo v. Four Star Greenhouse, Inc., 513 F. Supp. 3d 761, 793 (E.D. Mich. 2021) ("The first element merely requires that [the d]efendant knowingly receive a financial benefit." (quoting H.H. v. G6 Hosp., LLC, No. 2:19-CV-755, 2019 U.S. Dist. LEXIS 211090, at *7 (S.D. Ohio Dec. 6, 2019)).

123 Under this approach, the "knowingly benefits" prong evaluates the defendant's state of mind concerning the benefit, while the third prong "focuses on whether the defendant knew or should have known of [the violations] by the venture in which he allegedly participated." *Id*.

124 To be sure, there will be some cases where the beneficiary defendant escapes liability because it does not actually receive a financial benefit from the forced labor. For example, in *Ratha v. Phatthana Seafood Co.*, the Ninth Circuit Court of Appeals held that one of the beneficiary defendants—Rubicon—had not received a benefit because it had not actually been able to sell the shrimp it imported from the Thai defendants. 35 F.4th at 1176. However, the facts of this case are idiosyncratic, and are unlikely to be a major barrier to future plaintiffs. This is especially true because Congress amended § 1595 after *Ratha* to establish liability for any beneficiary defendant who "*attempts* . . . to benefit" from the venture, even if

B. "Participation in a Venture"

1. Judicial Interpretation of "Participation in a Venture" in Domestic Cases

The real battle to establish § 1595 beneficiary liability begins with the statute's second requirement that a beneficiary defendant "participate in a venture." Courts evaluating domestic beneficiary liability cases have generally taken two approaches to defining this requirement.[125] Under the first approach—which is embraced by the First and Tenth Circuit Courts of Appeals—courts have looked to § 1591(e)(6) of the statute, which defines a venture as "any group of two or more individuals associated in fact, whether or not a legal entity."[126] I refer to this as the "associated in fact" approach. Under the second approach, courts will go beyond the statute's text and define "venture" according to its "dictionary definition." This standard, which I refer to as the "common enterprise" approach, was the tact the Eleventh Circuit Court of Appeals took when it defined "venture" as "a common undertaking or enterprise involving risk and potential profit."[127]

The "associated in fact" approach is typically more plaintiff-friendly than the "common enterprise" approach. A wide range of individuals and institutions can be "associated in fact" because, as § 1591(e)(6) emphasizes, this standard does not require members of a "venture" to be part of the same "legal entity." This looser definition enables plaintiffs

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they do not *actually* benefit. Abolish Trafficking Reauthorization Act of 2022, Pub. L. 117-347, Title I, § 102, Jan. 5, 2023, 136 Stat. 6200 (emphasis added).

125 *See* Beltran, *supra* note 121, at 255–56, 259 (describing how courts have interpreted the word "venture" by using the "associated in fact" definition, or turning to a dictionary definition, such as defining venture as a "common enterprise"). The two main approaches described here are typical of how most district courts evaluate the "participation in a venture" requirement, and have both been validated at the appellate level. However, some district courts have also taken a third approach, which has not been validated by any courts of appeals. Under this approach, courts define "participation in a venture" by looking to another portion of the statute—§ 1591(e)(4)—which deals with child sex trafficking. Section 1591(e)(4) defines the entire phrase "participation in a venture" as "knowingly assisting, supporting, or facilitating a violation" of the sex trafficking crimes enumerated in § 1591(a). *See* Konstantinova v. Garbuzov, No. 2:21-CV-12795 (WJM), 2022 U.S. Dist. LEXIS 105882, at *11–12 (D.N.J. June 14, 2022) (dismissing a § 1595 complaint for failing to demonstrate the defendant had met the § 1596(e)(4) participation in a venture definition). However, this approach is uncommon, likely because § 1591(e)(6)'s requirement that the beneficiary defendant "knowingly" support the venture's TVPRA violation conflicts with § 1595's provision that a defendant is liable as long as they "should have known" the venture was engaged in a violation. *See* Doe I v. Red Roof Inns, Inc., 21 F.4th 714, 724 (11th Cir. 2021) (rejecting the § 1591(e)(4) definition because it would require "a plaintiff to prove that the defendant knowingly facilitated a violation, making the 'should have known' language superfluous").

126 18 U.S.C. § 1591(e)(6).

127 *Red Roof Inns*, 21 F.4th at 724–25.

to hold institutional defendants accountable when they benefit from TVPRA violations, even if they are not strictly in contractual privity with the direct perpetrator.

For example, in *Gilbert v. USA Taekwondo, Inc.*, the court examined a TVPRA beneficiary claim against USA Taekwondo ("USAT") (the United States Olympic Taekwondo organization) for a venture with two of its athletes (Steven and Jean Lopez), who had allegedly raped and sexually abused several of their female teammates. The court applied the "associated in fact" standard and concluded that the USAT was in a venture with the Lopez brothers, without inquiring whether the team and the two athletes could be considered a "common enterprise," or even a traditional commercial undertaking of any kind.[128]

The facts of *Gilbert* demonstrate why Congress might have included such a capacious definition of the term venture in the TVPRA. As will be discussed in Part III, the context and legislative history of the TVPRA demonstrates that Congress intended to establish broad civil liability for the individuals and organizations that benefit from TVPRA violations.[129] Had USAT taken the allegations against the Lopez brothers more seriously, it might have prevented numerous athletes from experiencing sexual abuse. By making organizations like USAT civilly liable for TVPRA violations, the "associated in fact" standard incentivizes organizations to do everything possible to protect their members from trafficking, abuse, and forced labor.

Conversely, the "common enterprise" approach is a more difficult standard for plaintiffs. Rather than demonstrating that the beneficiary defendant is generally "associated" with the direct perpetrator, the plaintiff must prove that the beneficiary and direct perpetrator are part of the same "commercial enterprise."[130] Comparing cases with similar facts, in which courts employed each standard, can help reveal the differences between the two approaches.

In *Ricchio v. McLean*, the First Circuit Court of Appeals found that the owners and operators of a motel were "associated in fact" with a sex trafficker (McLean) because "through renting space in which McLean obtained, among other things, forced sexual labor or services"

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128 *See* Gilbert v. USA Taekwondo, Inc., No. 18-CV-00981-CMA-MEH, 2020 U.S. Dist. LEXIS 94018, at *28 (D. Colo. May 29, 2020). The court did however discuss the benefits USAT received from its association with the Lopez brothers. These included non-financial benefits, such as recruitment of teammates and prestige from medals, as well as financial benefits such as sponsorships of the team. However, this analysis was meant to satisfy § 1595's requirement that a defendant have received a benefit from the venture, rather than establishing the existence of the venture itself. *Id.* at *19–20.

129 *See infra* Section III.A.

130 *See Red Roof Inns*, 21 F.4th at 724.

from the plaintiff, the beneficiary defendants "knowingly benefited," from the TVPRA violations.[131] Therefore, the First Circuit reversed the district court's dismissal of the complaint. Conversely, in *Doe I v. Red Roof Inns*, the Eleventh Circuit Court of Appeals applied the "common enterprise" definition to the "participation in the venture" requirement. Like *Ricchio*, the *Red Roof Inns* defendants profited from sex traffickers' use of their hotel rooms.[132] However, the Eleventh Circuit found that sex traffickers renting the hotel rooms did not qualify as a "common undertaking" with the hotel owners and franchisors, and therefore did not meet the participation in a venture requirement. The opposite outcomes in *Ricchio* and *Red Roof Inns* demonstrate that the "common enterprise" standard makes it more difficult for plaintiffs to establish "participation in a venture" than under the "associated in fact" standard.

2. "Participation in a Venture" in International Supply Chain Cases

Courts have declined to use the more permissive "associated in fact" standard for § 1595 cases involving forced labor in international supply chains.[133] Courts reviewing international plaintiffs' claims have opted instead to use the more stringent "common enterprise" approach.

In *Doe I v. Apple*, the district court considered a TVPRA claim against technology companies—including Apple, Dell, and Tesla—that purchased cobalt to produce batteries from several suppliers in the Democratic Republic of Congo.[134] The court's "common enterprise" definition made it more difficult for the plaintiffs to argue that an international supply chain fulfilled the venture requirement.[135] The *Apple* plaintiffs alleged that Umicore and its suppliers "formally agreed to form a venture" in which "Umicore would whitewash this blood-stained cobalt and sell it to[,] among others, Defendants Apple,

131 Ricchio v. McLean, 853 F.3d 553, 556 (1st Cir. 2017).

132 *Red Roof Inns*, 21 F.4th at 726 (noting that the hotel franchisors "received a percentage of the revenue generated by the operation . . . including a percentage of the revenue generated for the rate charged on the rooms in which each [plaintiff] was trafficked") (internal citations omitted).

133 *See* Ratha v. Phatthana Seafood Co., No. CV 16-4271 (ASx), 2017 WL 8293174, at *4 (C.D. Cal. Dec. 21, 2017) (construing the definition of "venture" in the TVPRA to relate solely to sex trafficking), *aff'd*, 26 F.4th 1029 (9th Cir. 2022); Doe I v. Apple Inc., No. 1:19-CV-03737 (CJN), 2021 WL 5774224, at *6 (D.D.C. Nov. 2, 2021), *aff'd*, 96 F.4th 403 (D.C. Cir. 2024) (rejecting plaintiffs' argument that defendants are in "a venture that is jointly responsible for the injuries suffered" and finding that "[p]laintiffs do not adequately plead that [d]efendants were in a venture").

134 *Apple*, 2021 WL 5774224, at *1–2.

135 *Id.* at *6–7.

Alphabet, and Microsoft."[136] It would be difficult for the defendant U.S. companies to argue that they are not "associated in fact" with the mining companies who supply a critical input that enables them to make billions of dollars in profit.[137] But, by requiring the beneficiary to be part of a "common enterprise" with the direct perpetrators, the *Apple* court concluded that a "'global supply chain' is not a venture."[138] The D.C. Circuit Court of Appeals affirmed the lower court's judgment, adopting the "common enterprise" approach and defining a venture as "taking part or sharing in an enterprise or undertaking that involves danger, uncertainty, or risk, and potential gain."[139] Using this definition, the Court of Appeals concluded that there is "no shared enterprise between the [c]ompanies and the suppliers who facilitate forced labor."[140]

The use of the "common enterprise" definition rather than the "associated in fact" definition was also critical in *Ratha v. Phatthana Seafood Co.*, a case brought by workers subjected to forced labor in Thailand's seafood processing industry.[141] The plaintiffs asserted a § 1595 claim against two Thai seafood processing companies (Phatthana Seafood and S.S. Frozen Food) and two U.S. importers (Rubicon and Wales).[142] According to their complaint, the plaintiffs, who were trafficked from Cambodia to Thailand and subjected to forced labor in the Thai defendants' factories, sued Rubicon and Wales for allegedly benefiting from a "venture" with the Thai companies.[143] Both U.S. companies had arranged to inspect and import seafood from the Thai defendants' Songkhla factory—one of the alleged plants using forced labor—to sell to major U.S. retailers, including Walmart.[144] Like the *Apple* court, the court in *Ratha* embraced the "common enterprise" definition of venture.[145] However, unlike the technology companies

136 There was some dispute between the plaintiffs and defendants about the nature of Umicore and Glencore's relationship but because this was a 12(b)(6) motion, the court was required to assume all of the plaintiffs' plausible allegations are true. *See Apple*, 2021 WL 5774224, at *1, *11 ("On these motions to dismiss, the Court accepts all well-pleaded facts in the complaint as true." (citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009))).

137 *See* First Amended Complaint ¶ 74, *Apple*, No. 1:19-CV-03737 (CJN), 2021 WL 5774224 (D.D.C. June 26, 2020).

138 *Apple*, 2021 WL 5774224, at *10.

139 *Apple*, 96 F.4th at 415 (D.C. Cir. 2024).

140 *Id.*

141 Ratha v. Phatthana Seafood Co., No. CV 16-4271 (ASx), 2017 WL 8293174, at *1 (C.D. Cal. Dec. 21, 2017), *aff'd*, 26 F.4th 1029 (9th Cir. 2022).

142 *Id.* at 2.

143 *Id.*

144 *See* Brief for Petitioner at 13–14, Ratha v. Phatthana Seafood Co., 143 S. Ct. 491 (2022) (No. 22-411).

145 *Ratha*, 2017 WL 8293174, at *4 (alteration in original) ("The term 'venture' is defined [in *Black's Law Dictionary*] as 'an undertaking that involves risk,' and is typically associated with 'a speculative commercial enterprise.'").

in *Apple*, the *Ratha* defendants were allegedly profiting from a direct, contractual relationship with the perpetrators of the TVPRA violations: While Umicore created a "degree of separation" between the U.S. corporate beneficiaries and the direct perpetrators in *Apple*, the parties in *Ratha* included no such intermediary. This would seem to suggest that Rubicon and Wales not only met the lower "associated in fact" definition, but were involved in a "common enterprise" with the Thai defendants.

However, the *Ratha* district court went a step beyond the *Apple* court's common enterprise standard. The district court found that in order to "participate" in the venture, the beneficiary defendants needed to have taken "some action to operate or manage the venture," importing a standard used by courts when interpreting the Racketeer Influenced and Corrupt Organizations (RICO) Act.[146] In RICO case law, operating and managing the venture would require Rubicon and Wales to have directed or participated in labor recruitment, employment practices, or working conditions at Phatthana's Songkhla factory.[147] Under such an arrangement, the beneficiary defendant has arguably become a direct perpetrator of forced labor under § 1589. Therefore, the *Ratha* district court's "operate or manage" standard effectively erases § 1595's beneficiary theory of liability entirely.

To be clear, I am not arguing that the *Apple* or *Ratha* courts erred by failing to follow out of circuit precedent like *Ricchio* or *Gilbert*. This Note makes its normative arguments in Part III. Rather, what is asserted here is that courts interpret the participation in the venture requirement more restrictively for international supply chain plaintiffs than in cases involving purely domestic issues. This is one of the reasons why the TVPRA has failed to live up to high hopes of the international human rights literature.

C. "Knew or Should Have Known"

1. Judicial Interpretation of "Should Have Known"

The third requirement for TVPRA beneficiary liability is that the defendant "knew, or should have known" that the venture was engaged in a violation of the TVPRA. The word "knew" clearly imposes liability for actual knowledge of forced labor practices. However, the phrase "should have known" expands the statute's reach to include defendants

146 *Id.*

147 *Id.* ("Plaintiffs have presented no evidence that Rubicon and Wales 'took some action to operate or manage the venture,' such as directing or participating in Phatthana's labor recruitment, Phatthana's employment practices, or the working conditions at Phatthana's Songkhla factory.").

with lower scienter.[148] There is wide disagreement among courts on how to interpret this standard in the context of the TVPRA.

Some courts require a plaintiff to demonstrate the beneficiary defendant had a scienter of recklessness.[149] Recklessness requires that a defendant "'consciously disregards a substantial and unjustifiable risk' attached to his conduct, in 'gross deviation' from accepted standards."[150] In other words, even if the beneficiary defendant lacked actual knowledge of the TVPRA violations, she is "reckless" if she was aware of, and consciously disregarded, the risk that the venture was violating the TVPRA.

Other courts adjudicating § 1595 claims interpret the phrase "knew or should have known" to establish a negligence scienter requirement.[151] Under a negligence standard, a defendant is liable if she fails to comport with the "standard of care" a reasonable person would exercise.[152] Under this standard, even if the beneficiary defendant company is not consciously aware of the risk that it is participating in a venture that violates the TVPRA, it is negligent if a reasonable person would have known the venture was conducting forced labor or trafficking. Courts evaluating TVPRA cases have recognized that negligence is a "less culpable mental state" than recklessness.[153]

2. The Scienter Requirement in International Supply Chain Cases

Judicial interpretation of § 1595's scienter standard has erected barriers to international supply chain claims, but for different reasons than the participation in a venture requirement. As explained previously, courts faced with international supply chain cases have interpreted the participation in a venture requirement using the more

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148 *See* Doe I v. Red Roof Inns, Inc., 21 F.4th 714, 726 (11th Cir. 2021) (holding that one of the elements of § 1595 liability is that "the defendant had constructive or actual knowledge that the undertaking or enterprise violated the TVPRA . . . .").

149 *See* Cho v. Chu, No. 21-cv-02297 (PGG) (SDA), 2022 WL 2532446, at *2 (defining the mens rea requirement as "knowledge or reckless disregard of the means by which the venture obtained the labor"); Bucco v. Western Iowa Tech Cmty. Coll., 555 F. Supp. 3d 628, 641 (N.D. Iowa 2021) (stating that the "knew or should have known" requirement is evaluated "[w]ith regard to defendants' knowledge or reckless disregard . . . .").

150 Borden v. United States, 141 S. Ct. 1817, 1824 (2021) (quoting Model Penal Code § 2.02(2)(c)).

151 *See* Ratha v. Phatthana Seafood Co., 35 F.4th 1159, 1177 (9th Cir. 2022) ("[T]he phrase 'knew or should have known' usually connotes negligence.") (quoting Mayview Corp. v. Rodstein, 620 F.2d 1347, 1358 (9th Cir. 1980)).

152 Restatement (Third) of Torts: Liability of Physical and Emotional Harm § 3 (Am. L. Inst. 2010) ("A person acts negligently if the person does not exercise reasonable care under all the circumstances.").

153 *Ratha*, 35 F.4th at 1077 (quoting Erickson Prods., Inc. v. Kast, 921 F.3d 822, 833 (9th Cir. 2019)).

stringent "common enterprise" approach. However, the Ninth Circuit's decision in *Ratha* determined that "should have known" established a plaintiff-friendly negligence standard, rather than the more onerous recklessness standard.[154] But while *Ratha* formally applied the lower of the two available scienter standards, it interpreted the negligence standard to impose an exceedingly low duty of care regarding potential forced labor in corporate supply chains.

In *Ratha*, the Ninth Circuit found that the plaintiffs failed to demonstrate that the beneficiary defendants "should have known" about the Thai factories' forced labor, despite the beneficiary defendants' extensive involvement with those factories. Rubicon and Wales, the beneficiary defendants, were brought into a venture with the Thai seafood processers to import the Thai companies' products and sell them to U.S. retailers. To ensure that the Thai companies' products would pass muster—including U.S. retailers' concerns about the factories' labor conditions[155]—Rubicon worked closely with Phatthana for years.[156] This collaboration included "supervising quality control, performing pre-audits, ensuring the factories met customer standards[,] and arranging for staff training."[157] Rubicon executives visited Thailand, including the Songkhla factory, where they had every opportunity to observe labor conditions firsthand.[158] However, none of these facts were enough to persuade the Ninth Circuit that the plaintiffs had presented a triable issue of fact on the beneficiary defendants' negligence.[159]

Additionally, the Ninth Circuit held that U.S. corporations are not negligent for failing to conduct due diligence on international business partners, even when there are warning signs of human trafficking and forced labor. The *Ratha* plaintiffs had pointed to several government and NGO reports that demonstrated the high risk of child labor and forced labor within the Thai seafood industry. For example, a 2009 Department of Labor report had included the Thai shrimp sector on a list of industries that had a "significant incidence of child labor and forced labor."[160] Similarly, a 2008 AFL-CIO Solidarity Center report had reported that a Thai worker at one of Phatthana's plants—albeit a different factory than the ones Rubicon and Wales were involved

154 *Id.*

155 *See* Brief for Petitioner at 13–14 n.9, Ratha v. Phatthana Seafood Co., 143 S. Ct. 491 (2022) (No. 22-411).

156 Appellants' Opening Brief at 11, Ratha v. Phatthana Seafood Co., 35 F.4th 1159 (9th Cir. May 25, 2018) (No. 18-55041).

157 *Id.* at 37.

158 *See id.*

159 *See Ratha*, 35 F.4th at 1180.

160 *Id.* at 1177.

with—had suffered wage deductions.[161] Nonetheless, the court concluded that these reports were insufficient to put Rubicon and Wales "on notice" because they were about the "Thai shrimp industry *generally*" rather than "abuses at the Songkhla factory from 2010 to 2012" specifically.[162] The approach adopted in *Ratha* suggests that a U.S. company need not ask about their business partners' labor practices unless there are allegations of abuses at the specific facility from which the U.S. company purchases products.

To the extent that there is any duty to conduct due diligence, the standard of care required in conducting this due diligence is exceptionally low. Anticipating that U.S. retailers would have questions about the Thai companies' labor practices, Wales and Rubicon performed two audits of the Songkhla factory. The audits only asked six questions: (1) whether the employees were given a handbook, which contained (2) pay and (3) vacation information; (4) whether the employees were paid minimum wage, (5) worked a six-day week, and (6) were over 18.[163] The audit did not ask any questions about debt bondage, or any of the warning signs of forced labor,[164] such as "recruitment debts owed to the factory, use of labor brokers, or factory retention of workers' identity documents."[165] Press reports, NGOs, and the U.S. Embassy had all warned that limited audits like this one were insufficient to uncover trafficking and forced labor.[166] Yet, the court stated that the plaintiffs had failed to establish that the audits "were even necessary under the circumstances or that a business's failure to conduct such audits would be negligent."[167] To the extent that such audits were necessary, the plaintiffs had failed to carry their burden of showing that the audits "fell short of industry standards at the time."[168] Therefore, while § 1595 imposes liability when an MNC "should have known" about forced labor in its supply chain, *Ratha*'s low standard of care makes it difficult for plaintiffs to carry this burden.

D. Extraterritoriality

One of the greatest sources of excitement about the TVPRA is a belief that the law's "civil-liability provision does not include any

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161 Appellants' Opening Brief, *supra* note 156, at 18.

162 *Ratha*, 35 F.4th at 1177–78.

163 Appellants' Reply Brief at 9–10, Ratha v. Phatthana Seafood Co., 35 F.4th 1159 (9th Cir. 2022) (No. 18-55041).

164 Appellants' Opening Brief, *supra* note 156, at 20.

165 Appellants' Reply Brief, *supra* note 163, at 10.

166 *Id*.

167 *Ratha*, 35 F.4th at 1179.

168 *Id.*

territorial limitations."[169] While courts have generally found that plaintiffs may bring civil suits for violations of the TVPRA that occurred abroad, two recent cases have questioned the statute's extraterritoriality.[170] Naturally, one cannot evaluate judicial interpretation of the TVPRA's extraterritoriality requirements by comparing cases with domestic and international plaintiffs because domestic TVPRA claims do not implicate extraterritoriality. However, close examination of the decisions that question the TVPRA's extraterritoriality demonstrate that courts have read the TVPRA narrowly in international supply chain cases.

The Supreme Court in *RJR Nabisco, Inc. v. European Community* established a two-part test for evaluating whether a statute applies beyond the borders of the United States.[171] The first step determines whether there is clear Congressional intent to overcome the "presumption against extraterritoriality."[172] In other words, the first step assumes the statute only applies to conduct within the United States, unless Congress says otherwise. Congress's intent to make the statute extraterritorial must be clear, but an "express statement" is not always required.[173] Intent can also be inferred from the statute's context.[174] If the statute fails step one, then it does not apply extraterritorially.

In the second step, a court should determine where the conduct "relevant to the statute's focus" occurred.[175] If this conduct took place within the United States, then the case involves a permissible domestic application of the statute, even if other conduct occurred abroad.[176]

Initially, the TVPRA appears to clear the first step of the *RJR Nabisco* test. Section 1596 provides "extra-territorial jurisdiction over any offense (or any attempt or conspiracy to commit an offense) under

169 *See, e.g.*, Ryerson, Pinker & Kelly, *supra* note 29, at 806.

170 *See, e.g.*, *Ratha*, 35 F.4th at 1196 (declining to extend extraterritorial application of the statute); *see also One-Legged Stool*, *supra* note 28, at 1710 (discussing how "challenges have recently been raised on the extraterritorial application of the TVPRA's civil cause of action under § 1595(a).").

171 *See* Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1936 (2021) (construing RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325 (2016)).

172 *RJR Nabisco*, 579 U.S. at 335 (explaining the presumption against extraterritoriality as an accepted canon of statutory interpretation).

173 *Id.* at 340. ("The presumption against extraterritoriality does not require us to adopt such a constricted interpretation. While the presumption can be overcome only by a clear indication of extraterritorial effect, an express statement of extraterritoriality is not essential.").

174 *Id.* ("Assuredly context can be consulted as well.") (quoting Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 265 (2010)).

175 *Id.* at 337.

176 *Id.*

section 1581 [peonage], 1583 [slavery], 1584 [sale into involuntary servitude], 1589 [forced labor], 1590 [trafficking persons into one of the aforementioned offenses], or 1591 [sex trafficking of children]."[177] While all of these provisions are criminal violations, courts have held that § 1595's private right of action incorporates the extraterritoriality of the criminal violations that give rise to the § 1595 civil action.[178]

However, in two recent international supply chain cases, courts applied the *RJR Nabisco* test narrowly, raising questions as to whether the TVPRA allows for civil suits based on forced labor that occurred outside the United States. Applying the first step of the test in *Ratha*, the Ninth Circuit observed that "[v]iewed in *isolation*, § 1595 is silent as to its extraterritorial application."[179] However, the court did not rule on the extraterritoriality question, and instead decided the case on other grounds.[180]

The district court in *Apple* went a step further by holding that § 1596 did not apply to TVPRA civil suits. The court concluded that, "while § 1596 explicitly grants extraterritorial application to many criminal statutes, it does not mention their civil analogue, § 1595."[181] Therefore, while Congress provided extraterritorial reach to the criminal violations that give rise TVPRA civil claims, this extraterritorial jurisdiction did not encompass the civil claims themselves.[182]

However, while the *Apple* court had walled off its analysis of § 1595's extraterritoriality from its criminal provisions in step one, it found these criminal provisions were actually the "focus" of § 1595 in step two. The second step of the *RJR Nabisco* test evaluates whether the conduct "relevant to the statute's focus" occurred within the U.S., and therefore presents a permissible domestic application of the statute.[183] The question for the *Apple* court was: What is the focus of a beneficiary liability claim under § 1595? As explained prior, § 1595 beneficiary liability has two actus reus elements: first, the receipt of

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177 18 U.S.C. § 1596.

178 *See* Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 204 (5th Cir. 2017) ("[B]y conferring extra-territorial jurisdiction over any offense . . . under the TVPRA, § 1596 permits private parties to pursue a civil remedy under the TVPRA for extraterritorial violations."); Abafita v. Aldukhan, No. 16-CV-06072, 2019 WL 6735148, at *5 (S.D.N.Y. Apr. 4, 2019) (finding that "[t]he TVPRA has extraterritorial effect" because § 1596 confers extraterritorial jurisdiction to § 1595 civil actions).

179 Ratha v. Phatthana Seafood Co., 35 F.4th 1159, 1167 (9th Cir. 2022) (emphasis added).

180 *Id.* at 1168 ("We therefore decline to decide whether § 1595 applies to foreign conduct . . . .").

181 Doe I v. Apple Inc., No. 1:19-CV-03737 (CJN), 2021 WL 5774224, at *15 (D.D.C. Nov. 2, 2021), *aff'd*, 96 F.4th 403 (D.C. Cir. 2024).

182 *Id.* at *15–16.

183 RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 337 (2016).

a benefit, and second, the participation in a venture.[184] Yet, the court found that neither element was the "focus" of a beneficiary liability claim.[185] Rather, the court held the § 1595's focus was the underlying criminal violations of the TVPRA prohibited by different sections of the statute. Because these criminal violations took place outside of the U.S., the plaintiffs' claims represented an impermissible extraterritorial application of the TVPRA. The Court of Appeals for the D.C. Circuit affirmed the lower court's judgment, but did not reach the extraterritoriality issue.[186]

Crucially, the *Apple* court is the exception, not the rule: Most courts have found that § 1595 applies extraterritorially.[187] However, the *Apple* court's narrow reading of the TVPRA is concerning for international supply chain plaintiffs. If the TVPRA's private right of action does not apply extraterritorially, it is difficult to imagine international supply chain plaintiffs bringing any successful TVPRA claims.

III
Have Recent Cases Been Correctly Decided? The Way Forward for International Supply Chain Plaintiffs

Part I discussed the TVPRA's potential for combatting trafficking and forced labor in international supply chains. Part II explained why recent international supply chain claims have failed. Courts have construed the TVPRA's actus reus and scienter requirements more permissively with respect to international supply chain defendants and interpreted the statute's extraterritoriality narrowly.

In Part III, I take these recent international supply chain cases head on. The TVPRA's text and legislative history demonstrate Congressional intent to create a statute with capacious civil liability and global reach. Against this backdrop, I argue that courts adjudicating international supply chain claims have misinterpreted the TVPRA. In particular, I argue that (1) a global supply chain can satisfy the participate in the venture requirement; (2) companies are negligent for failing to conduct adequate supply chain due diligence in certain circumstances; and (3) the TVPRA's private right succeeds under both steps of the *RJR Nabisco* test.

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184 *See supra* Sections II.A–B.

185 *See Apple*, 2021 WL 5774224, at *16 (stating that the reason "why" a defendant can be sued under the § 1595 is being a "perpetrator" or for "engag[ing] in an act in violation of this chapter" (alteration in original) (quoting 18 U.S.C. § 1595)).

186 Doe I v. Apple Inc., 96 F.4th 403, 414 n.4 (D.C. Cir. 2024) ("[W]e do not address the district court's alternative holdings . . . that the TVPRA does not apply extraterritorially").

187 *See supra* note 32.

A. Congressional Intent

Understanding the context from which a statute emerges can help reveal congressional intent.[188] The TVPRA was enacted in the wake of at least three significant developments.

The first event was the Supreme Court's decision in *United States v. Kozminski*, which narrowly interpreted existing statutory prohibitions on involuntary servitude to reverse convictions of defendants who had coerced individuals with mental disabilities into working seventeen hours a day, seven days a week, for negligible, and eventually, zero pay.[189] *Kozminski* limited the definition of forced labor to only include physical and legal coercion, and not the psychological abuse that had been used against the two survivors.[190]

Second, the period leading up to the TVPRA's passage was marked by several high-profile media reports of international trafficking survivors who had been subjected to grisly forced labor conditions in the U.S.[191] For example, a 1995 investigation in El Monte, California revealed that seventy-two Thai workers were trafficked into the United States and forced to live and work in a compound surrounded by barbed wire.[192] When the compound was discovered, some of the workers reported that they had been imprisoned for seven years.[193] A 2000 report "written by a State Department analyst under the auspices of the Central Intelligence Agency" confirmed that high-profile busts, like the one in El Monte were not isolated incidents.[194] The report reviewed cases of workers subjected to forced labor in the United States and found that a substantial portion were victims of human trafficking.[195]

Third, a parallel process at the United Nations developed the Protocol to Prevent, Suppress and Punish Trafficking in Persons,

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188 There is some debate about whether courts should ever look beyond the text of a statute when interpreting it. *See* Kevin Tobia, *We're Not All Textualists Now*, 78 N.Y.U. Ann. Surv. Am. L. 243 (2023) (contrasting Justice Kagan's statement in 2015, "we're all textualists now" with her statement in 2022, when she remarked that "[i]t seems I was wrong."). Regardless, courts interpreting the TVPRA have relied on the statute's legislative history to aid in its interpretation. *See* Roe v. Howard, 917 F.3d 229, 242 (4th Cir. 2019) (recounting the TVPRA's legislative history to aid in statutory interpretation); Burrell v. Staff, 60 F.4th 25, 39 (3d Cir. 2023) (same). Therefore, this Note adopts the position that legislative history and context can be used to support statutory interpretation.

189 487 U.S. 931, 935 (1988).

190 *Id.* at 951.

191 *See* Beale, *supra* note 29, at 23–24 (describing how "[w]idespread media coverage and NGO activity" following the El Monte incident helped to "galvanize support for the TVPA.").

192 *Id.* at 23.

193 *Id.*

194 *Id.*

195 *Id.*

Especially Women and Children (also known as the "Palermo Protocol"). The protocol called on states to combat trafficking through the "three Ps": prosecution, protection, and prevention.[196]

In 2000, Congress passed the Trafficking Victims Protection Act with overwhelming support.[197] Both the legislative record and the law's design demonstrate that Congress sought to respond directly to the three aforementioned phenomena by crafting a robust, internationally-minded statute.

First, the TVPRA responded to *Kozminski* by expanding the definition of forced labor to include any labor procured by "serious harm," "threats of serious harm," or "any scheme, plan, or pattern intended to cause the person to believe that" they would suffer "serious harm or physical restraint."[198]

Second, the TVPRA's "Purpose and Findings" section demonstrates that Congress had taken note of the international nature of trafficking and forced labor. The section states that "the degrading institution of slavery continues *throughout the world*," at least "700,000 persons . . . . are trafficked within or *across international borders*," and that "[a]pproximately 50,000 women and children are trafficked *into* the United States each year."[199]

Third, the TVPRA was expressly designed to follow the Palermo Protocol's "three Ps."[200] The TVPRA sought to enhace "prosecution" by enhancing penalties for pre-existing offenses, as well as establishing new substantive categories of offenses related to trafficking and forced labor.[201] It supported "prevention" by creating a reporting mechanism to evaluate countries' performance on anti-trafficking metrics.[202] Finally, the law provided "protection" by establishing social benefits for trafficking survivors, including enabling survivors of severe trafficking to obtain visas if they collaborated with law enforcement.[203]

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196 *3Ps: Prosecution, Protection, and Prevention*, U.S. Dep't of State, https://www.state.gov/3ps-prosecution-protection-and-prevention [https://perma.cc/HRG4-9NV6] (stating that the Palermo Protocol established the "3P" paradigm, which "continues to serve as the fundamental framework used around the world to combat human trafficking," and that "[t]he United States also follows this approach" in the "Trafficking Victims Protection Act of 2000").

197 *See Roll Call Vote 106th Congress - 2nd Session*, United States Senate, https://www.senate.gov/legislative/LIS/roll_call_votes/vote1062/vote_106_2_00269.htm [https://perma.cc/W6WZ-TCVZ] (reporting that H.R.3244, the TVPRA, passed the Senate with 95 votes).

198 *See* Burrell v. Staff, 60 F.4th 25, 36 (3d Cir. 2023) ("Congress heeded the Court's call in *Kozminski* for legislative action when it passed the TVPRA." (citation omitted)).

199 22 U.S.C. § 7101(b)(1) (emphasis added).

200 *See* Beltran, *supra* note 121, at 243.

201 *Id.*

202 *Id.* at 244.

203 *Id.*

As the Fourth Circuit Court of Appeals has remarked, "[T]he TVPA represents a far-reaching congressional effort to combat *transnational* human trafficking on numerous fronts, including by expanding the civil claims and remedies available to its victims."[204] Each time Congress has reauthorized the TVPRA, it has widened the law's civil liability provisions and enhanced its international reach. Congress's first reauthorization in 2003 established a private right of action that enabled survivors to sue the perpetrators who had subjected them to TVPRA violations.[205] Representative Chris Smith, one of the chief sponsors of the legislation, described that the law had "helped transform the way governments and the private sector *around the world* respond to human trafficking."[206]

In 2008, Congress greatly expanded the private right of action by establishing the TVPRA's beneficiary theory of liability. In addition to suing direct perpetrators, survivors could now bring lawsuits against individuals and entities that had benefited from the direct perpetrators' trafficking or forced labor offenses. Congress had previously considered the consequences of including such a beneficiary liability provision. The original Trafficking Victims Protection Act, enacted in 2000, established venture liability for child sex trafficking, but not for forced labor or adult trafficking.[207] The law's Conference Committee report explained the omission was "out of a concern that such a provision might include within its scope persons, such as *stockholders in large companies* who have an attenuated financial interest in a legitimate business where a few employees might act in violation of the new statute."[208]

Why did Congress put these concerns aside in 2008 and add both civil and criminal venture liability to the statute? An Amicus Brief from members of Congress in *Nestlé v. Doe* explained, "[a]s Congress' understanding of the problem evolved, concern arose about forced labor in the supply chain for goods sold in the United States."[209] During a 2007 hearing, one witness told the House Committee on Foreign Affairs that forced labor in the Brazilian charcoal industry contributes to American steel production, and that workers experiencing conditions resembling slavery in Jordan produced clothing sold in the U.S.[210] Another witness

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204 Roe v. Howard, 917 F.3d 229, 242 (4th Cir. 2019) (emphasis added).

205 Brief of Members of Cong. Sen. Blumenthal, Rep. Smith, et al. as Amici Curiae Supporting Respondents at 24, Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021) (No. 19-416).

206 *Id.* at 8 (emphasis added) (quoting 151 Cong. Rec. H11574 (daily ed. Dec. 14, 2005) (statement of Rep. Smith)).

207 *Id.* at 31.

208 H.R. Rep. No. 106-939, at 101–02 (2000) (Conf. Rep.) (emphasis added).

209 Brief of Members of Cong., *supra* note 205, at 13.

210 *Id*.

at the hearing described forced labor on tea plantations in Kenya and seafood processing facilities in Thailand producing products consumed by Americans.[211]

Similarly, each version of the TVPRA expanded the law's international focus. The 2003 reauthorization amended 18 U.S.C. § 1591—which covers child sex trafficking—to include conduct "within the special maritime and territorial jurisdiction of the United States."[212] These areas encompass locations under varying degrees of U.S. control, such as diplomatic installations and related premises. The 2006 reauthorization established liability for extraterritorial trafficking offenses committed by U.S. government employees abroad.[213] In 2008, Congress greatly expanded the statute's extraterritorial reach through § 1596, which established that U.S. courts would have "extraterritorial jurisdiction over any offense (or any attempt or conspiracy to commit an offense)" of several of the TVPRA's forced labor, slavery, and trafficking provisions.[214] As Senator Patrick Leahy remarked, "*[n]owhere on earth* should it be acceptable to deceive, abuse, and force a person into a life of enslavement."[215] The law also now contains numerous provisions providing funding and programmatic support to help "international efforts to address [the] global problem" of trafficking.[216] These include provisions establishing border interdictions to prevent trafficking at key border crossings,[217] as well as authorizing foreign assistance programs to protect and aid trafficking survivors outside the U.S.[218]

B. Misinterpreting the TVPRA and the Way Forward

Congress intended for the TVPRA to create broad, extraterritorial civil liability. Courts should shift their interpretation of the TVPRA's actus reus ("participate in the venture"), scienter ("knew or should have known"), and extraterritoriality requirements to better effectuate this vision.

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211 *Id.* at 13–14.

212 Roe v. Howard, 917 F.3d 229, 236 (4th Cir. 2019) (quoting Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 5(a)(2), 117 Stat. 2875, 2879).

213 *Id.* at 236–37.

214 18 U.S.C. § 1596(a); *see also supra* Section I.B.1 (explaining Congress's intent for the statute to apply extraterritorially).

215 Brief of Members of Cong., *supra* note 205, at 8 (quoting 154 Cong. Rec. S10886 (daily ed. Dec. 10, 2008) (statement of Sen. Leahy)) (emphasis added).

216 *Roe*, 917 F.3d at 242.

217 *Id.* (citing 22 U.S.C. § 7104(c)).

218 *Id.* (citing 22 U.S.C. § 7105).

1. Participation in the Venture

One of the most challenging elements of international supply chain cases is interpreting § 1595's requirement that the beneficiary defendant "participates in a venture" with the direct perpetrator. The first step is the correct definition of the word "venture." This Note does not take a position on which approach ("associated in fact" or "common enterprise") is correct. However, even if one assumes that the "common enterprise" definition is superior, courts have not yet correctly applied this standard to the international supply chain context.

Using the dictionary definition, the district court in *Ratha* asserted that participating in a venture requires the beneficiary to take some action to "operate or manage the venture," such as directing or participating in the recruitment of the workers that were subjected to forced labor conditions, or the employment practices or working conditions at the factory where the forced labor took place.[219] Recruiting individuals that will be subjected to forced labor conditions, as well as directing the employment practices that constituted forced labor, would make a defendant a direct perpetrator of TVPRA violations.[220] This interpretation renders § 1595's language establishing liability for "whoever knowingly benefits" from the TVPRA violation superfluous.[221] Because courts generally do not "treat statutory terms as surplusage,"[222] the *Ratha* district court's participation in the venture standard should be rejected.

In *Apple*, the district court held simply that a "'global supply chain' is not a venture."[223] However, this conclusory assertion does not pass muster, even under the court's own legal standard. The court defined a venture as a "commercial enterprise."[224] "Commercial" refers to something that is "occupied with or engaged in commerce or work

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[219] *See* Ratha v. Phatthana Seafood Co., No. CV 16-4271-JFW (ASx), 2017 WL 8293174, at *4 (C.D. Cal. Dec. 21, 2017), *aff'd*, 26 F.4th 1029 (9th Cir. 2022) ("Plaintiffs have presented no evidence that Rubicon and Wales 'took some action to operate or manage the venture,' such as directing or participating in Phatthana's labor recruitment, Phatthana's employment practices, or the working conditions at Phatthana's Songkhla factory.").

[220] 18 U.S.C. § 1589(b).

[221] *See* Cho v. Chu, No. 1:21-CV-02297 (PGG) (SDA), 2022 WL 2532446, at *3 (S.D.N.Y. May 12, 2022) ("[A]ctual participation in the forced labor is not required for civil liability under § 1595.").

[222] Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 698 (1995).

[223] Doe I v. Apple Inc., No. 1:19-CV-03737 (CJN), 2021 WL 5774224, at *10 (D.D.C. Nov. 2, 2021), *aff'd*, 96 F.4th 403 (D.C. Cir. 2024).

[224] *See id.* at *11 (interpreting venture's ordinary meaning based on dictionary definitions and the context of § 1595).

intended for commerce,"[225] while "enterprise" refers to "a project or undertaking that is especially difficult, complicated, or risky."[226] Two companies in a supply chain are certainly engaged in a common "project or undertaking" that involves "commerce" or "trading," and therefore "participate in a venture."[227]

The TVPRA's legislative history and purpose reinforce this conclusion. Contrary to the district court's assertion that a global supply chain is not a venture, Congress considered that beneficiary liability might insnare legitimate businesses with only a limited financial interest derived from the TVPRA violations.[228] Congress revised the TVPRA to include beneficiary liability despite these concerns because they understood that such a provision was necessary to address some of the worst forms of trafficking and forced labor.[229]

While a global supply chain *can* fulfill the venture requirement, this does not mean that every member of a global supply chain is part of the venture. Consider the following hypothetical. Imagine the reader of this Note decides to start selling chocolate on the subway. It turns out that the chocolate was manufactured by Nestlé, and produced from cocoa harvested by enslaved child laborers in Côte d'Ivoire. After reading this Note, a strong argument can be made that the reader "should have known" she was benefiting from selling a product produced by forced labor. Both the reader and Nestlé are profiting from their participation in a global supply chain that involves forced labor. Is the reader liable under § 1595? This scenario raises a genuine prudential concern about the scope TVPRA beneficiary liability in a globalized economy with long and complex supply chains.

Rather than taking an all-or-nothing approach, courts facing international supply chain cases can draw lessons from TVPRA decisions involving hotels and sex trafficking. Several courts have found hotels faced § 1595 venture liability when sex traffickers rented their rooms to

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225 *Commercial*, Merriam-Webster, https://www.merriam-webster.com/dictionary/commercial [https://perma.cc/CF3R-KUHA]; *see also Commercial*, Black's Law Dictionary (11th ed. 2019) (defining commercial as "of, relating to, or involving the buying and selling of goods").

226 *Enterprise*, Merriam-Webster, https://www.merriam-webster.com/dictionary/enterprise [https://perma.cc/Y4XV-VHAX].

227 Although not stated, the Court's conclusion in *Apple* that a global supply chain cannot be a "venture" might be based on the assumption that members of a venture must be part of the same legal entity. This interpretation of the statute is implausible. Congress designed the TVPRA to combat criminal sex and labor traffickers. Trafficking rings rarely register as an LLC in Delaware, and it is unlikely that Congress intended to shield these groups from liability under § 1595 due to the informal nature of criminal organizations.

228 *See supra* text accompanying notes 189–95.

229 *See supra* text accompanying notes 189–95.

conduct sex trafficking activities.[230] But not all of these cases come out the same way, as only some plaintiffs were able to successfully "connect the dots" between their claim and the beneficiary defendant.[231] Rather than establishing an *a priori* rule, courts facing hotel sex trafficking claims have conducted a fact-specific, "case-by-case" inquiry. Over time, indicia are beginning to emerge of when a venture exists between a hotel and a sex trafficker.

Although it affirmed the district court's decision, the Court of Appeals for the D.C. Circuit in *Apple* left the door open to such a "case-by-case" inquiry. Unlike the district court, the court of appeals did not find that a global supply can never be a venture, but rather held that participation in a venture requires "*something more* than engaging in an ordinary buyer-seller transaction."[232] The court then turned to the sex trafficking case law to help identify situations in which courts have found "something more," and suggested this standard might be met in at least two situations. First, the court drew on *Ricchio*[233] to suggest that "something more" could come from "common purpose, shared profits and risk, or control" between the beneficiary defendants and direct perpetrators.[234] Second, a venture might exist if there was a "continuous business relationship," and a "desire to promote the wrongful venture's success."[235] Both of these indicia might help address prudential concerns by separating the reader on the subway from large MNCs with forced labor in their supply chains.

However, the D.C. Circuit erred by concluding that neither of the indicia applied to the facts of *Apple*. First, the court found that "the plaintiffs here have not alleged a factual basis to infer a common purpose, shared profits and risk, or control as in *Ricchio*."[236] In *Ricchio*, the indirect liability defendants (the motel operators) did not share in the direct perpetrator's illicit prostitution revenue. Rather, they had a common purpose and shared profits with the direct perpetrator because the perpetrator's use of the motel rooms for sex trafficking activities led to increased occupancy and profit for the motel.[237] Similarly, the tech defendants in *Apple* allegedly share in profit, and have a

230 *See* J.G. v. Northbrook Indus., 619 F. Supp. 3d 1228, 1235 (N.D. Ga. 2022) (summarizing cases where hotels faced § 1595 venture liability and those where liability was not established).

231 *Id*.

232 Doe I v. Apple Inc., 96 F.4th 403, 415 (D.C. Cir. 2024) (emphasis added).

233 *See supra* text accompanying note 131 (providing an overview of the facts of *Ricchio*).

234 *Apple*, 96 F.4th at 416.

235 *Id.* at 415 (quoting G.G. v. Salesforce.com, Inc., 76 F.4th 544, 559–60 (7th Cir. 2023)).

236 *Id.*

237 *See* Ricchio v. McLean, 853 F.3d 553, 556 (1st Cir. 2017) (finding a venture because the defendants "knowingly benefited" by receiving something of value "through renting space in which McLean obtained, among other things, forced sexual labor or services from Ricchio").

common purpose with the DRC mining companies. While they (like the beneficiary defendant in *Ricchio*) do not share in the illicit revenue generated by forced labor, they financially benefit from the mining companies' use of forced labor. Forced labor creates "shared profit," as the ability to produce cobalt at forced labor prices increases the profits of both the mining companies selling the cobalt and the tech companies buying it at forced labor prices.

Second, the tech companies certainly had a "continuous business relationship" with the DRC mines that allegedly supply their cobalt. The "continuous business relationship" language comes from *G.G. v. Salesforce.com*. In *Salesforce*, a survivor of child sex trafficking brought a TVPRA action against Salesforce, a Customer Relationship Management (CRM) company, for participating in a venture with Backpage.com.[238] Backpage.com was a classified advertisements[239] website that violated the TVPRA when it knowingly allowed G.G.'s traffickers to advertise G.G. on the site for prostitution.[240] The court found the plaintiff had sufficiently alleged Salesforce's participation in a venture with Backpage.com by demonstrating a "continuous business relationship" between the two companies.

The D.C. Circuit distinguished *Salesforce* from *Apple* on the grounds that Salesforce had "provided direct support, specific business advice, and productivity enhancing software to Backpage.com," while the tech companies had only "purchas[ed] a commodity" from the cobalt companies.[241] However, as the *Salesforce* court stated, "[t]o survive a motion to dismiss, all that is necessary is for a plaintiff to allege such a 'continuous business relationship,' which gives rise to an inference . . . that the civil defendant facilitated the venture's success."[242] The

238 *See* G.G. v. Salesforce.com, Inc., 76 F.4th 544, 548 (7th Cir. 2023). CRM is a "strategy that uses technology to manage and analyze customer interactions." Tom Nolte & Kara Credle, *What is CRM? The Complete Guide 2024*, MarketWatch (July 1, 2024), https://www.marketwatch.com/guides/business/what-is-crm [https://perma.cc/V7TM-YV4V]. However, "it's not just a piece of software" but rather a "comprehensive strategy that encompasses people, processes and technology." *Id.*

239 Classified advertisements websites allow users to post advertisements selling and soliciting goods and services. Readers may be more familiar with "Craigslist," a similar classified advertisements site.

240 Backpage.com violated 18 U.S.C. § 1591(a)(1)'s criminal prohibitions by "'knowingly . . . advertis[ing]' G.G., 'knowing, or . . . in reckless disregard of the fact . . . that [G.G. had] not attained the age of 18 years and [would] be caused to engage in a commercial sex act." *Salesforce*, 76 F.4th at 552. Backpage violated § 1592(a)(2) by "'knowingly . . . benefit[ing] . . . from participation in' the street-level trafficker's 'venture which [was] engaged in' acts that violated Section 1591(a)(1), 'knowing, or . . . in reckless disregard of the fact . . . that [G.G. had] not attained the age of 18 years and [would] be caused to engage in a commercial sex act.'" *Id.*

241 Doe I v. Apple Inc., 96 F.4th 403, 415–16 (D.C. Cir. 2024).

242 *Salesforce*, 76 F.4th at 560.

tech companies certainly had a continuous business relationship with the cobalt companies that supplied them with a critical input for their products.[243] Additionally, while Salesforce facilitated Backpage.com's success with technological and advisory services, the *Apple* defendants facilitated the cobalt companies' success by purchasing large amounts of cobalt. In both cases, the beneficiary defendant profited from the TVPRA violation, and supported the venture's success by helping the direct perpetrator grow their revenue.

The D.C. Circuit Court of Appeals erred when it concluded that the *Apple* defendants did not meet the "participation in the venture" standard. However, its general approach—a case-by-case inquiry that draws on the TVPRA case law for indicia of participation in a venture—is promising. This type of fact-specific inquiry may help address prudential concerns surrounding TVPRA liability for members of long and complex supply chains. Through this approach, advocates may be able to steer courts away from the *Apple* district court's conclusion that a global supply chain is never a venture,[244] preserving the TVPRA's utility for future forced labor supply chain plaintiffs.

2. Scienter Requirement

The Ninth Circuit's *Ratha* decision provides the most authoritative statement on the TVPRA's scienter requirement for international supply chain cases. The court correctly held that § 1595's "should have known" clause establishes a negligence standard.[245]

However, the court wrongly interpreted the standard of care by finding that the beneficiary defendants were not negligent. Contrary to *Ratha*, a corporation is negligent when it does not conduct adequate supply chain diligence, despite red flags that suggest forced labor is taking place among its suppliers. Section 1595 cases have found that hotels were negligent when they failed to mitigate sex trafficking risks when they knew that sex trafficking was generally occurring in their hotels.[246]

To be sure, there is an important difference between a hotel being aware of sex trafficking occurring in its own hotels, and a buyer being

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[243] *See Apple*, 96 F.4th at 406 (noting that the tech defendants buy cobalt from at least three firms that obtain cobalt from the DRC).

[244] *See supra* text accompanying note 223.

[245] *See* Ratha v. Phatthana Seafood Co., 35 F.4th 1159, 1177 (9th Cir. 2022) ("The phrase 'knew or should have known' usually connotes negligence." (quoting Mayview Corp. v. Rodstein, 620 F.2d 1347, 1358 (9th Cir. 1980))).

[246] *See* M.A. v. Wyndham Hotels & Resorts, Inc., 425 F. Supp. 3d 959, 968 (S.D. Ohio 2019) ("Defendants were on notice about the prevalence of sex trafficking generally at their hotels and failed to take adequate steps to train staff in order to prevent its occurrence.").

aware that labor trafficking and forced labor are common in a particular area or industry. However, there are also important similarities. In both cases a pattern of criminal activity should put a corporate actor on alert that they may be engaged in commerce with the criminals, and that, absent mitigation measures, the business will benefit financially from criminal trafficking or forced labor.

This conclusion is also supported by multiple international instruments. The U.N.'s Guiding Principles on Business and Human Rights stress the importance of businesses conducting human rights due diligence, especially when "operating contexts pose significant risk to human rights."[247] Similarly, the International Labor Organization's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration) states that "enterprises . . . should carry out due diligence to identify, prevent, mitigate and account for how they address . . . internationally recognized human rights."[248] At the country level, supply chain mapping is required under France's human rights due diligence law, and is a functional prerequisite for risk assessments mandated by the U.K., Australia, Germany, and the Netherlands.[249] Whether other countries' laws or international instruments create enforceable legal obligations in U.S. courts is beyond the scope of this paper.[250] Rather, here they help to clarify the standard of care, and suggest that companies fall below that standard when they fail to conduct adequate diligence on sectors with high forced labor and trafficking risks.

U.S. law also suggests that corporations are negligent when they fail to conduct appropriate due diligence under the aforementioned circumstances. Other sections of the U.S. Code clearly proscribe

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247 U.N. Off. of the High Comm'r, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, at 7, U.N. Doc. HR/PUB/11/04 (2011).

248 Int'l Lab. Org. [ILO], Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, at 10 (2022).

249 Jay Holtmeier et al., *Regulation of Forced Labor in Supply Chains: Why it Matters and How Companies Can Comply*, WilmerHale: Client Update 21–22 (June 13, 2022), https://www.wilmerhale.com/insights/client-alerts/20220613-regulation-of-forced-labor-in-supply-chains-why-it-matters-and-how-companies-can-comply [https://perma.cc/D48C-BLFL].

250 For example, the U.N. Guiding Principles on Business and Human Rights are expressly non-binding, meaning they do not create international legal obligations on states. *See Justice Delayed: 10 Years of UN Guiding Principles*, Eur. Coal. for Corp. Just. (Jun. 16, 2021), https://corporatejustice.org/news/justice-delayed-10-years-of-un-guiding-principles [https://perma.cc/V635-8ZN6] ("[T]he framework's non-binding nature explains its poor track record in terms of implementation."). Even for internationally binding treaties, their enforceability in U.S. courts is a complicated legal question. For an overview of the evolution of U.S. law on international treaties, see generally Oona A. Hathaway, Sabria McElroy & Sara Aronchick Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 Yale J. Int'l L. 51 (2012).

importing goods produced by forced labor. Section 1307 of the Tariff Act of 1930 forbids importing "goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by . . . forced labor."[251] The fact that importing goods produced by forced labor clearly violates U.S. law suggests that a company is negligent when it fails to make reasonable efforts to avoid purchasing from suppliers using forced labor.

Finally, the TVPRA's purpose—combatting global trafficking and forced labor—demonstrates that the law establishes a duty to conduct due diligence in circumstances like the facts of *Ratha*. The Ninth Circuit's interpretation of § 1595's scienter requirement significantly reduces incentives for U.S. corporations to screen their international business partners for forced labor. Because companies are liable if they have actual knowledge of the forced labor under § 1595, the lack of duty to conduct due diligence in *Ratha* actually incentivizes companies to ask as few questions as possible: If they do discover forced labor, then they have met the statute's scienter requirement, but if they stick their heads in the sand, they avoid liability.

While a U.S. company still faces market pressures from consumers to avoid tainting their products with forced labor, the *Ratha* court's decision dramatically weakens the incentive effects of these consumer preferences. If companies choose to perform an audit, they are not negligent for conducting the audit so poorly—as was the case with the six-question audit of the Songkhla factory—that they are unlikely to uncover any forced labor. Therefore, if *Ratha*'s analysis is correct, a corporation is incentivized to perform only perfunctory due diligence where they ask enough questions to placate consumers, but not enough to reveal forced labor, as this discovery would constitute actual knowledge and potentially establish liability. Such a standard would contradict the statute's purpose of combatting trafficking and forced labor.

3. Extraterritoriality Requirement

Part II discussed the *Apple* court's narrow TVPRA interpretation and conclusion that plaintiffs' claims failed both steps of the *RJR Nabisco* test. I now argue that the *Apple* court's analysis was incorrect. The plaintiffs should have succeeded under step one because the statute's plain text and context reveal Congressional intent to rebut the presumption against extraterritoriality. Even if the plaintiffs failed at step one, they should still have prevailed under step two because the conduct relevant to the statute's focus occurred in the U.S.

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[251] 19 U.S.C. § 1307.

The TVPRA's private right of action succeeds under the first step of the *RJR Nabisco* test because there is a clear indication of Congressional intent to rebut the presumption against extraterritoriality. Like the statute examined in *RJR Nabisco*, § 1595 incorporates extraterritorial "predicate offenses." In *RJR Nabisco*, the Supreme Court evaluated whether § 1962 of the Racketeer Influenced and Corrupt Organizations Act ("RICO") applied extraterritorially. Inter-alia, § 1962 prohibits using "pattern[s] of racketeering activity" to influence or operate an enterprise.[252] The "'most obvious textual clue' that § 1962 applied extraterritorially was that RICO defined 'racketeering activity' to include 'a number of predicates that plainly apply to at least some foreign conduct.'"[253] Therefore, the Court found clear Congressional intent for § 1962 to apply extraterritorially, at least to the extent that the underlying RICO predicate offenses applied extraterritorially.[254] Like RICO, the TVPRA's private right of action incorporates extraterritorial "predicate offenses," such as the extraterritorial prohibition on forced labor provided by §§ 1589 and 1596. Therefore, the reasoning of *RJR Nabisco* suggests that § 1595 overcomes the presumption against extraterritoriality.

Absent an express statement, courts can infer that Congress intended for a law to apply extraterritorially from the statute's context.[255] The TVPRA's context strongly reinforces the conclusion that Congress contemplated civil suits for extraterritorial conduct. As is argued extensively in Section III.A, Congress intended the TVPRA to be a robust and internationally-focused response to the global problem of human trafficking and forced labor.[256] Limiting the extraterritorial reach of the TVPRA's private right of action would leave survivors of international trafficking rings without a civil remedy. This result is incongruous with the statute's "purpose" of addressing the problem of human trafficking that continues "throughout the world."[257]

Even if § 1595 fails the *RJR Nabisco* framework's first step, the second step allows a claim to proceed when "the conduct relevant to the statute's focus occurred in the United States."[258] The plaintiffs in

252 *See* RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 340 (2016).

253 Roe v. Howard, 917 F.3d 229, 241 (4th Cir. 2019) (quoting *RJR Nabisco*, 579 U.S. at 338).

254 *RJR Nabisco*, 579 U.S. at 339.

255 *See id.* at 340 ("While the presumption can be overcome only by a clear indication of extraterritorial effect, an express statement of extraterritoriality is not essential. 'Assuredly context can be consulted as well.'" (quoting Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 265, (2010))).

256 *See supra* Section III.A.

257 *Roe*, 917 F.3d at 242 (codified at 22 U.S.C. § 7101(a)).

258 *RJR Nabisco*, 579 U.S. at 337.

Apple argued that the focus of § 1595 is the receipt of benefits from participation in a venture that employs forced labor. However, the court found that § 1595 focused on the underlying conduct subjecting the plaintiff to forced labor, rather than to the receipt of benefits from the venture employing forced labor. Because this conduct took place extraterritorially, the plaintiffs suit could not proceed.

The *Apple* court's conclusion was incorrect. As the Supreme Court noted in *Nestlé*, Congress's "current approach to private remedies" under the TVPRA distinguishes "between direct and indirect liability."[259] Congress settled on this approach after "'its understanding of the problem evolved' through years of studying 'how to best craft a response.'"[260] Including beneficiary liability in the statutory scheme demonstrates that Congress intended the statute to focus on those who benefit from trafficking and forced labor, in addition to the traffickers and individuals directly compelling forced labor. A beneficiary defendant is liable precisely because they have received a benefit from their participation in a venture with the direct perpetrator. These actions, and not the underlying criminal violation, are the conduct relevant to the statute's focus. When they take place within the U.S. (e.g., because an MNC has U.S. operations), the conduct relevant to the statute's focus occurs domestically, and the TVPRA claim may proceed.

Comparing TVPRA beneficiary liability to *RJR Nabisco* itself again supports the conclusion that the TVPRA's focus is the receipt of the benefit, rather than the underlying criminal violations as the *Apple* court concluded. In *RJR Nabisco*, the Supreme Court evaluated whether RICO's private right of action under § 1964(c) applied to extraterritorial conduct. Section 1964(c) allows "'[a]ny person injured in his business or property by reason of a violation of section 1962' to sue for treble damages, costs, and attorney's fees."[261] In step one of the analysis, the court found that § 1964 (the private right of action) did not expressly rebut the presumption of extraterritoriality. The court then proceeded with step two to determine whether the conduct relevant to the statute's focus occurred domestically. Crucially, the court determined that the § 1964(c)'s focus was the "injury to business or property" caused by the § 1962 violation.[262] Therefore, even if the underlying criminal activity causing the injury had occurred overseas, a plaintiff could still bring

259 Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1940 (2021).

260 *Id.*

261 *RJR Nabisco*, 579 U.S. at 346 (citation omitted).

262 *See id.* at 354 ("Section 1964(c) requires a civil RICO plaintiff to allege and prove a domestic injury to business or property and does not allow recovery for foreign injuries.").

a § 1964 civil claim if there had been "domestic injury to business or property."[263]

Analogizing to the TVPRA, a private right of action exists when one of the statute's criminal provisions is violated. However, the focus of the private right of action, and indeed the very thing that gives rise to the cause of action, is the beneficiary defendant's receipt of a benefit and participation in a venture using forced labor. When this conduct occurs domestically, the plaintiff's claim may proceed under step two of the *RJR Nabisco* framework.

Therefore, international supply chain plaintiffs should succeed at both steps of the *RJR Nabisco* test. Plaintiffs may bring TVPRA claims against companies that benefit from their forced labor, even if the forced labor occurred abroad as part of an international supply chain.

Conclusion

This Note has three main takeaways. First, why should we care about the TVPRA? We, as Global North consumers, share responsibility for forced labor around the world by fueling demand for goods at forced labor prices. Civil liability could help incentivize companies to eliminate forced labor from their supply chains and secure justice and compensation for survivors of forced labor. But restrictive rulings on other causes of action—such as the ATS—have left the TVPRA as one of the last and best hopes for international supply chain cases.

Second, why have recent international supply chains failed to meet the literature's high hopes for TVPRA beneficiary liability? Courts have interpreted the statute's actus reus and scienter requirements more narrowly in international supply chain cases than in purely domestic ones. They have also begun to question whether the statute overcomes either step of the *RJR Nabisco* test.

Third, have these cases been correctly decided? This Note argued they have not. Congress intended the TVPRA to establish broad civil liability and reach extraterritorial conduct. Against this backdrop, courts should conclude that an international supply chain can meet the participation in the venture requirement in certain circumstances. Companies also fall below the TVPRA's standard of care when they purchase goods from high-risk sectors and fail to conduct adequate due diligence on their suppliers. Finally, TVPRA beneficiary liability claims should overcome the presumption against extraterritoriality at step one of the *RJR Nabisco* test. Even if they do not, the conduct relevant to

263 *Id.*

the statute's focus (receipt of the benefit and participation in a venture) will frequently occur domestically at step two, allowing plaintiffs to establish liability for forced labor perpetrated abroad.

This Note does not explore every aspect of the TVPRA's application to forced labor in international supply chains. Important questions remain over personal jurisdiction and Article III standing, and should be the subject of future research.