

# NOTES

## Human Trafficking in Multinational Supply Chains: A Corporate Director's Fiduciary Duty to Monitor and Eliminate Human Trafficking Violations

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## INTRODUCTION

Corporate directors cannot afford to remain ignorant of human trafficking violations in corporate supply chains.<sup>1</sup> Corporations in the United States that benefit from supply-chain trafficking have been able to escape liability when the trafficking occurs in the labor force of their suppliers instead of the labor force of the corporation itself.<sup>2</sup> However, the 2008 reauthorization of the Trafficking Victims Protection Act specifically targets this behavior under its criminal and civil provisions regarding financial benefit from labor trafficking.<sup>3</sup> Corporations with trafficking violations in their supply chains risk criminal prosecution and civil suits filed by foreign and domestic victims, and the directors of such corporations risk shareholder derivative suits for failure to perform fiduciary duties.

Corporations discussed in this Note are United States-based corporations whose supply chains include foreign suppliers, manufacturers, distributors, security forces, subsidiaries, and other parties (collectively, “suppliers”). These suppliers are separate legal entities but may be crucial to the business operations of the corporations. This Note analyzes the legal obligations under the Trafficking Victims Protection Act of these multinational corporations

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1. *Corporate Liability and Human Trafficking*, HUMAN RIGHTS FIRST 1 (Dec. 2015), <http://www.humanrightsfirst.org/sites/default/files/HRFCorporateLiabilityTraffickingreport.pdf> [perma.cc/CX88-MD4A] (“Civil society and victims’ rights groups are [ ] finding new ways to hold accountable not only the perpetrators, but the beneficiaries of [forced labor], increasingly targeting supply chains . . .”).

2. See Naomi Jiyoung Bang, *Unmasking the Charade of the Global Supply Contract: A Novel Theory of Corporate Liability in Human Trafficking and Forced Labor Cases*, 35 HOUS. J. INT’L L. 255, 257–58 (2013) (explaining that corporations have not been held accountable for supply-chain trafficking).

3. The TVPRA has had four separate reauthorizations since it was passed—in 2003, 2005, 2008, and 2013. *Current Federal Laws*, POLARIS PROJECT, <http://www.polarisproject.org/current-federal-laws> (last visited Jan. 24, 2016) [perma.cc/R3AY-3A74].

and their directors when there is labor trafficking in the workforce of the supplier but not the corporation.<sup>4</sup>

Prior to initial passage of the Trafficking Victims Protection Act in 2000, no domestic legal regime was well suited to criminalize and create liability for labor trafficking occurring abroad or to hold multinational corporations accountable if they benefitted from, but did not directly commit, human rights violations.<sup>5</sup> This status quo fails because corporations that benefit from human trafficking violations lack financial incentives to monitor their supply chains to avoid this wrongful benefit. In 2000, the Trafficking Victims Protection Act became the first law to fill the legislative gap and attempt to comprehensively address human trafficking.<sup>6</sup> The Trafficking Victims Protection Act of 2000 and its four subsequent reauthorizations (“TVPRA”) criminalize a broader range of trafficking-related activities than other existing laws.<sup>7</sup>

Congress intended the TVPRA to fill the gaps left by previous laws to more effectively deter and punish traffickers for their crimes both domestically and abroad.<sup>8</sup> In 2003, legislators added a civil cause

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4. See generally SURYA DEVA, REGULATING CORPORATE HUMAN RIGHTS VIOLATIONS: HUMANIZING BUSINESS 21 (2012) (describing a multinational corporation as one that “operate[s] in more than one country, including by owning, managing[,] or controlling other corporations as well as acting, in part, through suppliers and contractors”). This Note will not address whether a U.S. corporation and its directors should be held morally responsible to foreign plaintiffs for trafficking violations under notions of corporate social responsibility, but rather whether a U.S. corporation and its directors are legally responsible to foreign trafficking victims and domestic shareholders when an entity in its supply chain commits trafficking violations. For a discussion of U.S. laws in addition to the TVPRA that could apply to corporate supply chains, see *Corporate Liability and Human Trafficking*, *supra* note 1, at 2–18.

5. See Bang, *supra* note 2, at 257–58 (noting corporations’ ability to avoid accountability for trafficking); Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN’S L.J. 4 (2004) (explaining the problem of applying other laws to trafficking offenses).

6. H.R. Rep. 106-939, at 5 (2000) (Conf. Rep.). In 2000, President Bill Clinton said that the Victims of Trafficking and Violence Prevention Act of 2000 “creates a new ‘forced labor’ felony criminal offense that will provide Federal prosecutors with the tools needed to prosecute the sophisticated forms of nonphysical coercion that traffickers use today to exploit their victims.” President William J. Clinton, Statement by the President on HR 3244 (Oct. 30, 2000), 2000 WL 1617225.

7. H.R. Rep. 106-939, at 1 (2000) (Conf. Rep.); *Current Federal Laws*, *supra* note 3.

8. H.R. Rep. 106-939, at 5 (2000) (Conf. Rep.):

Existing legislation and law enforcement in the United States and other countries are inadequate to deter trafficking and bring traffickers to justice, failing to reflect the gravity of the offenses involved. No comprehensive law exists in the United States that penalizes the range of offenses involved in the trafficking scheme. Instead, even the most brutal instances of trafficking in the sex industry are often punished under laws that also apply to lesser offenses, so that traffickers typically escape deserved punishment.

of action to the Trafficking Victims Protection Act.<sup>9</sup> In the 2008 reauthorization (“2008 TVPRA”), they expanded the language of the Act to include criminal and civil penalties for any person who “knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services” by means of force, threats, or abuse when the party knew or recklessly disregarded how the labor was obtained.<sup>10</sup> The 2008 TVPRA also expanded courts’ jurisdiction over violations of the Act.<sup>11</sup>

Since the 2008 TVPRA, a corporation can be held directly liable for financial benefit accrued from business associations where the corporation knew or was in reckless disregard of the fact that the other party employed<sup>12</sup> trafficked labor.<sup>13</sup> The TVPRA applies to corporations that financially benefit from trafficked labor even if the labor-trafficking violation occurred abroad or was perpetrated in the supply chain of the corporation by a separate legal entity.<sup>14</sup>

Due to the applicability of the TVPRA to corporations, corporate directors should now implement systems to oversee and monitor corporate supply chains to eliminate and prevent trafficking violations.<sup>15</sup> Where corporate directors fail to minimize the risk of suit and potential reputational harm stemming from trafficking violations by not having strong information systems in place, shareholders may file derivative suits for breach of the directors’ fiduciary duties.<sup>16</sup>

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9. 18 U.S.C. § 1595 (2012); Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 2009 U. CHI. LEGAL F. 247, 280 (2009); Kim & Hreshchyshyn, *supra* note 5, at 1, 3, 16 (2004) (“Using civil litigation as a strategy for compensating victims of trafficking is emerging as a powerful tool in the United States for addressing the growing problem of modern-day slavery, both at national and at global levels.”); *Current Federal Laws*, *supra* note 3.

10. 18 U.S.C. §§ 1589, 1595 (2012); *Polaris Project—Trafficking Victims’ Protection Act (TVPRA)—Fact Sheet*, POLARIS PROJECT (2008), [http://www.rescue.org/sites/default/files/resource-file/trafficking%20victims%20protection%20act%20fact%20sheet\\_0.pdf](http://www.rescue.org/sites/default/files/resource-file/trafficking%20victims%20protection%20act%20fact%20sheet_0.pdf) [perma.cc/W2TM-69L8].

11. *Polaris Project—Trafficking Victims’ Protection Act (TVPRA)—Fact Sheet*, *supra* note 10.

12. The word “employ” is used here because it connotes an understanding of a labor relationship. Important to note, however, is that this use of “employ,” and any additional use of the word throughout this Note, does not necessarily describe a relationship where the employee is being paid, as the employee may continue to work out of fear without regular wages.

13. 18 U.S.C. § 1589 (2012).

14. 18 U.S.C. §§ 1589, 1595–96 (2012).

15. See generally *Corporate Liability and Human Trafficking*, *supra* note 1, at 1–2 (explaining that potential corporate liability for supply-chain trafficking should result in “companies [that are] engaged in businesses where trafficking is known to occur [being] vigilant in investigating their suppliers, rooting out the problem at its source, and establishing solid prevention policies and practices”); *infra* Part IV.

16. *Infra* Section IV.B.ii.

The financial benefit provision of the 2008 TVPRA alters the corporate status quo. Corporate directors must be aware that human rights activists can rely on the TVPRA for litigation striving for corporate accountability.<sup>17</sup> The financial benefit provision creates liability for corporate actions that were once immune from judgment.<sup>18</sup> To avoid criminal and civil liability, corporations must alter existing business practices to diminish incentives for suppliers to rely on trafficked labor.<sup>19</sup> Directors should be aware of the circumstances and factors that indicate use of trafficked labor in order to make decisions in good faith and avoid liability for failure to fulfill fiduciary duties.<sup>20</sup> Financial loss due to litigation under the TVPRA or reputational damage from publicized trafficking violations provides a basis for shareholder derivative suits enforcing a director's fiduciary duty when a corporation fails to have systems in place to monitor corporate activity.<sup>21</sup>

This Note analyzes corporate responsibility to monitor human trafficking violations in the supply chain springing from legal and fiduciary obligations under the TVPRA. It proposes that corporate directors' fiduciary duty to make informed decisions in good faith encompasses an obligation to affirmatively monitor the corporate supply chain for indications of trafficked labor.<sup>22</sup> Part I discusses human trafficking and its role in global supply chains of multinational corporations. This Part also describes a corporate director's fiduciary duty with regard to human rights violations. Part II considers the use of litigation as a tool of corporate accountability and discusses why current laws other than the TVPRA have not created the same litigation risks to corporations for supply-chain trafficking violations. Part III introduces the TVPRA and discusses the criminal and civil liability provisions for financial benefit from human trafficking. Part IV

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17. See Martina E. Vandenberg, *Ending Impunity, Securing Justice*, THE HUMAN TRAFFICKING PRO BONO LEGAL CENTER AND THE FREEDOM FUND 13 (2015), [http://www.htprobono.org/wp-content/uploads/2015/12/FF\\_SL\\_AW02\\_WEB.pdf](http://www.htprobono.org/wp-content/uploads/2015/12/FF_SL_AW02_WEB.pdf) [<http://perma.cc/35UY-GBT9>] (encouraging strategic litigation to combat trafficking violations and mentioning the TVPRA as a necessity for civil anti-trafficking litigation in the United States).

18. *Infra* Part IV.

19. See generally *Corporate Liability and Human Trafficking*, *supra* note 1, at 2–18 (discussing various laws that could be applied to render corporations liable for trafficking violations).

20. See *In re Caremark Int'l*, 698 A.2d 959, 970 (Del. Ch. 1996) (explaining that a director's duty requires an adequate "information and reporting system"); *Corporate Liability and Human Trafficking*, *supra* note 1, at 18 (mentioning a potential director duty to monitor for human trafficking but failing to explain how they work in practice).

21. *Caremark*, 698 A.2d at 970 (describing a duty to have adequate reporting systems in place).

22. See *Corporate Liability and Human Trafficking*, *supra* note 1, at 18 (suggesting directors may have a duty to monitor for human trafficking).

discusses a plaintiff's ability to apply the financial benefit provisions to human trafficking violations in global corporate supply chains. This Part also addresses how the TVPRA may be used as a basis for a shareholder derivative suit against directors where a corporation fails to monitor its labor and the labor of its suppliers for the presence of human trafficking. Directors' failure to actively monitor corporate supply chains could be considered bad faith and reckless disregard of trafficking, and such a risk of corporate liability may violate those directors' fiduciary duties to shareholders. Finally, this Part recommends clear steps a corporate director may take to avoid liability for corporate violations of the TVPRA and failure of his or her own fiduciary duty.

### I. HUMAN TRAFFICKING<sup>23</sup>

Consumers, business officers, and politicians are growing more aware of corporate human rights violations and, in particular, trafficking violations in global supply chains.<sup>24</sup> In 2015, the U.S.

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23. Academic interest in human trafficking is an emerging issue, and thus there remains variance in the language used to describe this crime. For this Note, the term "labor trafficking" and "trafficked labor" will be used to describe labor trafficking as defined in 22 U.S.C. § 7102(9)(B) (2012) as "the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery." Note that under this definition, transportation may be an element of human trafficking, but it is not a required element. U.S. DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 7 (2015), <http://www.state.gov/documents/organization/245365.pdf> [hereinafter TIP Report 2015]. Cf. *Aguirre v. Best Care Agency, Inc.*, 961 F. Supp. 2d 427, 459 (E.D.N.Y. 2013) ("Violations of the TVPRA are often referred to as 'human trafficking.'").

24. Vandenberg, *supra* note 17, at 2 ("Around the world, investigative reporters regularly unearth stories of human trafficking and modern-day slavery. Human rights organizations document forced labor abuses in report after report. These stories dominate headlines and inspire editorials."). Reliable statistics analyzing the prevalence and gravity of human trafficking are hard to find due to its illegal and therefore hidden nature, inconsistent definitions, and lack of victims' testimony. *E.g.*, STEPHANIE A. LIMONCELLI, THE POLITICS OF TRAFFICKING 14 (2010); Jennifer S. Nam, Note, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 COLUM. L. REV. 1655, 1657 (2007); Elizabeth M. Wheaton, Edward J. Schauer & Thomas V. Galli, *Economics of Human Trafficking*, 48 INT'L MIGRATION 114, 118 (2010); *Profits and Poverty*, INT'L LABOUR OFFICE 3 (2014), [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_243391.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_243391.pdf) [<http://perma.cc/24B3-DSTJ>] [hereinafter *Profits and Poverty*]. The International Labour Organization (ILO) has stated 21 million people are trafficked today, while End Slavery Now estimates about 28 million people are trafficked. *Profits and Poverty, supra*, at 1 (this number includes people "in forced labour, trafficked, held in debt bondage, or work in slave-like conditions"); *Slavery Today*, END SLAVERY NOW, <http://endslaverynow.org/learn/slavery-today> [<http://perma.cc/VRP7-L3TR>] (this number refers to people in "some kind of slavery"); see also INT'L LABOUR OFFICE, A GLOBAL ALLIANCE AGAINST FORCED LABOUR, GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK 2005 1 (2005), [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/)

Department of State highlighted human trafficking in global supply chains in its annual Trafficking in Persons Report.<sup>25</sup> In 2012, the International Labour Office estimated that traffickers held about 10.7 million people in non-domestic labor trafficking, producing an average of \$4,000 profit per individual each year.<sup>26</sup>

Labor trafficking occurs both in the United States and abroad.<sup>27</sup> Consider the case of an Indian citizen, recruited to work in the United States with promises of a green card and permanent residency, “and forced . . . to pay inbound travel expenses, visa expenses, and other recruiting expenses.”<sup>28</sup> He is lured to the job with “false promises and representations,” but upon arrival in the United States he is confronted with “deplorable conditions,” faces high debts he must repay, and is forced to continue working despite being “discriminated against.”<sup>29</sup> Furthermore, he is fearful of bringing legal action due to his employer’s threats, and he fears leaving because he believes that staying with the employer is the only way to keep his proper immigration status.<sup>30</sup> Several individuals brought a claim, decided by a jury in 2015, under the TVPRA’s forced labor provision for just these alleged conditions.<sup>31</sup> As long as the profit to traffickers from using fear or fraud to subject workers to harmful conditions is greater than the cost to traffickers of legal penalties, stories such as this one will continue to exist.<sup>32</sup>

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publication/wcms\_081882.pdf [http://perma.cc/R7CV-WHZ8] (“Forced labour is present in some form on all continents, in almost all countries, and in every kind of economy.”).

25. TIP Report 2015, *supra* note 23, at 13–34:

Long and complex supply chains that cross multiple borders and rely on an array of subcontractors impede traceability and make it challenging to verify that the goods and services bought and sold every day are untouched by modern-day slaves . . . . Governments, the private sector, and individuals can all make a difference when it comes to addressing human trafficking in supply chains.

26. *Profits and Poverty*, *supra* note 24, at 21. *But see supra* note 24 (discussing the reliability of trafficking statistics).

27. *See* TIP Report 2015, *supra* note 23, at 352 (“The United States is a source, transit, and destination country for . . . forced labor.”); *supra* note 24.

28. *David v. Signal Int’l*, 37 F. Supp. 3d 822, 824–25, 832 (E.D. La. 2014).

29. *Id.* at 825, 832.

30. *Id.* at 832.

31. *Id.* at 825, 831–33; Kathy Finn, *Indian Workers Win \$14 Million in U.S. Labor Trafficking Case*, REUTERS (Feb. 18, 2015), <http://www.reuters.com/article/2015/02/19/us-usa-louisiana-trafficking-idUSKBN0LN03820150219#UkpCFxtEzLtlBoDJ.97> [perma.cc/HX3J-FXTG].

32. GARY A. HAUGEN & VICTOR BOUTROS, *THE LOCUST EFFECT: WHY THE END OF POVERTY REQUIRES THE END OF VIOLENCE* 67–68 (2014) (“[F]orced labor is a category of violence that is driven *entirely* by money and the willingness to put violence to work as an economic enterprise.”); Wheaton, et al., *supra* note 24, at 118–19.

*A. Human Trafficking Defined*

Labor trafficking, or “forced labor,” describes the practice of using fear, coercion, or deceit to force an individual to work in return for a bare level of survival, allowing the perpetrator of the violence, lies, or schemes to profit.<sup>33</sup> Labor trafficking not only describes poor working conditions or insufficient pay, but also involves a situation where—despite a desire to leave—a worker cannot escape.<sup>34</sup> Due to the vulnerability of individuals as a result of poverty and lack of police protection, “low-income countries tend to have the highest levels of slavery.”<sup>35</sup> In developing countries, vulnerable populations, which include victims of trafficking, are not protected by law enforcement, and therefore perpetrators of trafficking have practical immunity under their own nations’ laws.<sup>36</sup>

The most prevalent form of labor trafficking today is bonded labor, where a trafficker exploits a victim’s ignorance about debt.<sup>37</sup> For example, an employer may offer a loan upfront to encourage an individual to take a deceptively appealing job, but the worker is then compelled to work until the loan is repaid.<sup>38</sup> While attempting to repay the loan, the worker likely has no control over wages, the wages will never be sufficient for the loan to be repaid, and the individual is forcibly and violently prevented from leaving.<sup>39</sup> In *The Locust Effect*, the authors give a vivid description of the use of violence and fear to prevent an individual from escaping bonded labor, saying:

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33. HAUGEN & BOUTROS, *supra* note 32, at 67–68; Wheaton, et al., *supra* note 24, at 117 (“[P]rofit is the driving motive for human trafficking.”) (footnote omitted); *Profits and Poverty*, *supra* note 24, at 20.

34. *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 991, 1014 (S.D. Ind. 2007); *Muchira v. Al-Rawaf*, No. 1:14-cv-770, 2015 U.S. Dist. LEXIS 49806, at \*30–31 (E.D. Va. Apr. 15, 2015):

No matter how unpleasant the work, or the conditions under which services are provided, the critical inquiry for the purposes of the TVPA is whether a person provides those services free from a defendant’s physical or psychological coercion that as a practical matter eliminates the ability to exercise free will or choice.

35. HAUGEN & BOUTROS, *supra* note 32, at 69 (footnote omitted); *see also* SIDDHARTH KARA, *BONDED LABOR* 6 (2012) (“Perhaps the most important feature shared by bonded laborers in South Asia is extreme poverty.”).

36. HAUGEN & BOUTROS, *supra* note 32, at xiii–xv (“[B]asic law enforcement systems in the developing world are so broken that global studies now confirm that most poor people live outside the protection of law.”); *id.* at 73–74 (“[A]ll of this grotesque violence in the bonded labor system is illegal and only possible because it is legitimized by the complicity of local authorities.”); Wheaton, et al., *supra* note 24, at 117.

37. HAUGEN & BOUTROS, *supra* note 32, at 70–71; KARA, *supra* note 35, at 3–4.

38. HAUGEN & BOUTROS, *supra* note 32, at 70–72.

39. *Id.*

“[T]he murders are shocking: Madur, a 12-year-old boy held as a bonded laborer in the Mohan Reddy Brick Factory, says he watched while the overseers tied his dad to a post in the middle of the brick yard and beat him to death because Madur had run away from the facility.”<sup>40</sup>

In other situations, a worker may be required to pay large recruitment or transportation fees, and the employer will charge such a high interest rate that it is not feasible for the employee to ever escape the high debt.<sup>41</sup> Alternatively, a trafficker may provide a worker and his family with housing and food while demanding they work for little or no pay and forcing them to stay using violence.<sup>42</sup> Traffickers may also steal a worker’s passport or other legal documents, which prevents the individual from leaving.<sup>43</sup>

### *B. Corporate Benefit from Human Trafficking*

Multinational corporations financially benefit from trafficked laborers working in their supply chains by obtaining cheaper goods due to low labor costs, since labor from trafficked workers is cheaper than from paid employees.<sup>44</sup> Economically, trafficking is only profitable while the profits exceed the costs, which may include “housing, clothing, and feeding workers” and “physical, psychological, and criminal costs.”<sup>45</sup> In some circumstances, corporations at the end of the supply chain may avoid the actual costs of providing for the workers, but they can still profit from obtaining cheaper goods.<sup>46</sup>

Labor trafficking creates estimated profits of \$43.40 billion annually worldwide.<sup>47</sup> To put these profits in perspective, if labor trafficking were a corporation, it would have the highest profits of all the Fortune 500 companies—edging out the next most profitable

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40. *Id.* at 71.

41. *Profits and Poverty*, *supra* note 24, at 20.

42. TIP Report 2015, *supra* note 23, at 15 (describing reasons workers cannot leave these jobs); *id.*

43. *See* TIP Report 2015, *supra* note 23, at 15–18 (describing labor recruitment practices).

44. *See, e.g.,* Bang, *supra* note 2, at 262–63, 268; Wheaton, et al., *supra* note 24, at 128 (“Employers may seek trafficked individuals as a cheaper labor source . . .”).

45. Wheaton, et al., *supra* note 24, at 124, 128–30.

46. *Id.* at 129–30:

At a low level, employers use trafficked labour for production in sweatshops, agriculture, and domestic labour. On the next level, producers subcontract jobs out to lower cost producers. A third level includes the intermediaries who obtain the goods from producers to supply to larger corporations. At the top, international corporations demand the lowest priced goods for resale to consumers and to increase shareholder dividends.

47. *Profits and Poverty*, *supra* note 24, at 13.

company by \$3.89 billion.<sup>48</sup> Moreover, for multinational corporations using foreign labor sources, harms to individuals and society from the trafficking violations are geographically separated from any positive well-being produced by the corporation in its home country.<sup>49</sup>

### C. Corporate Incentives to Regulate Human Trafficking

Prior to the initial passage of the TVPRA in 2000, no law specifically targeted human trafficking violations.<sup>50</sup> Corporations have acted with legal impunity for supply-chain trafficking violations due to a scarcity of cases being brought under the TVPRA and an ability to avoid liability for actions of corporate affiliates under other legal regimes.<sup>51</sup> In 2014 there were only 216 criminal convictions based on labor trafficking worldwide—a stark number compared to estimates of over twenty million people in various forms of human trafficking globally.<sup>52</sup> Weak penalties for trafficking violations in the United States prior to passage of the TVPRA in 2000, coupled with a desire for low labor costs and cheap goods, have provided little or no incentive for a corporation to be concerned with legal compliance.<sup>53</sup> High pressure to cut costs and raise profits encourages corporations to be lax in

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48. *Fortune 500*, FORTUNE, <http://fortune.com/fortune500/> [<http://perma.cc/4JMC-KJY7>] (last visited Feb. 25, 2016) (filtering by “profits”). The current leader of the Fortune 500 in terms of profit is Apple, with \$39,510 billion per year. *Id.*

49. See Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 750 (2002) (“[T]ransnational corporations with headquarters in one country have engaged in activities that are alleged to have had serious, negative implications for people or the environment in another country . . . .”); David Nersessian, *Business Lawyers as Worldwide Moral Gatekeepers? Legal Ethics and Human Rights in Global Corporate Practice*, 28 GEO. J. LEGAL ETHICS 1135, 1184 (2015) (“[I]n global commerce, there is real potential for both geographic and analytic remoteness from the actual perpetration of human rights violations.”).

50. See 22 U.S.C. § 7101 (2012) (discussing the state of human trafficking regulations prior to the TVPRA).

51. See Sarah C. Pierce, Note, *Turning a Blind Eye: U.S. Corporate Involvement in Modern Day Slavery*, 14 J. GENDER RACE & JUST. 577, 588 (2011) (“Corporate involvement in human trafficking within the United States usually occurs in elaborate subcontracting schemes.”); Vandenberg, *supra* note 17, at 2 (“[S]trategic litigation . . . is a direct challenge to the impunity [perpetrators of human trafficking] currently enjoy. It also serves as a genuine deterrent to would-be traffickers in an environment where other deterrents are sorely lacking.”); *infra* Part II. According to a LexisAdvance search, as of February 26, 2016, only twenty-five cases were brought between 2008 and 2016 citing § 1595 and mentioning the “knowingly benefits, financially” language.

52. TIP Report 2015, *supra* note 23, at 48; *supra* note 24. In 2013, there were 470. TIP Report 2015, *supra* note 23, at 48. In 2012, there were 518. *Id.*

53. See 22 U.S.C. § 7101 (2012) (discussing the state of human trafficking regulations prior to the TVPRA); E. Christopher Johnson, Jr., *The Corporate Lawyer, Human Trafficking, and Child Labor: Who's in your Supply Chain?*, 30 T.M. COOLEY L. REV. 27, 33–34 (2013) (discussing corporate incentives and disincentives to monitor supply chains).

monitoring labor conditions, an effort which requires time and resources.<sup>54</sup> Because victims of human trafficking may be uneducated, poor, foreign nationals unaware of their legal rights, prosecutors may have difficulty finding victims and evidence to support criminal prosecution, and victims may be poorly situated to bring civil suits.<sup>55</sup>

Without enforcement of the TVPRA provision criminalizing financial benefit from trafficking, multinational corporations lack strong financial incentives to monitor their suppliers' work environments.<sup>56</sup> However, without monitoring their suppliers' labor practices, these corporations risk getting entangled in human trafficking themselves.<sup>57</sup> Human rights activists' increased enthusiasm for litigation as a means of corporate accountability and a recent legal decision in favor of trafficking victims suggest the current incentive structure for monitoring labor conditions may change.<sup>58</sup>

#### *D. Directors' Fiduciary Duty to Regulate Human Trafficking*

Under the business judgment rule, courts afford corporate directors discretion in decisionmaking, provided those decisions are made in good faith, after reasonable diligence, and are not self-dealing.<sup>59</sup> Chancellor Allen established in *In re Caremark International* that "a director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the

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54. See TIP Report 2015, *supra* note 23, at 33 ("[C]onstant pressure on cutting costs can have a destabilizing effect on the proactive measures a company may take to prevent human trafficking."); Pierce, *supra* note 51, at 587 ("The demand for lower prices by buyers from corporations, both within and outside of the United States, indirectly drives the number of human trafficking cases."); Editorial, *Forced Labor on American Shores*, N.Y. TIMES (July 8, 2012), <http://www.nytimes.com/2012/07/09/opinion/forced-labor-on-american-shores.html> [<http://perma.cc/R3UQ-5WRR>].

55. See 22 U.S.C. § 7101 (describing the factors that make individuals susceptible to trafficking); *infra* notes 146–154 and accompanying text (describing reasons why lawyers may not be bringing cases under the TVPRA).

56. See Vandenberg, *supra* note 17, at 3 ("Even by the most conservative estimate, the obvious lack of risk for perpetrators of human trafficking and forced labor is astounding.").

57. See Naomi Jiyoung Bang, *Justice for Victims of Human Trafficking and Forced Labor: Why Current Theories of Corporate Liability Do Not Work*, 43 U. MEM. L. REV. 1047, 1048 (2013) ("Multinational corporations who produce goods through massive global production chains also increase chances that their products could be made by trafficked workers.").

58. Vandenberg, *supra* note 17, at 2 (encouraging human rights lawyers to actively pursue justice for trafficking victims through strategic litigation). In *David v. Signal International, LLC*, a jury awarded \$14 million to workers who alleged trafficking violations under §§ 1589 and 1590 of the TVPRA. 37 F. Supp. 3d 822, 831–33 (E.D. La. 2014) (describing the sufficiency of the TVPA § 1589 claims to survive a motion to dismiss); Finn, *supra* note 31. Due to this and other trafficking cases, Signal International, LLC filed for bankruptcy. Vandenberg, *supra* note 17, at 7.

59. *E.g.*, CHARLES R.T. O'KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 222 (4th ed. 2003).

board concludes is adequate, exists.”<sup>60</sup> *Caremark* set the precedent that a director’s failure to establish or have in place a “reasonable information and reporting system” may demonstrate a lack of good faith, which deprives the directors of the protection of the business judgment rule and exposes them to liability.<sup>61</sup>

Additionally, corporate directors have a fiduciary duty to protect the interests of shareholders, which generally requires maximizing the corporation’s stock price.<sup>62</sup> Litigation or reputational harm affecting consumer choices creates heavy corporate costs.<sup>63</sup> To maximize shareholder wealth, directors should take steps to avoid negative publicity and expensive, time-consuming litigation that may hurt stock prices.<sup>64</sup> When a corporation does not behave in a socially responsible manner, the public may boycott its goods, media may highlight the company’s failures, shareholders may sell their shares, and management may leave.<sup>65</sup> Some human rights NGOs use the tactic of

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60. 698 A.2d 959, 970 (Del. Ch. 1996).

61. *Id.* at 971.

62. See O’KELLEY & THOMPSON, *supra* note 59, at 226–29, 276; Daniel J. Morrissey, *The Riddle of Shareholder Rights and Corporate Social Responsibility*, 80 BROOK. L. REV. 353, 353 (2015) (“Corporations exist primarily to make profit for their shareholders. This has been the black letter rule of law and the reigning orthodoxy of American business for a century.”).

63. See SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION 14 (2004) (“[C]ivil suits can potentially result in huge damages awards, directly harming [transnational corporations] financial bottom line . . . .”); *Corporate Liability and Human Trafficking*, *supra* note 1, at 1 (“Legal liability can, in turn, hurt the reputation of companies and the interests of their investors.”); Press Release, U.S. Equal Opportunity Emp’t Comm’n, Judge Orders John Pickle Co. to Pay \$1.24 Million to 52 Foreign Workers in “Human Trafficking” Case (May 26, 2006), <http://www.eeoc.gov/eeoc/newsroom/release/5-26-06.cfm> [perma.cc/P929-R22K]; *infra* note 180 and accompanying text.

64. Erika R. George & Scarlet R. Smith, *In Good Company: How Corporate Social Responsibility Can Protect Rights and Aid Efforts to End Child Sex Trafficking and Modern Slavery*, 46 N.Y.U. J. INT’L L. & POL. 55, 106 (2013) (“[A] good reputation is good for stock prices because it allows stakeholders to trust that the business is capable of delivering valued outcomes and competitors cannot imitate having a good reputation with stakeholders.”). *But see* JOSEPH, *supra* note 63, at 7 (explaining that the relationship between stock prices and negative publicity is unclear); Michael E. Porter & Mark R. Kramer, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, HARVARD BUS. REV., Dec. 2006, at 83, <https://hbr.org/2006/12/strategy-and-society-the-link-between-competitive-advantage-and-corporate-social-responsibility> [<http://perma.cc/6DKZ-SGWF>] (“As for the concept of [corporate social responsibility] as insurance, the connection between the good deeds and consumer attitudes is so indirect as to be impossible to measure.”).

65. JOSEPH, *supra* note 63, at 6. For example, Nike and publicized reports of terrible labor conditions “has now become an object lesson in how giant corporations can be brought to account by ordinary consumers.” Simon Birch, *How Activism Forced Nike to Change its Ethical Game*, THE GUARDIAN (July 6, 2012, 11:04), <http://www.theguardian.com/environment/green-living-blog/2012/jul/06/activism-nike> (last modified Dec. 29, 2015, 7:46) [perma.cc/5FVB-6SEQ]; see Max Nisen, *How Nike Solved Its Sweatshop Problem*, BUSINESS INSIDER (May 9, 2013, 10:00 PM), <http://www.businessinsider.com/how-nike-solved-its-sweatshop-problem-2013-5>, (describing Nike’s response to negative consumer reaction to its labor practices) [<http://perma.cc/65AD-9F5Q>].

“naming and shaming” corporations with human rights violations, such that a corporation may find difficulty avoiding reputational consequences of rights violations.<sup>66</sup> As consumers become more aware of supply-chain human rights violations generally,<sup>67</sup> some may consciously consider a corporation’s reputation with regard to human rights when making purchasing decisions.<sup>68</sup> Publicized human rights violations can result in severe reputational damage to a corporation, regardless of whether the corporate officers attempt to mitigate the problem once publicized or whether the alleged violations result in actual corporate liability.<sup>69</sup>

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66. See JOSEPH, *supra* note 63, at 6 (“Numerous prominent corporations have suffered the wrath of high profile negative NGO campaigns, including Nestlé, Shell, McDonalds, Coca Cola, and Nike.”); Janine S. Hiller & Shannon S. Hiller, *A Co-opetition Approach to Business, Human Rights Organizations and Due Diligence*, in LAW, BUSINESS AND HUMAN RIGHTS 118, 120 (Robert C. Bird et al. eds., 2014):

[T]ensions and conflict between businesses and human rights organizations persist, perhaps as the norm, fueled at least in part by the tactics used by human rights organizations to derive their power and influence over private sector entities by means of a ‘name and shame’ approach that utilizes the media and public opinion to identify and then pressure a company into taking remedial actions.

67. See *Corporate Liability and Human Trafficking*, *supra* note 1, at 2 (“[The U.S. Government] has called worldwide attention to this blight and made it difficult for individuals and organizations engaged in businesses plagued by trafficking to claim ignorance about the problem.”).

68. Morrissey, *supra* note 62, at 382 (“Approximately 77% of consumers now say it is important for business to be socially responsible and 50% of them take that into consideration when they buy things.” (footnotes omitted)); Janet E. Kerr, *The Creative Capitalism Spectrum: Evaluating Corporate Social Responsibility Through a Legal Lens*, 81 TEMP. L. REV. 831, 850 (2008) (stating fifty-two percent of consumers claim they seek information on corporate social practices); see Johnson, *supra* note 53, at 33–34 (citing a Harvard University study stating consumers consider anti-trafficking efforts of a corporation in purchasing decisions). *But see* DEVA, *supra* note 4, at 140–43 (explaining that not all consumers consider human rights when making purchasing choices due to information-sharing failures, disinclination to consider human rights in making purchasing decisions, failure to understand the relationship between human rights and a particular company, and inability to afford higher costs of ethically-sourced goods).

69. Cynthia A. Williams & John M. Conley, *Is There an Emerging Fiduciary Duty to Consider Human Rights?*, 74 U. CIN. L. REV. 75, 77, 93–94 (2005) (“The risks to business reputation from credible allegations of human rights abuses create incentives for companies and directors to consider these issues seriously, irrespective of whether an ultimate finding of liability is likely.”); Nisen, *supra* note 65 (describing protests against Nike regarding labor practices even after the corporation created a code of conduct and “establishe[d] a department tasked with working to improve the lives of factory laborers”); see also Williams, *supra* note 49, at 736 (stating that citizens have higher expectations of corporate social responsibility than mere compliance with law).

## II. CORPORATE ACCOUNTABILITY FOR HUMAN RIGHTS THROUGH LITIGATION

As society becomes increasingly aware of corporate human rights violations,<sup>70</sup> activists are placing more emphasis on litigation as a means for an injured party to impose costs on the corporation that profited from the harm, as well as raise awareness of the existence and prevalence of the human rights violations.<sup>71</sup> Civil litigation can hold corporations accountable for crimes prosecutors may overlook or choose not to pursue.<sup>72</sup> However, litigation is a slow and expensive method of holding corporations accountable and less effective than having strong corporate monitoring systems to prevent trafficking violations from occurring in the first place.<sup>73</sup>

Although laws other than the TVPRA do criminalize aspects of supply-chain trafficking, difficulties in applying these laws have made corporations effectively immune from liability for trafficking violations in the past.<sup>74</sup> Three primary difficulties exist today for applying laws enacted prior to the TVPRA in 2000 to a multinational corporation's supply-chain trafficking: (1) a lack of jurisdiction over trafficking violations that occur abroad, (2) an inability to prosecute a corporation at the end of the supply chain that benefits from but does not directly perpetrate human rights violations, and (3) a lack of statutes that criminalize trafficking entirely rather than just elements of the crime.<sup>75</sup>

### A. *Jurisdictional Limitations for Corporate Accountability*

Corporations are not insulated from liability simply because human rights violations occur in different countries.<sup>76</sup> Accordingly, corporate directors should be aware of how a court's jurisdiction over crimes committed abroad affects their corporation's litigation risks.<sup>77</sup>

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70. In 2014, President Obama named January 2015 "National Slavery and Human Trafficking Prevention Month." Proclamation No. 9225, 80 F.R. 825 (Dec. 31, 2014).

71. See Beth Stephens, *Human Rights Litigation in U.S. Courts Against Individuals and Corporations*, in CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS IMPACTS 179, 179, 185, 199 (Lara Blecher et al. eds., 2014).

72. Kim & Hreshchshyn, *supra* note 5, at 16–18.

73. *Infra* Section IV.C. (describing appropriate corporate monitoring).

74. Bang, *supra* note 2, at 257 ("Corporations driving [the use of human trafficking and forced labor in supply chains] easily avoid accountability given the extraterritorial location of suppliers, and the appearance of 'arm's length' contracts with their suppliers.") (footnote omitted); *infra* Section II.B.

75. See Bang, *supra* note 2, at 257 (noting problems with extraterritoriality and "arm's length" contracts in holding corporations accountable).

76. *Infra* note 77 and accompanying text.

77. See *Corporate Liability and Human Trafficking*, *supra* note 1, at 1–2.

The Alien Tort Statute (“ATS”) is a jurisdictional statute that grants courts subject-matter jurisdiction over foreign violations of international law.<sup>78</sup> A string of human rights cases relying on the ATS for jurisdiction over foreign torts after 1980 raised activists’ hopes of litigation as a tool for human rights reform.<sup>79</sup> However, significant limitations of the ATS have reduced its applicability in the foreign supply-chain context.<sup>80</sup>

Under the ATS, a plaintiff that has suffered a tortious violation of international law that is “specific, universal, and obligatory” has a private cause of action.<sup>81</sup> Labor trafficking and slavery are internationally accepted crimes that are actionable under the ATS.<sup>82</sup>

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78. *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980); CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW* 409 (5th ed. 2014). The ATS was enacted in 1789 as part of the Judiciary Act but was hardly used until 1980, when the Second Circuit held the ATS granted subject matter jurisdiction over foreign torts. *Filartiga*, 630 F.2d at 887; *see also* Stephens, *supra* note 71, at 181–82, 181 n.11 (explaining that prior to *Filartiga*, only twenty-one cases were brought under the ATS); Williams, *supra* note 49, at 750 (explaining that the ATS provides subject-matter jurisdiction in United States federal courts); BRADLEY & GOLDSMITH, *supra* note 78, at 409.

79. Robert C. Thompson, Anita Ramasastry & Mark B. Taylor, *Transnational Corporate Responsibility for the 21st Century: Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 GEO. WASH. INT’L L. REV. 841, 842 (2009) (“Since the decision in *Unocal*, every year litigants have filed increasing numbers of ATCA cases involving the complicity of corporations in human rights abuses outside the United States.”); Stephens, *supra* note 71, at 184–85 (noting that between 1980 and 2004, “about eighty cases were filed asserting ATS jurisdiction, but only about a dozen led to final judgments in favor of the plaintiffs”); *see, e.g., Filartiga*, 630 F.2d at 889 (stating the ATS grants jurisdiction in the United States for a claim of torture against a citizen of Paraguay); *see also* DEVA, *supra* note 4, at 6 (discussing the ATCA’s use in corporate human rights litigation).

80. *See Warfaa v. Ali*, No. 14-1810, 2016 U.S. App. LEXIS 1670, at \*10 (4th Cir. Feb. 1, 2016) (“[R]ecent Supreme Court decisions have significantly limited, if not rejected, the applicability of the *Filartiga* rationale.” (citations omitted)); Williams, *supra* note 49, at 750 (discussing the limitations of the ATS); Stephens, *supra* note 71, at 192–93 (noting that “foreign plaintiffs suing a foreign corporation for events that took place in a foreign country” could not have jurisdiction under the ATS).

81. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004); Williams, *supra* note 49, at 764–65; *see* Stephens, *supra* note 71, at 184; *see also* Williams & Conley, *supra* note 69, at 85–86 (“By recognizing that the ATCA establishes a federal cause of action based on evolving, international law norms of obligatory behavior, *Sosa* allowed the continuing development of case law to inform thinking about companies’ human rights obligations.”). Rules of international law are determined based on the international law of today, not as it was at the time the ATS was passed. *Filartiga*, 630 F.2d at 881 (“Thus it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.”). The Second Circuit explained in *Kadic v. Karadzic* that the scope of the ATS includes suits against private defendants. Williams & Conley, *supra* note 69, at 82.

82. *See Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674, 687 (S.D. Tex. 2009) (“Numerous courts within the United States have found trafficking, forced labor, and involuntary servitude cognizable under ATS.” (citing *Licea v. Curacao Drydock Co.*, 584 F. Supp. 2d 1355 (S.D. Fla. 2008); *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160, 1179 (N.D. Cal. 2001); *Doe v. Unocal Corp.*, 963 F. Supp. 880, 892 (C.D. Cal. 1997))).

Therefore courts have subject-matter jurisdiction under the ATS over trafficking violations that occur abroad.<sup>83</sup>

In 2013, the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.* curtailed activists' goals of sweeping corporate accountability through ATS litigation.<sup>84</sup> After *Kiobel*, courts only have ATS jurisdiction if claims "touch and concern the territory of the United States."<sup>85</sup> While not completely quashing corporate human rights litigation brought by foreign plaintiffs,<sup>86</sup> the court's decision in *Kiobel* reduced the number of cases in which the ATS can provide the means of establishing corporate liability for human trafficking violations in the global supply chain.<sup>87</sup>

No longer can the ATS create federal jurisdiction if a foreign victim of human trafficking were to sue a corporation with minimal links to the United States for trafficking violations that occurred abroad.<sup>88</sup> Courts, therefore, lack jurisdiction under the ATS over actions of corporate suppliers in foreign countries with minimal links to the

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83. See *id.*

84. *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1668 (2013); see *Warfaa*, 2016 U.S. App. LEXIS 1670, at \*11 (explaining that after *Kiobel*, "the reach of the ATS is narrow and strictly circumscribed") (citation omitted); see also Paul Hoffman, *The Implications of Kiobel for Corporate Accountability Litigation under the Alien Tort Statute*, in CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS IMPACTS, *supra* note 71, at 201, 221 ("The new *Kiobel* presumption can be seen as a broader, more discretionary tool to screen out additional ATS cases—beyond those that the existing screening mechanisms catch—that the court believes lack an adequate connection to the United States or threaten U.S. foreign policy."). The presumption against extraterritoriality is a principle of legislative interpretation that indicates legislation is read to apply domestically unless clear Congressional intent indicates a broader application. BRADLEY & GOLDSMITH, *supra* note 78, at 93. The Court held that the principles of the presumption against extraterritoriality (though not the presumption itself) apply to claims brought under the ATS. *Kiobel*, 133 S. Ct. at 1668; Hoffman, *supra*, at 204–05, 210 ("[T]he Roberts opinion concedes that the usual presumption against the extraterritorial application of U.S. substantive statutes does not apply to the ATS; in fact, the presumption had never before been applied to any jurisdictional statutes.").

85. *Kiobel*, 133 S. Ct. at 1668–69; see *Warfaa*, 2016 U.S. App. LEXIS 1670, at \*14–15 (describing cases where the extraterritoriality presumption prevented a case from having jurisdiction under the ATS); Hoffman, *supra* note 84, at 206 ("The majority opinion, though, provides little guidance about the meaning of the new term, *touch and concern*.").

86. See Bang, *supra* note 2, at 274 (explaining that the *Kiobel* ruling left the possibility of claims against corporate defendants); Hoffman, *supra* note 84, at 207, 216–21 (questioning how the presumption against extraterritoriality will be applied to different fact scenarios); Stephens, *supra* note 71, at 180, 193 ("*Kiobel* leaves unresolved the status of claims that have a greater connection to U.S. territory than those at issue in *Kiobel*, such as claims filed against U.S. citizens, including U.S. corporations; claims against individuals living in the United States; and claims that involve events occurring in the United States."); *Corporate Liability and Human Trafficking*, *supra* note 1, at 8 (listing some criteria circuit courts have found that meet the "touch and concern" requirements).

87. *Kiobel*, 133 S. Ct. at 1668; *Corporate Liability and Human Trafficking*, *supra* note 1, at 7. It has not been decided whether corporate fiduciary duties are sufficient to establish the "touch and concern" standard, and such a discussion is beyond the scope of this Note.

88. *Kiobel*, 133 S. Ct. at 1668–69.

United States, and courts cannot reach American corporations that benefit from but do not directly commit these crimes without legal theories of agency, joint liability, or aiding and abetting.<sup>89</sup> This limitation of ATS litigation for corporate accountability demonstrates the need for the TVPRA to hold U.S. corporations accountable for deriving financial benefit from trafficked labor.<sup>90</sup>

### *B. Limitations of Legislation for Corporate Accountability*

Although the TVPRA, discussed in detail below, is the first law to comprehensively target human trafficking, several other laws apply to elements of human trafficking violations in the multinational corporate supply-chain context.<sup>91</sup> For example, the Racketeer Influenced and Corrupt Organizations Act applies to involuntary servitude, trafficking, or slavery that occurs abroad, but it can be challenging to apply.<sup>92</sup> The Fair Labor Standards Act (“FLSA”) does not apply extraterritorially.<sup>93</sup> In international law, international criminal

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89. *Corporate Liability and Human Trafficking*, *supra* note 1, at 8 (questioning how aiding and abetting theories may be applied to slavery cases under the ATS). Mere corporate presence is insufficient to establish an ATS claim. *Kiobel*, 133 S. Ct. at 1669; Hoffman, *supra* note 84, at 206;

90. See Bang, *supra* note 2, at 260, 274; see also Bang, *supra* note 57, at 1065 (“On the bright side, since the Second Circuit’s opinion only affected the ATCA, plaintiffs are still free to pursue claims under other relevant statutes, such as the TVPRA, where attacks on extra-territoriality and corporate liability appear weak given a stronger and clearer legislative history.”).

91. 18 U.S.C. §§ 1581–97 (2000); MOHAMED Y. MATTAR, *Corporate Liability for Violations of International Human Rights Law*, in LABOUR MIGRATION, HUMAN TRAFFICKING AND MULTINATIONAL CORPORATIONS: THE COMMODIFICATION OF ILLICIT FLOWS 10–11 (Ato Quayson and Antonela Arhin eds., 2012); Bang, *supra* note 57, at 1055–83; Naomi Jiyoung Bang, *Navigating the Complexities of Corporate Liability in Human Trafficking and Forced Labor Cases*, 75 TEX. B.J. 766, 768 (2012). Depending on the fact pattern, plaintiffs and prosecutors can use a variety of laws: aiding and abetting under the ATS, principal-agent theories of law, the Racketeer Influenced and Corrupt Organizations Act (RICO), third party benefits, alter-ego theories of law, the Child Labor Deterrence Act, the 2000 Trade and Development Act, the North American Agreement on Labor Cooperation, the Fair Labor Standards Act (FLSA), the Foreign Corrupt Practices Act (FCPA), the Anti-Peonage Act, laws against involuntary servitude, and the Thirteenth Amendment of the Constitution; e.g., MATTAR, *supra*, at 10–11; Bang, *supra* note 57, at 1055–83; Bang, *supra*, at 768 (explaining that the Racketeer Influenced and Corrupt Organizations Act (RICO) may be used to hold corporations accountable for human trafficking, although successfully arguing a RICO claim may be difficult); Kim & Hreshchyshyn, *supra* note 5, at 26; Pierce, *supra* note 51, at 584. There are also several state laws that target human trafficking, but a discussion of all fifty different regulatory regimes is beyond the scope of this Note. See Pierce, *supra* note 51, at 591–93 (describing state anti-trafficking laws that create corporate liability).

92. See JOSEPH, *supra* note 63, at 79–80 (noting that RICO can apply to cases of forced labour and other human rights abuses); Bang, *supra* note 2, at 276 (explaining RICO has complicated pleading requirements); *Corporate Liability and Human Trafficking*, *supra* note 1, at 3 (“Knowingly engaging in human trafficking has been expressly subject to criminal prosecution under RICO since 2003.”).

93. Erika C. Collins, *Extraterritorial Application of U.S. Employment Laws*, 2006 A.B.A. SEC. INT’L L. 6–7. At least one court has even suggested that a claim of forced labor would be better

tribunals serve as an inadequate alternative to domestic courts because they lack jurisdiction for offenses committed by corporations.<sup>94</sup>

Because other laws are not focused on trafficking directly, they fail to properly criminalize trafficking violations, allowing corporations to escape liability for violations they commit.<sup>95</sup> When laws only criminalize part of traffickers' actions, such as poor labor conditions, prosecution and civil suits fail to provide proper deterrence, and corporations are not held accountable for human rights abuses from which they benefit.<sup>96</sup> Additionally, laws may be unable to reach beyond the supplier that actually perpetrates the crime to the corporation that derives financial benefit from its supplier's illegal actions.<sup>97</sup>

Holding corporations accountable for human trafficking violations by suppliers is a more difficult and attenuated argument to make than accountability for violations committed by the corporation itself.<sup>98</sup> Corporations can sometimes rely on the legal separation between themselves and a supplier to deflect liability for the supplier's actions.<sup>99</sup> Where a supplier in a foreign country creates conditions of force, fraud, or coercion, but a multinational corporation at the end of the supply chain lacks control over the supplier, establishing sufficient corporate control or authority over the trafficking offense for liability

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brought under the TVPRA than the FLSA. *Shuvalova v. Cunningham*, No. C 10-02159 RS, 2010 WL 5387770, at \*5 (N.D. Cal. Dec. 22, 2010).

94. Thompson et al., *supra* note 79, at 870 (explaining that the Rome Statute does not include legal persons in the jurisdiction of the ICC).

95. 22 U.S.C. § 7101(b)(14) (2012) ("Existing legislation and law enforcement in the United States and other countries are inadequate to deter trafficking and bring traffickers to justice, failing to reflect the gravity of the offenses involved."); *see also* Kim & Hreshchyshyn, *supra* note 5, at 4 ("Until recently, trafficked persons could rely on sundry federal and state labor and employment laws and tort laws related to forced labor conditions in order to seek remedies from their traffickers."); Pierce, *supra* note 51, at 593-94 ("Current human trafficking legislation does not hold corporations civilly and criminally liable."). Although Pierce includes the TVPRA in her assessment that current laws do not create corporate liability, there is little analysis of the potential for the financial benefit provision added in the 2008 reauthorization. *See* Pierce, *supra* note 51, at 596 (mentioning the financial benefit standard is "still a difficult or impossible level to reach").

96. *See* Kim & Hreshchyshyn, *supra* note 5, at 24-26 (calling laws prior to the TVPRA "incomplete avenues for relief").

97. *Infra* notes 98-105 and accompanying text.

98. *See* Bang, *supra* note 57, at 1049-50, 1054 (explaining the ineffectiveness of several current methods of legal liability for human trafficking and the difficulties in finding a legal link between a corporation and the party actually committing the human rights violation); Pierce, *supra* note 51, at 589-90 (explaining it is difficult to hold corporations liable under agency theories).

99. *See* DEVA, *supra* note 4, at 9 & n.38 (explaining how corporations use "legal tools" to escape liability for human rights violations); Pierce, *supra* note 51, at 578-79 (explaining that plaintiffs face difficulties in establishing corporate liability where there is a subcontractor). *But see Corporate Liability and Human Trafficking*, *supra* note 1, at 3 (suggesting a RICO claim could be brought against a company that "actively associated itself with a RICO enterprise").

may be immensely challenging.<sup>100</sup> If a corporation's supplier is directly responsible for trafficking, a court must establish both the existence of an agency relationship and the culpability of the agent before it can find that a corporation has violated the law.<sup>101</sup>

Although vicarious liability, joint liability, and theories of aiding and abetting suggest corporations could be accountable for the actions of their agents,<sup>102</sup> these theories create a poor incentive structure by encouraging corporations to remain ignorant about what occurs in their supply chains to avoid liability for trafficking violations.<sup>103</sup> Aiding and abetting requires a purposeful intent—an intent that would not be present if, for example, a corporation knew trafficking was occurring and stated a preference for better labor conditions but refused to alter prices or work quotas.<sup>104</sup> Corporations can deflect accusations of liability by denying knowledge or asserting their lack of physical control over the systems that created and perpetuated the trafficking conditions.<sup>105</sup>

As a result, with the exception of the TVPRA, there is an absence of domestic enforcement tools that apply to corporations that benefit from trafficking violations.<sup>106</sup> However, since 2008 the TVPRA

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100. See Bang, *supra* note 2, at 275 (stating that it is difficult for plaintiffs to satisfy elements of control or authority in the context of crimes committed by overseas contractors).

101. Pierce, *supra* note 51, at 589–91.

102. See Bang, *supra* note 91, at 767–77 (“[A]n agency argument could prevail in the global contracting context, [but] it appears that success may depend on the existence of evidence supporting the ‘control’ aspect of the principal-agent relationship.”); Karin Dryhurst, Note, *Liability Up the Supply Chain: Corporate Accountability for Labor Trafficking*, 45 N.Y.U. J. INT’L L. & POL. 641, 655 (2013) (explaining the application of vicarious liability doctrine to the contract relationship); *Corporate Liability and Human Trafficking*, *supra* note 1, at 4 (noting RICO could be used against a corporation via a vicarious liability theory).

103. Dryhurst, *supra* note 102, at 655–56 (“[T]he traditional rule creates perverse incentives for corporations to exert less control over their agents and structure independent contractor relationships with thinly capitalized contractors.”).

104. See Bang, *supra* note 2, at 278. Further, in international law, the elements of a crime of aiding and abetting are currently debated, as inconsistencies exist. Guido Acquaviva, *Aiding and Abetting International Crimes and the Value of Judicial Consistency: Reflections Prompted by the Perisic, Taylor and Sainovic Verdicts*, QUESTIONS OF INT’L L., June 1, 2014, at 3, 12–16, [http://www.qil-qdi.org/wp-content/uploads/2014/06/02\\_FRAGMENTATION-ICL\\_Acquaviva\\_FINAL-ter.pdf](http://www.qil-qdi.org/wp-content/uploads/2014/06/02_FRAGMENTATION-ICL_Acquaviva_FINAL-ter.pdf) [perma.cc/L9YY-AP43].

105. Bang, *supra* note 2, at 277–78 (“Unless there is blatant direct evidence of active wrongdoing, corporations continue to escape accountability.”).

106. Thompson et al., *supra* note 79, at 886 (“Domestic prosecution of [international criminal law] violations is a vital part of achieving justice and accountability.”); see also Williams, *supra* note 49, at 725 (“One of the defining features (and perhaps the defining feature) of globalization, as it is now understood, is that it undermines the ability of sovereign nations to impose substantive, proactive limits on economic actors such as transnational corporations . . .”). There still remain other difficulties with domestic litigation for international crimes, such as *forum non conveniens*, state sovereignty, sovereign immunity, and the need for a court to find personal jurisdiction. Stephens, *supra* note 71, at 185, 194–95 (explaining how sovereign immunity and

criminalizes trafficking in the supply chains of multinational corporations; it applies to corporations and individuals that financially benefit from human trafficking, in addition to parties that directly perpetrate the abuses.<sup>107</sup>

### III. TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT (“TVPRA”)

Corporate directors have heightened fiduciary duties to monitor and eliminate human trafficking violations based on the broad scope of the TVPRA.<sup>108</sup> In 2000, the TVPRA became the first federal law to specifically and comprehensively address crimes of human trafficking.<sup>109</sup>

#### A. Financial Benefit Provisions

Congress passed the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008<sup>110</sup> with the purpose of “enhanc[ing] measures to combat trafficking in persons.”<sup>111</sup> Specific provisions in the 2008 reauthorization criminalize benefitting financially from human trafficking, enhance civil liability for TVPRA violations, and expand courts’ jurisdiction over crimes committed under the TVPRA.<sup>112</sup> If a corporation uses labor provided by force, harm, abuse, or fear or benefits financially from labor recruited in these

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*forum non conveniens* can make prosecuting a suit under the ATS difficult); Williams, *supra* note 49, at 750–51.

107. See Pierce, *supra* note 51, at 594–95 (acknowledging the TVPRA’s direct application to trafficking crimes).

108. See 18 U.S.C. §§ 1581–97 (2012).

109. *Id.*; Aguirre v. Best Care Agency, Inc., 961 F. Supp. 2d 427, 442–43 (E.D.N.Y. 2013); *Polaris Project—Trafficking Victims’ Protection Act (TVPA)—Fact Sheet*, *supra* note 10.

110. Aguirre, 961 F. Supp. 2d at 459; 154 CONG. REC. S10,945–01 (daily ed. Dec. 11, 2008).

111. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110–457, 122 Stat. 5044 (2008). The TVPRA lacks retroactive application, and it has a ten-year statute of limitations, except in circumstances where the victim was a minor when the violation occurred, where the statute of limitations runs ten years from the date the victim turns eighteen. 18 U.S.C. § 1595(c); see Ditullio v. Boehm, 662 F.3d 1091, 1099 (9th Cir. 2011); Adhikari v. Daoud & Partners, 994 F. Supp. 2d 831, 840 (S.D. Tex. 2014), *reh’g denied*, 2015 WL 1387941 (S.D. Tex. Mar. 24, 2015), *appeal docketed*, No. 15-20225 (5th Cir. Apr. 21, 2015); Aguirre, 961 F. Supp. 2d at 443 (citing Velez v. Sanchez, 693 F.2d 308, 325 (2d Cir. 2012)); Camayo v. John Peroulis & Sons Sheep, Inc., No. 10-cv-00772, 2013 U.S. Dist. LEXIS 106714, at \*4 (D. Colo. July 30, 2013). The ten-year statute of limitations was added in 2008. Bang, *supra* note 57, at 1077 (citing 18 U.S.C. § 1595(c) (2006 & Supp. 2008)).

112. 18 U.S.C. §§ 1589, 1596 (2012); *Polaris Project—Trafficking Victims’ Protection Act (TVPA)—Fact Sheet*, *supra* note 10.

conditions, the corporation violates both the criminal and civil provisions of the TVPRA.<sup>113</sup>

Financially benefitting from trafficked labor, even without perpetrating the crime, is illegal under § 1589 of the TVPRA (“criminal provision”):<sup>114</sup>

Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a), knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means, shall be punished as provided in subsection (d).<sup>115</sup>

Including criminal liability for knowingly benefitting from human trafficking expands the reach of the law beyond actors that traffic laborers to those “up the chain of command . . . who may profit from the venture.”<sup>116</sup> The TVPRA defines “venture” as “any group of two or more individuals associated in fact, whether or not a legal entity.”<sup>117</sup>

The criminal provision has a civil parallel in § 1595 (“civil provision”), which imposes civil liability against a perpetrator or anyone who knowingly benefits from participation in a venture in violation of the TVPRA sections against Peonage, Slavery, and Trafficking in Persons.<sup>118</sup> Subsection (a) of the civil provision almost mirrors the language of the criminal provision regarding financial benefit:

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113. 18 U.S.C. §§ 1589, 1593, 1595. Force, fraud, or coercion sufficient for a claim under the TVPRA may include verbal or physical threats or assaults, the deceptive promise of employment, or threats of deportation. *Camayo*, 2012 U.S. Dist. LEXIS 136100, at \*13–15; *Shuvalova v. Cunningham*, No. C 10–02159 RS, 2010 WL 5387770, at \*7–10 (N.D. Cal. Dec. 22, 2010). As corporations have legal personhood under U.S. law, the TVPRA can apply to corporations as well as individuals. See O’KELLEY & THOMPSON, *supra* note 59, at 136 (“In fact, in most respects a corporation will be granted the same legal rights and responsibilities as would any person.”).

114. 18 U.S.C. §§ 1589, 1595. See *Pierce*, *supra* note 51, at 586 (“Thus, under [the 2008] reauthorization, even someone who does not act to further the trafficking but merely consciously benefits from its existence is liable.”).

115. 18 U.S.C. § 1589(b); William Wilberforce Trafficking Victims Protection Reauthorization Act § 222. Language that focuses on financial benefit was also used in 18 U.S.C. § 1593A: “Whoever knowingly benefits, financially or by receiving anything of value” from a venture that is a violation of the provisions against peonage or unlawful conduct with respect to documents to further forced labor “knowing or in reckless disregard of the fact that the venture has engaged in such violation” is punishable. 18 U.S.C. §§ 1581, 1592, 1593A, 1595 (2012).

116. POLARIS PROJECT, *The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008: Summary of Important Provisions*, WYNN CONSULTING 7, <http://www.markwynn.com/trafficking/the-william-wilberforce-trafficking-victims-protection-reauthorization-act-of-2008.pdf> (last visited Jan. 7, 2016) [<http://perma.cc/2D5H-QVNC>].

117. 18 U.S.C. § 1591(e)(5) (2012). Nothing indicates that this definition is not consistent throughout the TVPRA. See 18 U.S.C. §§ 1589, 1595 (using the term “venture” but not giving a specific definition).

118. 18 U.S.C. § 1595; *Ditullio v. Boehm*, 662 F.3d 1091, 1094 (9th Cir. 2011) (holding that the civil liability created in 18 U.S.C. § 1595 could not be retroactively applied to conduct that occurred prior to its effective date); see *Kim*, *supra* note 9, at 280 (stating that understanding how the civil provision works requires an understanding of its criminal parallel).

An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, 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) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.<sup>119</sup>

Application of the TVPRA to a corporation can have a significant financial impact.<sup>120</sup> Section 1593 grants financial restitution of at least the measure of the value of victims' services and labor to victims, which can be measured by the Fair Labor Standards Act.<sup>121</sup> Punitive damages and attorneys' fees are also available under the statute.<sup>122</sup>

### B. Jurisdiction of the TVPRA

Courts have broad extraterritorial jurisdiction for trafficking offenses under the TVPRA; since the passage of the 2008 TVPRA, Congress has clearly intended the TVPRA to have international application.<sup>123</sup> Section 1596 grants courts jurisdiction over TVPRA violations: "[T]he courts of the United States have extra-territorial jurisdiction over any offense (or any attempt or conspiracy to commit an offense) [of the TVPRA] if—(1) an alleged offender is a national of the United States . . . ."<sup>124</sup> Relying on legislative history, district courts

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119. 18 U.S.C. § 1595(a). If a criminal and civil suit are filed based on the same occurrence, the civil suit will be stayed until the final trial court adjudication of the criminal action. 18 U.S.C. § 1595(b)(1).

120. See 18 U.S.C. §§ 1593 (2012) (creating mandatory restitution for a violation under the TVPRA). There is a fine imposed on anyone who knowingly benefits from trafficked labor under § 1593A of the TVPRA. 18 U.S.C. § 1593A; Pierce, *supra* note 51, at 586.

121. 18 U.S.C. § 1593; Carazani v. Zegarra, 972 F. Supp. 2d 1, 15–16, 24–27 (D.D.C. 2013) (discussing how liability under the TVPRA can also include emotional distress and punitive damages); Shuvalova v. Cunningham, No. C 10–02159 RS, 2010 WL 5387770, \*11–14 (N.D. Cal. Dec. 22, 2010); see also Dryhurst, *supra* note 102, at 667 ("Criminal restitution is limited to the economic loss of the complaining witness, which is limited to lost wages and direct expenses such as medical costs, necessary transportation, temporary housing, childcare expenses, lost income, attorney's fees, and other costs incurred.").

122. *Ditullio*, 662 F.3d at 1096–98; Pierce, *supra* note 51, at 585.

123. 18 U.S.C. § 1596 (2012). Proposed legislation may affect this statute. Further, the Congressional record establishes, "Trafficking in persons substantially affects interstate and foreign commerce." H.R. Rep. 106-939, at 4 (2000) (Conf. Rep.). One court in the Eastern District of New York discussed the purpose of the law, stating, "While the legislative history of the TVPA undoubtedly focuses primarily on the need to combat international sex trafficking, the Congressional purpose and findings of the TVPA make clear the intended broad scope of the legislation." *United States v. Marcus*, 487 F. Supp. 2d 289, 301 (E.D.N.Y. 2007), *vacated*, 538 F.3d 97, *rev'd*, 560 U.S. 258, *aff'd in part, vacated in part*, 628 F.3d 36 (2d. Cir. 2010).

124. 18 U.S.C. § 1596; POLARIS PROJECT, *supra* note 116, at 8. In 2007, the Southern District of Indiana declared that § 1589 did not apply extraterritorially but that, "[i]f Congress wants to impose such liability, it knows how to do so." *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1003 (S.D. Ind. 2007). One year later, Congress did. 18 U.S.C. § 1596. Although § 1595 is not explicitly mentioned in the provisions for which § 1596 grants jurisdiction, at least one court has held that

have interpreted the scope of the TVPRA broadly, emphasizing that the Act is meant to deter trafficking both domestically and globally.<sup>125</sup> Courts may have personal jurisdiction over a corporation where the corporation has its headquarters in or does business in the United States.<sup>126</sup>

The scope of the statute reflects the scope of the crime; labor trafficking is a borderless crime with repercussions in countries beyond where the trafficking takes place.<sup>127</sup> Courts have rejected the argument that § 1596 should be construed to limit application of the TVPRA to only circumstances where a victim is trafficked into the United States, saying, “[T]he thrust of the TVPRA would be severely undermined by a holding that U.S. defendants who gained commercial advantage in this country through engaging in illegal human trafficking were free from liability, so long as the trafficking acts themselves took place outside of American borders.”<sup>128</sup>

However, there are limitations to jurisdiction over foreign events that may restrict the application of the TVPRA. For example, a prosecutor may not bring a case if a foreign government is already prosecuting the defendant for the same conduct.<sup>129</sup> Where a foreign country is involved, the case may be dismissed for *forum non conveniens*, which applies if there is a more adequate or appropriate

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the same jurisdiction is extended to the civil provision as the criminal provision. *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674, 682–84 (S.D. Tex. 2009).

125. *Aguilera v. Aegis Commc'ns Grp., LLC*, 72 F. Supp. 3d 975, 977–79 (W.D. Mo. 2014) (citing HR Conf. Rep. 106-939, at 1 (2000)); *Nunag-Tanedo v. E. Baton Rouge Parish Sch. Bd.*, 790 F. Supp. 2d 1134, 1143 (C.D. Cal. 2011)). The presumption against extraterritoriality does not apply to the TVPRA because Congress did offer clear intent. 18 U.S.C. § 1596; *BRADLEY & GOLDSMITH*, *supra* note 78, at 93 (citing *Equal Emp't Opportunity Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991)) (“Our conclusion today is buttressed by the fact that ‘when it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute.’”).

126. *JOSEPH*, *supra* note 63, at 147.

127. *See* 22 U.S.C. § 7101 (2012) (“Trafficking in persons is a transnational crime with national implications.”); *Adhikari v. Daoud & Partners*, 697 F.Supp.2d 674, 683 (S.D. Tex. 2009) (“[H]uman trafficking is by nature an ‘international’ crime; it is difficult clearly to delineate those trafficking acts which are truly ‘extraterritorial’ and those which sufficiently reach across U.S. borders.”); TIP Report 2015, *supra* note 23, at 13 (“Human trafficking has no boundaries and respects no laws.”).

128. *Aguilera*, 72 F. Supp. 3d at 977–79 (citing HR Conf. Rep. 106-939, at 1 (2000)); *Adhikari*, 697 F. Supp. 2d at 683.

129. 18 U.S.C. § 1596(b). This jurisdictional limitation does not explain whether suit may be brought where an international subsidiary is being sued in a local court but plaintiffs seek to sue the parent company, a major U.S. corporation, in U.S. courts. *See Thompson et al.*, *supra* note 79, at 873 (discussing the complexity in international law where the entity that violates the law is a subsidiary in one country but the parent corporation is a multinational corporation headquartered in a different country).

forum to hear the case;<sup>130</sup> or the court may choose not to apply the TVPRA if there are choice-of-law issues.<sup>131</sup>

### C. *Mens Rea and Evidentiary Burdens of the TVPRA*

Prosecutors must prove two mens rea elements to establish a violation of the criminal provision: (1) that the defendant knowingly benefitted from the venture and (2) that the defendant knew or was in reckless disregard of the fact that the venture relied upon forced labor.<sup>132</sup> Several factors indicate whether a corporation or individual should have known trafficking violations may exist, including terms of a contract agreement, separation of a division of the labor force, lack of competing suppliers with equally low costs, and promises of immigrant visas.<sup>133</sup> The TVPRA therefore has a wide scope; a defendant corporation can be liable under the statute without directly contributing to the force, fraud, or coercion if it recklessly disregarded trafficking in its supply chain that provided a financial benefit.<sup>134</sup>

To maintain a civil action under the TVPRA, a plaintiff must establish facts by a preponderance of the evidence.<sup>135</sup> This standard requires that the plaintiff prove that the alleged facts more likely than not occurred.<sup>136</sup> While the civil liability provision creates an avenue for victims of trafficking to pursue civil liability, these cases are more often brought on behalf of victims by “human rights advocates, lawyers, law school students and professors.”<sup>137</sup> A civil case allows victims and victims’ advocates to initiate their own cases, bring cases that prosecutors may be unwilling to bring, receive damages in accordance with the harms suffered, and receive damages from injuries that may not have enough evidence to result in criminal punishment.<sup>138</sup>

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130. Jack H. Friedenthal, Arthur R. Miller, John E. Sexton & Helen Hershkoff, *Civil Procedure* 348 (9th ed. 2005); JOSEPH, *supra* note 63, at 72, 87–88.

131. JOSEPH, *supra* note 63, at 74–76.

132. 18 U.S.C. § 1589 (2012). These same mens rea elements apply to the fine levied under § 1593A, the section which creates a fine for violations of the civil provision. 18 U.S.C. § 1593A (2012).

133. *Infra* Section IV.A.i; see Bang, *supra* note 57, at 1085–92; Bang, *supra* note 26, at 298 (describing the importance of contract terms).

134. 18 U.S.C. §§ 1589, 1595 (2012); George & Smith, *supra* note 64, at 91 (citing Pierce, *supra* note 51, at 586).

135. *United States v. Sabhnani*, 599 F.3d 215, 241–44 (2d Cir. 2010); *Aguirre v. Best Care Agency, Inc.*, 961 F. Supp. 2d 427, 443 (E.D.N.Y. 2013) (citing 18 U.S.C. § 1589); *Shukla v. Sharma*, No. 07-CV-2972, 2012 WL 481796, at \*4–5 (E.D.N.Y. Feb. 14, 2012).

136. *Preponderance*, BLACK’S LAW DICTIONARY 1373 (10th ed. 2014).

137. Bang, *supra* note 2, at 264.

138. Kim & Hreshchyn, *supra* note 5, at 15–18. The civil burden of proof is lower than the burden of proof required under the criminal provision, “beyond a reasonable doubt,” which means

*D. Use of the TVPRA in Litigation to Date*

In its summary of the 2008 TVPRA, the Polaris Project, a prominent anti-human trafficking organization, predicted, “If these [financial benefit] provisions are robustly implemented, they will ultimately result in transfers of trafficker wealth to their victims and will increase the financial risks of engaging in trafficking.”<sup>139</sup> However, robust implementation has not yet occurred due to prosecutors and litigators bringing only a scarcity of cases, despite high estimates regarding the number of victims of trafficking.<sup>140</sup>

Since its passage in 2000 and the addition of a civil remedy in 2003, the TVPRA in general has failed to achieve its potential as a tool for sweeping trafficking accountability.<sup>141</sup> According to Martina E. Vandenberg, founder and president of the Human Trafficking Pro Bono Legal Center, since the civil provision was added in 2003, only 141 civil cases have claimed forced labor under the TVPRA (an average of less than twelve cases per year).<sup>142</sup> Further, she states, “Of the total 152 cases [filed under the civil provision of the TVPRA], 87 include corporate entities as defendants. Most of these corporate entities are labor recruiters, who are in large part responsible for the abuses in the labor supply chain.”<sup>143</sup> Labor recruiters work on the “frontlines” of trafficking and may be distinct from the actual beneficiaries of the

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that it is possible for a victim to win a case under § 1595 even though the facts are not strong enough to win under § 1589. *See Beyond a reasonable doubt*, BLACK’S LAW DICTIONARY 1373, 1457 (10th ed. 2014). Civil evidence rules also are more favorable to victims of trafficking than criminal evidence rules because they allow evidence of psychological conditions. Kim & Hreshchyshyn, *supra* note 5, at 17.

139. POLARIS PROJECT, *supra* note 116, at 7; *About*, POLARIS PROJECT, <https://polarisproject.org/about> (last visited Feb. 6, 2016) [perma.cc/26JM-WRU4] (“Polaris is a leader in the global fight to eradicate modern slavery.”).

140. *See supra* note 24 and accompanying text (estimating the number of trafficked victims in the world today); Pierce, *supra* note 51, at 578 (explaining that few trafficking cases are ever prosecuted).

141. *See* Bang, *supra* note 57, at 1050–51; Bang, *supra* note 2, at 264; Wheaton, et al., *supra* note 24, at 126 (“[W]ith only a few hundred federal prosecutions since January 2001, [as of 2010] the TVPA has had little impact on human traffickers in the United States.”).

142. Vandenberg, *supra* note 17, at 13; *Leadership*, THE HUMAN TRAFFICKING PRO BONO LEGAL CENTER, <http://www.htprobono.org/about-us/leadership/> (last visited Feb. 5, 2016); *Current Federal Laws*, *supra* note 3. According to Human Rights First, “From 2001 to 2008, the Department of Justice (DOJ) and the U.S. Attorneys’ Offices prosecuted 531 defendants under the TVPA, secured 518 convictions and guilty pleas, and opened 1,005 new investigations. . . . In 2014, the U.S. Government pursued 208 cases and obtained 184 convictions.” *Corporate Liability and Human Trafficking*, *supra* note 1, at 2.

143. Vandenberg, *supra* note 17, at 13.

labor.<sup>144</sup> Civil litigators have used the financial benefit provisions of the 2008 TVPRA even less frequently—as of February 2016 only twenty-five published cases even cited the financial benefit provision.<sup>145</sup>

If victims are unaware of their legal rights, incapable of leaving their workplace, and fearful of law enforcement, they are unlikely to bring forth cases on their own behalf.<sup>146</sup> Some victims may also face language barriers, fear of retaliation by traffickers, and psychological barriers and therefore be unwilling to bring a case.<sup>147</sup> Victims lack the means to afford proper legal representation, and traffickers may lack the ability to pay damages.<sup>148</sup> Therefore, the use of the TVPRA is dependent on concerned parties to take up victims' cases on their behalf in order to obtain justice. Activists are growing more aware of this call to action.<sup>149</sup> In January 2015 the White House hosted a discussion on eliminating supply-chain trafficking, and in May 2015 lawyers in London met to discuss how to best use strategic litigation as a tool to fight trafficking crimes.<sup>150</sup> Because the TVPRA authorizes a court to provide attorneys' fees, activists may be more willing to bring a case for an indigent plaintiff.<sup>151</sup>

One commentator has suggested so few cases have been brought due to the difficulty of finding victims and of victims self-identifying and wishing to go forward with a case.<sup>152</sup> Further, there may have been a lack of investment in these cases, and victims themselves are unable to

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144. Wheaton, et al., *supra* note 24, at 127, 136 (explaining the recruiter may be on the frontlines of trafficking as opposed to the destination, or in some circumstances the trafficker and employer may be the same individual).

145. *Supra* note 51; *see also* Nam, *supra* note 24, at 1668 (noting the “infrequent utiliz[ation]” of § 1589).

146. *See* Bang, *supra* note 2, at 264; *see also* HAUGEN & BOUTROS, *supra* note 32, at 73–74 (explaining victims' fear to seek help from law enforcement).

147. Kim & Hreshchyshyn, *supra* note 5, at 15; *see also* HR Conf. Rep. 106-939, at 1 (2000):

Because victims of trafficking are frequently unfamiliar with the laws, cultures, and languages of the countries into which they have been trafficked, because they are often subject to coercion and intimidation including physical detention and debt bondage, and because they often fear retribution and forcible removal to countries in which they will face retribution or other hardship, these victims often find it difficult or impossible to report the crimes committed against them or to assist in the investigation and prosecution of such crimes.

148. *See* Bang, *supra* note 2, at 264 (describing barriers victims face when seeking legal remedies).

149. *See* Vandenberg, *supra* note 17, at 3; Amy Pope, *Combating Human Trafficking in Supply Chains*, THE WHITE HOUSE (Jan. 29, 2015, 5:07 PM), <https://www.whitehouse.gov/blog/2015/01/29/combating-human-trafficking-supply-chains> [<https://perma.cc/J3CH-NJ3K>].

150. Vandenberg, *supra* note 17, at 3; Pope, *supra* note 149.

151. *See* Pierce, *supra* note 51, at 585 (noting that the TVPRA provides for attorneys' fees).

152. Nam, *supra* note 24, at 1678, 1687.

fund civil litigation costs.<sup>153</sup> Finally, perhaps due to the limited use thus far, litigators may not know the best strategies for bringing cases or even what kind of cases to bring.<sup>154</sup>

The cases that litigators have brought under the civil liability provision of the TVPRA to date are scarce.<sup>155</sup> In a notable case, *David v. Signal International*, the plaintiffs survived a motion to dismiss and ultimately won a jury verdict when they filed suit under the civil provision of the TVPRA alleging recruitment based on false premises, the creation of substantial debt, and the requirement to work until the debt was paid.<sup>156</sup> These plaintiffs were Indian citizens who were subjected to the terrible conditions described at the beginning of this Note.<sup>157</sup>

In another example, *Aguilera v. Aegis Communications Group*, a plaintiff pled sufficient facts to survive a motion to dismiss when she alleged she worked long hours for her employer in poor conditions and was told that if she left her job, her employers would not pay for her return flight home from India to the United States as planned.<sup>158</sup> In *Aguirre v. Best Care Agency, Inc.*, the plaintiff survived a motion for summary judgment when she alleged her employers paid her less than she was promised and threatened to remove their sponsorship for her employment visa petition if she quit working.<sup>159</sup> Because the defendants, as the two owners of the corporation, would have benefitted financially from the plaintiff's employment, the court decided that the plaintiff sufficiently alleged that the defendants knowingly benefitted under the TVPRA.<sup>160</sup>

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153. See Bang, *supra* note 2, at 264 (noting attorneys may not be eager to take these cases); Vandenberg, *supra* note 17, at 2 (“[H]igh impact investment has the potential to reap enormous dividends in the fight to end impunity and secure justice . . .”); *supra* note 35 and accompanying text.

154. See Vandenberg, *supra* note 17, at 3, 6 (noting the importance of lawyers sharing past experiences and describing the choices litigators must make in bringing trafficking cases).

155. See Nam, *supra* note 24, at 1668 (suggesting the TVPRA has not been utilized enough).

156. 37 F. Supp. 3d 822, 831–33 (E.D. La. 2014); Vandenberg, *supra* note 17, at 7; Finn, *supra* note 31. Plaintiffs voluntarily dropped their § 1590 claim and left only the § 1589 claim. *David v. Signal Int’l, LLC*, No. 08-1220, 2015 U.S. Dist. LEXIS 1482, at \*198 n.1 (E.D. La., Jan. 6, 2015).

157. *David*, 37 F. Supp. 3d at 824; *supra* Part I.

158. *Aguilera v. Aegis Commc’ns Grp.*, 72 F. Supp. 3d 975, 976 (W.D. Mo. 2014).

159. *Aguirre v. Best Care Agency, Inc.*, 961 F. Supp. 2d 427, 461 (E.D.N.Y. 2013).

160. *Id.* at 460–61.

#### IV. A NEW APPROACH TO TRAFFICKING LIABILITY: CRIMINAL, CIVIL, AND FIDUCIARY LIABILITY UNDER THE TVPRA

Since activists already use litigation as a tool for corporate accountability and the legal landscape is constantly changing, corporations should alter their business practices to minimize liability in response to new legislation. The financial benefit provision of the 2008 TVPRA poses a greater risk of liability than did prior labor regulations to corporations that fail to alter practices when their suppliers are committing trafficking violations. To comply with their fiduciary duty to make informed decisions in good faith, corporate directors should be aware of how the TVPRA can be applied to corporations with labor trafficking in their supply chains and how the TVPRA may see expanded use in the future.<sup>161</sup> Corporations may then be required to put greater pressure on their suppliers to eliminate trafficking from their labor force or to terminate supplier contracts in order to minimize their own liability risk.

Activists, victims, and prosecutors have underused the TVPRA since its passage in 2000, but greater emphasis on holding corporations accountable through litigation may result in more plaintiffs bringing cases under the TVPRA and judges developing a greater understanding of its application.<sup>162</sup> Just as the ATS lay dormant until 1980, when activists recognized the potential application of the statute, so activists may reinvigorate the TVPRA with application to corporations.<sup>163</sup> Whereas under the ATS a human rights violation occurring abroad brought by a foreign plaintiff against a supplier would need a theory of vicarious liability or aiding and abetting to reach a U.S. parent corporation, the financial benefit provision of the TVPRA eclipses the need for these more complicated legal theories.<sup>164</sup>

Trafficking is an economic problem with economic motivations, and when trafficking laws are not enforced, corporations and

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161. *E.g.*, *In re Caremark Int'l*, 698 A.2d 959, 968 (Del. Ch. 1996) (“Where a director in fact exercises a good faith effort to be informed and to exercise appropriate judgment, he or she should be deemed to satisfy fully the duty of attention.”).

162. *See* Vandenberg, *supra* note 17, at 8 (encouraging lawyers, NGOs, journalists, and others to use strategic litigation to fight human trafficking); Bang, *supra* note 57, at 1050 (“A surprisingly small number of trafficking cases have been filed in federal district courts, and few of those cases involve the overseas global corporate supply contracting system.”).

163. Between 1789 and 1980, only twenty-one ATS cases were brought. *See* Stephens, *supra* note 71, at 181–82, 181 n.11 (explaining that prior to *Filartiga v. Pena-Irala*, only twenty-one cases were brought under the ATS). After *Filartiga* in 1980, this number increased dramatically. *Id.* at 184–85 (approximately eighty cases were filed between 1980 and 2004 relying on the ATS).

164. *See* 18 U.S.C. §§ 1589, 1595; *Corporate Liability and Human Trafficking*, *supra* note 1, at 8–9 (describing a slavery case brought under the ATS under a theory of aiding and abetting); *supra* Part II (discussing limitations of the ATS).

individuals profit from forced labor without facing the costs of their behavior.<sup>165</sup> When returns are high and risks of actual punishment are low, corporations stand to gain financially from the use of trafficked labor.<sup>166</sup> However, steep litigation costs or reputational damage could effectively negate this potential financial gain.<sup>167</sup> Strong legal enforcement both criminally and civilly can decrease the demand side of trafficking economics.<sup>168</sup> By complying with the TVPRA and striving to eliminate trafficking from its supply chain, a corporation absorbs the costs of negative externalities produced by trafficked labor and reduces its likelihood of liability and reputational costs based on human trafficking violations.<sup>169</sup>

### A. TVPRA as a Legal Basis for Corporate Criminal and Civil Liability

As of 2008, the TVPRA is unique compared to other laws because the financial benefits provision creates liability for entities distinct from the actual perpetrators of the crime without requiring an agency relationship.<sup>170</sup> Because the TVPRA's financial benefits provisions have not yet been applied to a large corporation, activists, judges, and lawyers may lack a general understanding of how to apply the language of the criminal and civil provisions to traffickers' actions.<sup>171</sup>

#### 1. Financial Benefit Provision Applied to Corporations

Professor Naomi Bang has proposed using an “economic realities test” for determining whether joint employment exists for purposes of applying the TVPRA to corporations that financially benefit from human trafficking.<sup>172</sup> Bang's proposal is that the economic realities test, as currently applied to the National Labor Relations Act and the Fair

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165. See *supra* notes 44–49 and accompanying text.

166. Kim & Hreshchyshyn, *supra* note 5, at 7 (“Trafficking has a high return-to-risk ratio that makes it more attractive to criminals than other, riskier criminal activities.”).

167. See *supra* notes 64–69 and accompanying text.

168. See generally Jonathan Todres, *The Private Sector's Pivotal Role in Combating Human Trafficking*, 3 CALIF. L. REV. CIRCUIT 80, 85 (2012), <http://www.californialawreview.org/wp-content/uploads/2014/10/The-Private-Sector-s-Pivotal-Role-in-Combating-Human-Trafficking.pdf> (“Tackling demand side issues will require addressing . . . the attendant pressure on businesses to constantly increase profits.”).

169. See Morrissey, *supra* note 62, at 387 (explaining that the corporate focus on quick profits can result in negative externalities on society).

170. See 18 U.S.C. §§ 1589, 1595; Pierce, *supra* note 51, at 578–79 (explaining that plaintiffs face difficulties in establishing corporate liability where there is a subcontractor).

171. See generally Nam, *supra* note 24, at 1656 (“[T]rafficking victims have filed very few lawsuits under this civil remedy [§ 1595] . . . since its creation . . .”); *supra* note 51.

172. Bang, *supra* note 57, at 1085–87; Bang, *supra* note 2, at 258–59, 277–96, 308–09.

Labor Standards Act, could be a mechanism to link the corporation to the acts of the supplier.<sup>173</sup> A theory of joint employment enables courts to look beyond the immediate perpetrator of the crime to the corporation that may have a great deal of control over the perpetrator entity.<sup>174</sup> Bang proposes this test be applied to effectively prosecute corporations under the first subsection of the criminal provision of the TVPRA, § 1589(a), which criminalizes anyone who obtains or provides forced labor through force, harm, abuse, or fraud.<sup>175</sup>

However, a test to prove joint employment in order for the law to reach a parent corporation is unnecessary given the explicit language of the financial benefit provision of the 2008 TVPRA.<sup>176</sup> The language of the 2008 TVPRA provides this legal connection between the supplier and the corporation because it encompasses anyone that benefits from participation in a venture.<sup>177</sup> The language of the 2008 TVPRA eclipses the need for complicated legal theories of vicarious liability or joint employment to hold corporations accountable for actions of their suppliers under § 1589(a), since the remedy for both § 1589(a) and (b), the financial benefits subsection of the criminal provision, are the same.<sup>178</sup>

Although the application of the economic realities test is unnecessary due to the financial benefits provision, the factors Professor Bang mentions to determine the legal relationship between the supplier, its employees, and the corporation are relevant to determine what constitutes corporate knowledge or reckless disregard under the TVPRA.<sup>179</sup> Under the economic-realities-test theory, corporations could be held accountable under the TVPRA for trafficking in supply chains based on the terms of the corporate supply contract

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173. See Bang, *supra* note 57, at 1089–91 (“The economic realities test provides a solid framework and a legally sound nexus tying the foreign contractor to the corporation.”); see also Bang, *supra* note 2, at 258–59 (suggesting a strong link between the TVPRA and FLSA).

174. See Bang, *supra* note 2, at 279–82 (arguing the joint employment doctrine is vital to prevent companies from avoiding liability).

175. 18 U.S.C. § 1589; Bang, *supra* note 2, at 311.

176. 18 U.S.C. § 1589(b).

177. See *id.* (outlining those who can be held responsible for benefitting by participating in a venture).

178. See 18 U.S.C. § 1593 (requiring mandatory restitution for any offense under the chapter, which includes § 1589); see also Bang, *supra* note 2, at 275 (“Satisfying this central requirement of ‘control’ of the corporation over its contractors is particularly challenging in overseas trafficking cases . . .”).

179. See Bang, *supra* note 57, at 1085–92 (mentioning terms of the supply contract and the contractor’s dependency on the corporation as relevant to application of the economic realities test); see also *supra* Section III.C. (discussing mens rea as applied to the TVPRA).

and the contractor's ability to negotiate terms of the supply contract to determine the workers' dependence.<sup>180</sup>

For example, if examined closely, supply-contract terms may indicate the labor conditions of a supplier.<sup>181</sup> While relevant for the joint employer test, contract terms also give notice to a corporation to be skeptical about true working conditions.<sup>182</sup> Considering how many workers are on staff, how much they are paid, and what their rate of production is may indicate whether the labor costs meet a reasonable wage or reasonable number of hours worked. Red flags may also include reports of concern from NGOs or media outlets.<sup>183</sup> If there were trafficking in the workforce of a supplier but nothing hinted about the actual conditions to the corporation, a corporation would not be on notice of potential TVPRA violations, and there would be insufficient evidence for reckless disregard of trafficking, absent other factors.

A courts' determination of what constitutes a "benefit" sufficient to trigger liability will likely need to be a case-by-case evaluation.<sup>184</sup> The language used in both the criminal and civil provisions of the TVPRA—"benefits, financially or by receiving anything of value"—has been interpreted in the context of a different section of the TVPRA as covering both monetary and non-monetary value.<sup>185</sup> Until courts decide more TVPRA cases on the merits and establish precedent for what degree of benefit results in liability or culpability, corporations should be wary of the liability risk from any degree of reduced costs they profit from by relying on suppliers that use forced labor.

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180. See Bang, *supra* note 57, at 1089–91 (highlighting the importance of the supply contract and dependency of the contractor); see also Bang, *supra* note 2, at 300–02 (same).

181. See Bang, *supra* note 2, at 298 (“[C]ontract terms concerning price and deadlines are the factors forming the crux of the economic realities test.”).

182. See Bang, *supra* note 57, at 1089–91 (“With the supply contract provisions as proof of working conditions, big name corporations cannot feign ignorance of the margin left to pay for the soft costs of labor, benefits, safety measures, and other unexpected costs.”).

183. See Rich *ex rel.* Fuqi Int'l v. Yu Kwai Chong, 66 A.3d 963, 983 (2013) (“One way that the plaintiff may plead such a conscious failure to monitor is to identify ‘red flags,’ obvious and problematic occurrences . . .”).

184. See 18 U.S.C. § 1589 (2012) (giving no indication of what constitutes financial benefit); see also Bang, *supra* note 57, at 1083–91 (explaining the five factors considered in determining application of the economic realities test to date and the proposed factors to be considered in applying the test to the trafficking context).

185. United States v. Flanders, 752 F.3d 1317, 1331–32 (11th Cir. 2014) (describing receipt of auditioning fees and ownership of copies of porn videos as benefits); United States v. Cook, No. 10-00244-02-CR-W-DW, 2013 WL 3039296, at \*12–13 (W.D. Mo. June 17, 2013) (describing ownership of something for which people will pay money, faster file downloading, or expectation of a sexual encounter as things of value in interpreting 18 U.S.C. § 1591(a)).

## 2. Hypothetical Application

With its broad language, the TVPRA can hold corporations accountable for a wider range of activities than previous human rights laws have done.<sup>186</sup> The case *Doe v. Unocal Corp.*<sup>187</sup> involves a set of facts that today could give rise to a violation of the TVPRA's financial benefit provisions. *Unocal* was brought in 1997 and settled in 2004, prior to the addition of the financial benefits provisions of the 2008 TVPRA.<sup>188</sup> In this case, the defendant corporation financially benefitted from trafficked labor but did not directly perpetrate the trafficking violation.<sup>189</sup>

*Unocal* involved the construction of an oil pipeline and allegations that the military hired for security was responsible for terrible human rights abuses.<sup>190</sup> Both Unocal Corporation and Total S.A. set up subsidiaries<sup>191</sup> with an interest in the pipeline project, and the two corporations met to discuss security issues and concerns about the amount of force the Myanmar military may use in providing project security.<sup>192</sup> Unocal executives found no indications of human rights violations in the project in 1994, but individuals from Human Rights Watch and Amnesty International informed Unocal in 1995 that forced labor was a major concern.<sup>193</sup> Also in 1995, a Unocal consultant reported that forced labor was occurring.<sup>194</sup> Under the TVPRA, warnings from prominent human rights organizations may be sufficient to put a corporation on notice of the likely existence of labor trafficking in the supply chain.<sup>195</sup>

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186. See 18 U.S.C. §§ 1589, 1595 (2012).

187. 963 F. Supp. 880 (C.D. Cal. 1997).

188. *Id.* *Unocal* has a complicated procedural history: "The case was dismissed by [Judge Lew] in 2000 . . . , but reinstated by the Ninth Circuit in 2002 . . . . That decision was vacated [in] 2003, and [Judge Lew's] decision reinstated, pending an appeal to an eleven[-]judge *en banc* panel within the Ninth Circuit." JOSEPH, *supra* note 63, at 68 (footnotes omitted). The parties settled in 2004. *Unocal Settles Rights Suit in Myanmar*, N.Y. TIMES (Dec. 14, 2004), <http://www.nytimes.com/2004/12/14/business/unocal-settles-rights-suit-in-myanmar.html> [<http://perma.cc/ATP7-C3HT>].

189. *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1310 (C.D. Cal. 2000).

190. JOSEPH, *supra* note 63, at 68–69.

191. These subsidiaries were named Unocal Myanmar Offshore Company ("UMOC"), Unocal International Pipeline Corporation, and Total Myanmar Exploration and Production ("TMEP"), respectively. *Doe v. Unocal Corp.*, 395 F.3d 932, 937 (9th Cir. 2002); *Unocal*, 110 F. Supp. 2d at 1297–98.

192. *Unocal*, 110 F. Supp. 2d at 1298–99.

193. *Id.* at 1299–1302; *Unocal*, 395 F.3d at 941.

194. *Unocal*, 110 F. Supp. 2d at 1299–1300; *Unocal*, 395 F.3d at 941.

195. See Rich *ex rel.* Fuqi Int'l v. Yu Kwai Chong, 66 A.3d 963, 983 (2013) (describing the importance of responding to red flags).

The plaintiffs, a class of resident farmers of a particular area in Myanmar, asserted that defendant corporations Unocal and Total S.A. knew that violence and fear were tools used by the local military junta to assist in the defendant corporations' creation of a pipeline.<sup>196</sup> Specifically, the plaintiffs alleged that "defendants Unocal and Total were aware of and *benefitted from*, and continue to be aware of and benefit from, *the use of forced labor* to support the Yadana gas pipeline project."<sup>197</sup> One alleged benefit from the reliance on trafficked labor, the plaintiffs claimed, was that the corporations gained an "unfair competitive advantage in the United States gas market."<sup>198</sup> Although "benefit" from forced labor has yet to be sufficiently established with case law, benefit from competitive advantage alone would likely be sufficient to constitute a benefit under the TVPRA because it has value.<sup>199</sup>

A similar set of facts today could result in corporate liability under the financial benefit provision of the TVPRA. The corporation was part of a venture that knowingly financially benefitted from forced labor in the construction of the pipeline.<sup>200</sup> In fact, the trial court stated, "The evidence does suggest that Unocal *knew* that forced labor was being utilized and that the Joint Venturers *benefitted from* the practice."<sup>201</sup> Under the TVPRA, this knowledge of the benefit from a venture that the corporation knew was perpetrating human trafficking violations would be sufficient to allege a violation of the criminal and civil provisions of the TVPRA.<sup>202</sup> Unocal did not have any specific desire that the security forces rely on trafficked labor, but this is not enough to avoid liability under the TVPRA.<sup>203</sup>

Corporations can no longer ignore red flags, such as reports from human rights groups or other third parties, that human rights

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196. *Unocal*, 963 F. Supp. at 883, 888.

197. *Id.* at 885 (emphasis added).

198. *Id.* at 888. This claim was part of an argument that the defendants' actions had a direct effect in the United States for an exception to the Foreign Sovereign Immunities Act.

199. *See* notes 184–185 and accompanying text.

200. JOSEPH, *supra* note 63, at 71; Williams, *supra* note 49, at 758–61. In 1996, Total S.A. sent Unocal a memorandum that demonstrated knowledge that labor trafficking violations had occurred. *Unocal*, 110 F. Supp. 2d at 1302 ("In a September 17, 1996 memorandum from Total to Unocal regarding forced labor, Total acknowledged that 'we were told that even if Total is not using forced labor directly, the troops assigned to the protection of our operations use forced labor to build their camps and to carry their equipments.'").

201. *Unocal*, 110 F. Supp. 2d at 1310 (emphasis added).

202. *See* 18 U.S.C. § 1589, 1595 (2012).

203. *See* 18 U.S.C. § 1589, 1595 (no element regarding corporate intent that labor be derived by force, fraud, or coercion); *Unocal*, 110 F. Supp. 2d at 1310 ("In fact, the Joint Venturers expressed concern that the Myanmar government was utilizing forced labor in connection with the Project.").

violations are occurring in connection with their business operations.<sup>204</sup> Directors should be wary of supplier relationships that once insulated their corporation from liability—either because they were not liable or because proof of liability required complicated legal theories—but that, since 2008, now fit directly within the scope of the TVPRA.

### *B. TVPRA as a Legal Basis for Corporate Directors’ Fiduciary Liability*

The financial benefit provision of the 2008 TVPRA expands the scope of potential liability to include more defendants.<sup>205</sup> Corporate directors should monitor their suppliers’ employment strategies in order to fulfill corporate obligations to make good faith, informed decisions in structuring policies to minimize liability risk.<sup>206</sup> If given notice that a subsidiary is violating the laws against human trafficking, a corporation must act.<sup>207</sup>

#### 1. Expansion of the Corporate Duty to Monitor

Directors have a general duty to have adequate reporting systems in place to make informed decisions about the company.<sup>208</sup> However, with the expanded potential for corporate liability under the 2008 TVPRA, directors now have an expanded duty of information-gathering under the TVPRA, as now the labor practices of both the supplier and the corporation affect the corporation’s liability risk.<sup>209</sup> Because the 2008 TVPRA criminalizes benefitting financially from

204. See *Rich ex rel. Fuqi Int’l v. Yu Kwai Chong*, 66 A.3d 963, 983 (2013) (describing the importance of responding to red flags).

205. Dryhurst, *supra* note 102, at 661 (“Employer corporations most likely would be held liable under the provision penalizing ‘whoever knowingly benefits’ from a venture engaged in labor trafficking.”).

206. See *infra* Section I.D.

207. See *Fuqi Int’l*, 66 A.3d at 984 (“When faced with knowledge that the company controls are inadequate, the directors must *act*, i.e., they must prevent further wrongdoing from occurring.”); *In re Caremark Int’l*, 698 A.2d 959, 971 (Del. Ch. 1996) (explaining that directors’ failure to take steps to remedy a violation of law they knew or should have known was occurring is an element of proving a breach of duty); O’KELLEY & THOMPSON, *supra* note 59, at 265–66 (describing a “board’s responsibility to monitor and prevent illegal activity”).

208. See *Caremark*, 698 A.2d at 970 (explaining a director’s failure to have an adequate reporting system in place may make him or her liable for losses from legal non-compliance).

209. See *supra* Section IV.A. A 2015 report by Human Rights First, a non-profit human rights organization, raised the idea of director fiduciary obligations to monitor for human trafficking but did not discuss these duties in the context of the TVPRA nor did it discuss how they applied in practice. *Corporate Liability and Human Trafficking*, *supra* note 1, at 18; *About Us*, HUMAN RIGHTS FIRST, <http://www.humanrightsfirst.org/about> (last visited Feb. 6, 2016) [perma.cc/WU6F-EE6B].

trafficking in addition to the direct perpetration of the crime, corporate directors must have information regarding indicators of potential trafficking violations not only in their own workforce but also in the workforce of their suppliers.<sup>210</sup>

Courts may no longer afford business-judgment-rule protection to regulation systems that may have been acceptable prior to the TVPRA's passage in 2000 and later expansions, in light of the greater liability imposed for supply-chain trafficking under the TVPRA. If necessary, directors must alter the corporate status quo of lax regulation and inadequate monitoring of suppliers in order to comply with fiduciary duties.<sup>211</sup> For example, if directors could once in good faith ignore the implications from suppliers' contracts about labor practices, now they should be alert to hints of trafficking.<sup>212</sup>

Compliance with this higher degree of monitoring under the TVPRA may require increased labor and supply costs as a corporation alters its current practices.<sup>213</sup> Depending on the current state of a corporation's monitoring procedures, compliance with fiduciary duties arising out of the TVPRA may require improvements in a corporation's monitoring structure and greater evaluation of members of the supply chain, as discussed below.<sup>214</sup> However, these costs are necessary because corporate directors have an affirmative duty to establish adequate reporting systems to ensure director awareness of company operations and activities to make informed decisions in good faith.<sup>215</sup>

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210. See 18 U.S.C. §§ 1589, 1595 (criminalizing and creating liability for financial benefit from trafficked labor); Johnson, *supra* note 53, at 28, 33–35 (explaining that corporate lawyers should care about trafficking in the supply chain). Williams and Conley have argued that corporate directors have a fiduciary obligation “to be aware of human rights risks and potential violations within a company’s global operations and to develop policies and management procedures to reduce the risks of such violations.” Williams & Conley, *supra* note 69, at 81–94 (explaining corporate liability under the ATS).

211. See *Caremark*, 698 A.2d at 971 (explaining that a board’s lack of oversight or monitoring and failure to have information systems in place could constitute a lack of good faith).

212. See *supra* Section III.C.

213. See Williams, *supra* note 49, at 737 (noting that Nike altered wages and safety requirements as a reaction to negative publicity for poor labor conditions).

214. *Infra* Section IV.C; see Norman Bishara & David Hess, *Human Rights and a Corporation’s Duty to Combat Corruption*, in LAW, BUSINESS AND HUMAN RIGHTS, *supra* note 66, at 71, 81, 85–89 (arguing for corporate due diligence with respect to corporate social responsibility); Hiller & Hiller, *supra* note 66, at 118–22 (arguing for corporate due diligence under the United Nations Framework for Business and Human Rights); Nersessian, *supra* note 49, at 1182 (“The failure to take reasonable steps to prevent [human rights violations], or to properly investigate reports of such violations by subsidiaries or agents, may constitute mismanagement and a fiduciary breach.”).

215. See, e.g., Williams & Conley, *supra* note 69, at 88:

After *Sosa*, human rights violations are part of the liability risks that directors need to consider, at least to the extent of ensuring that the company has established

Corporate directors should be aware of the state of human rights laws and potential risks of liability in their corporation.<sup>216</sup> Directors must be knowledgeable about human rights, as a director's fiduciary duty of care requires understanding the risks and liability exposure of the corporation, including those in the context of international human rights.<sup>217</sup> From the very beginning of their relationship with suppliers, directors and corporate officers should consider the need to be informed about potential trafficking violations and implement safeguards such as "a prohibition on the use of trafficked, forced, or child labor; cooperation requirements; audit rights; and rights to suspend performance, withhold payments, and terminate the contract if violations are uncovered."<sup>218</sup> By implementing these safeguards, directors indicate to suppliers that trafficking violations will not be tolerated.

As social awareness of human trafficking has grown, so has directors' need to recognize the problem and take action: "[W]here a decade ago businesses might have been unaware that they reaped economic benefits from enslaved labor, today the issue of human trafficking is regularly in the news, making it much harder for any individual or entity to profess ignorance."<sup>219</sup> Under the TVPRA, reckless disregard of trafficking in the corporate supply chain is criminal behavior and directors should be aware of and eliminate this risk of liability to the corporation.<sup>220</sup>

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appropriate information and reporting systems to assess risks of human rights violations, as well as policies to address conditions that may give rise to such risks.

216. See Kerr, *supra* note 68, at 835 ("[T]he duty of good faith may even require that directors consider the social impact of their decisions in this current era of corporate responsibility."); *Corporate Liability and Human Trafficking*, *supra* note 1, at 25 (describing the importance of understanding the laws against human trafficking).

217. See, e.g., Williams & Conley, *supra* note 69, at 88, 92.

218. See Brittany Prelogar et al., *New Human Trafficking Laws and US Government Initiatives Make Anti-Trafficking a Compliance Priority for Businesses in 2013*, STEPTOE & JOHNSON LLP (Feb. 14, 2013), <http://www.steptoel.com/publications-8618.html> [perma.cc/7SBL-J9QH].

219. Todres, *supra* note 168, at 89–90. For example, CNN has created the CNN Freedom Project, a webpage "to amplify the voices of the victims of modern-slavery, highlight success stories and help unravel the tangle of criminal enterprises trading in human life." *The CNN Freedom Project*, CNN.COM, <http://www.cnn.com/specials/world/freedom-project> (last visited Feb. 6, 2016) [<http://perma.cc/9LEV-SPUA>]. The New York Times has a "Times Topics" page dedicated to Human Trafficking that includes an entire chronology of the paper's coverage of human trafficking stories, as well as links to general information about human trafficking. *Human Trafficking*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/subjects/h/human\\_trafficking/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/h/human_trafficking/index.html) (last visited Feb. 6, 2016) [<http://perma.cc/A29G-PFMV>].

220. See 18 U.S.C. § 1589 (2012).

## 2. Shareholder Derivative Suits

Shareholders may bring a derivative suit for breach of fiduciary duty against the directors of a corporation who fail to effectively monitor their suppliers' labor conditions for the presence of human trafficking if that failure results in loss to the company.<sup>221</sup> In other areas of the law, follow-on derivative suits have become an anticipated response to litigation for a company's failure to comply with the law.<sup>222</sup> Additionally, scholars have encouraged more shareholder activism to exert greater oversight of corporate governance.<sup>223</sup> The chances of double liability or even triple liability for human trafficking violations (if both a criminal and civil suit were brought under the TVPRA and shareholders brought a derivative suit) could result in steep costs for the corporation and directors who failed to eliminate trafficking from the corporate supply chain. So far, no case has been brought as a shareholder derivative suit citing the TVPRA.<sup>224</sup>

With a derivative suit, shareholders assert wrongs done to the corporation on behalf of the corporation.<sup>225</sup> To effectively bring a derivative suit in Delaware, shareholders must first make demand or prove demand futility.<sup>226</sup> To plead demand futility, shareholders may

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221. See FED. R. CIV. P. 23.1 (outlining the requirements for shareholders to bring a derivative suit in federal court); see also Joseph M. McLaughlin, *Shareholder Derivative Litigation*, PRAC. L. (2015), <http://us.practicallaw.com/8-508-8277> [perma.cc/QM58-8Z7J]. Depending on where the suit is brought, the shareholders may need to first fulfill the demand requirement by informing the directors of what claims they have and give the directors an opportunity to first bring the claim. O'KELLEY & THOMPSON, *supra* note 59, at 325. If the directors do not pursue the claim, "shareholder[s] may challenge the directors' decision as a breach of fiduciary duty, but [they] have no right to directly pursue the original claim that was the subject of [their] demand." *Id.* at 325. If demand is futile, shareholders may not have to make demand prior to bringing a derivative action. *Id.* at 325–26.

222. Gabriela Jara, Note, *Following on the Foreign Corrupt Practices Act: The Dynamic Shareholder Derivative Suit*, 63 DUKE L.J. 199, 201–02 (2013) (noting that follow-on derivative suits often follow allegations of Foreign Corrupt Practices Act violations).

223. See Morrissey, *supra* note 62, at 373–74 (discussing approaches from academics on how increased shareholder rights can guard against managerial misconduct).

224. In addition to broad corporate liability, directors should consider how the TVPRA might be used against individuals if the corporate veil is pierced. Piercing the corporate veil is a legal device that allows plaintiffs to bring a case against individuals of the corporation in circumstances of crimes or injustice, in effect removing the shield that the corporate entity normally provides. O'KELLEY & THOMPSON, *supra* note 59, at 501–02. Prosecuting individual directors may serve the same deterrent function as a suit against the corporation due to the indemnification clauses most corporations have. Thompson et al., *supra* note 79, at 872–73.

225. See Jara, *supra* note 222, at 201 (explaining that in derivative suits, the injury is an injury to the corporation).

226. *Stone v. Ritter*, 911 A.2d 362, 366–67 (Del. 2006). See O'KELLEY & THOMPSON, *supra* note 59, at 325 (noting that requirements for demand and demand futility vary in different jurisdictions); Jara, *supra* note 222, at 209–13 (explaining the demand requirement). Shareholders can allege demand futility for both board action and inaction under the *Aronson v. Lewis* test and

argue that directors allowed poor oversight of trafficking violations in the labor force of suppliers, which allowed the corporation to illegally financially benefit from trafficking, or that they ignored red flags that should have given them knowledge.<sup>227</sup> In the *Caremark* litigation, in order to prove a derivative claim that directors breached their duty, plaintiffs had to prove: “(1) that the directors knew or (2) should have known that violations of law were occurring and, in either event, (3) that the directors took no steps in a good faith effort to prevent or remedy that situation, and (4) that such failure proximately resulted in the losses complained of.”<sup>228</sup>

Several trafficking violations in the corporation’s supply chain could be sufficient to prove the directors had knowledge of a failure to comply with the TVPRA, but these arguments may depend on additional facts.<sup>229</sup> As awareness of supply-chain trafficking grows, however, directors may find it more difficult to defend against shareholders’ claims that they should have known trafficking was occurring.<sup>230</sup>

If directors know that the corporation is benefitting financially from a supplier’s trafficking violations and take no action, the directors breach their fiduciary duty to make a good-faith attempt to stop the violations.<sup>231</sup> Director liability for failure to monitor requires “(a) [that] the directors utterly failed to implement any reporting or information

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*Rales v. Blasband* test, respectively. Jara, *supra* note 222, at 210. “To show (1) bad faith for the *Caremark* violation and (2) substantial likelihood of liability for demand futility, plaintiffs must allege the directors *knew* they were violating a duty.” Jara, *supra* note 222, at 213.

227. See Jara, *supra* note 222, at 218–19:

[T]he shareholder claim under *Caremark* must “contend[ ] that the directors set in motion or ‘allowed a situation to develop and continue which exposed the corporation to enormous legal liability and that in doing so they violated a duty to be active monitors of corporate performance.’” . . . If plaintiffs can show that directors failed to monitor and that directors *knew* they were violating a fiduciary duty by “conscious[ly] disregard[ing] their responsibilities,” they are more likely to demonstrate a failure of oversight and a substantial likelihood of liability under the demand-futility analysis for director interest.

(alterations in original) (footnotes omitted) (quoting *La. Mun. Police Emps. Ret. Sys. v. Pyott*, 46 A.3d 313, 340 (Del. Ch. 2012) and *Stone*, 911 A.2d at 370).

228. 698 A.2d 959, 971 (Del. Ch. 1996). Under a different theory of liability, if a defendant corporation has actually engaged in labor trafficking, the basis for this derivative suit may be the corporation’s realization of illegal profits. See McLaughlin, *supra* note 221 (realization of illegal profits is a classic breach of fiduciary duty).

229. See Jara, *supra* note 222, at 221–24 (comparing the different results in *In re Abbott Laboratories Derivative Shareholders Litigation* and *Midwestern Teamsters Pension Trust Fund v. Deaton*, both of which involved directors being on notice of repetitive corporate violations).

230. See *supra* note 219 and accompanying text (noting it is more difficult to claim ignorance of trafficking violations today than it was in the past).

231. See *Caremark*, 698 A.2d at 971 (requiring plaintiffs prove that directors lacked a good faith effort to “prevent or remedy” a violation of law as an element of breach of duty).

systems or controls; or (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed.”<sup>232</sup> If directors have no monitoring or oversight mechanisms in place to prevent the corporation from recklessly disregarding a financial benefit from trafficking, they fail their duty to act in the best interests of the corporation to maximize shareholder value by exposing the corporation to high litigation costs under the criminal and civil provisions of the TVPRA and to potential reputational harm.<sup>233</sup>

In *Stone v. Ritter*, the court clarified that a failure to act in good faith is not alone sufficient for director liability, but it is “essential to establish director oversight liability.”<sup>234</sup> The business judgment rule cannot protect actions that are not made in good faith.<sup>235</sup> Bad faith actions include a failure to adequately monitor the actions of the corporation.<sup>236</sup> Given the prevalence of supply-chain trafficking and the potential liability under the TVPRA for corporations that financially benefit from trafficking, directors’ disregard of trafficking indicators and failure to remedy any problems discovered could demonstrate failure to act in good faith.<sup>237</sup>

The final element of the *Caremark* test to show directors breached their duty requires shareholders to prove that the knowing or reckless disregard of violations of law and failure to “prevent or remedy that situation” proximately caused loss.<sup>238</sup> With regard to human trafficking, a failure to monitor the labor practices of suppliers could

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232. *Stone*, 911 A.2d at 370.

233. See generally *Corporate Liability and Human Trafficking*, *supra* note 1, at 1 (explaining there is a connection between legal liability for supply-chain trafficking and harm to reputation and shareholders).

234. *Stone*, 911 A.2d at 370.

235. *Rich ex rel. Fuqi Int’l v. Yu Kwai Chong*, 66 A.3d 963, 977 (2013) (“[T]he business judgment rule does not apply if directors fail to inform themselves of all material information reasonably available to them and fail to act with requisite care.”); *Caremark*, 698 A.2d at 967–68 (“[T]he business judgment rule is process oriented and informed by a deep respect for all *good faith* board decisions.”) (emphasis added); O’KELLEY & THOMPSON, *supra* note 59, at 222–23.

236. *Jara*, *supra* note 222, at 215 (“The liability for breach, however, only arises when the director acted in bad faith by consciously or knowingly failing to fulfill the duty concerning compliance and monitoring.”).

237. See *Kerr*, *supra* note 68, at 834–39 (“Purposely refusing to consider the social effects of a business decision could be considered a dereliction of duty and therefore a breach of good faith . . .”). As an example of supply-chain prevalence, in 2011, an estimated fifty-three percent of American manufacturing companies employed foreign workers in product creation. Bang, *supra* note 2, at 270 (citing Job Outsourcing Statistics, STATISTIC BRAIN (July 20, 2012), <http://www.statisticbrain.com/outourcing-statistics-by-country/> [<http://perma.cc/H6J8-VQWS>]).

238. 698 A.2d at 971. At least one court has explained that the fiduciary duty of care described in *Caremark* is really a fiduciary duty of loyalty, but this Note will not address this distinction between duties of care and duties of loyalty. *Stone*, 911 A.2d at 370.

negatively impact the corporation, resulting in financial loss, if costly litigation or reputational damage results.<sup>239</sup>

Several cases that plaintiffs filed against corporations with human trafficking or other human rights violations have resulted in large settlement fees or judgments.<sup>240</sup> For example, in 2006 a judge ruled that an oil-industry parts manufacturer must pay \$1.24 million to fifty-two victims of human trafficking under a civil rights theory.<sup>241</sup> In a corporate human rights case, though not a human trafficking case, Shell settled with plaintiffs for \$15.5 million.<sup>242</sup> As previously noted, Signal International, LLC, faced a \$12 million judgment for trafficking violations and later settled with other workers in July 2015 for \$20 million before filing bankruptcy.<sup>243</sup> Similarly large judgments could result from increased use of the TVPRA, particularly as activists are encouraging increased use of litigation against human trafficking violations.<sup>244</sup> With the addition of the financial benefit provision to the TVPRA in 2008, the status quo of general apathy towards supply-chain practices should no longer be an acceptable, good-faith business decision.

At least one commentator has criticized the financial benefit provision of the 2008 TVPRA for not going far enough to create civil liability for corporate action and for creating a moral hazard for corporations.<sup>245</sup> This criticism comes from a concern that corporations

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239. See OLUFEMI AMAO, CORPORATE SOCIAL RESPONSIBILITY, HUMAN RIGHTS AND THE LAW 69 (2011) (theorizing that good corporate social responsibility should positively impact a corporation but also recognizing that the impact is difficult to quantify); Johnson, *supra* note 53, at 33–35 (describing risks of engaging in trafficking); Prelogar et al., *supra* note 218 (“Companies associated with human trafficking not only face serious legal and enforcement risks, but also risk severely tarnishing their brands in the eyes of consumers, investors, employees, and other stakeholders.” (footnote omitted)). Litigation may have a greater impact on the corporation’s finances than consumer reaction, depending on multiple factors. JOSEPH, *supra* note 63, at 7 & n.53 (explaining the relationship between stock price and reputation is unclear but that adverse judgments can affect stock price); see also Bang, *supra* note 2, at 270–71 (explaining that after an initial negative public reaction to working conditions at Nike and Disney, little occurred).

240. See Pierce, *supra* note 51, at 584 n.73 (describing damages of \$1.24 million against traffickers); JOSEPH, *supra* note 63, at 14–15 (noting corporate civil damages can harm a corporation’s bottom line and share price).

241. Press Release, U.S. Equal Opportunity Emp’t Comm’n, *supra* note 63.

242. Ed Pilkington, *Shell Pays Out \$15.5m Over Saro-Wiwa Killing*, GUARDIAN (June 8, 2009, 7:07 P.M.), <http://www.theguardian.com/world/2009/jun/08/nigeria-usa> [perma.cc/K7WL-ZNZT].

243. Vandenberg, *supra* note 17, at 7; Finn, *supra* note 31 (explaining Signal International was required to pay \$12 million of the \$14 million verdict).

244. Vandenberg, *supra* note 17, at 2; *Corporate Liability and Human Trafficking*, *supra* note 1, at 1.

245. See Pierce, *supra* note 51, at 594–96 (arguing the TVPRA still does not create adequate liability for corporations culpable for human trafficking violations). Pierce calls the financial benefit provision a “step in the right direction” and yet “still not sufficient” because it cannot reach corporations that willfully ignore trafficking violations in the supply chain. *Id.* at 594. Compare

that are willfully blind to trafficking violations will remain immune from liability.<sup>246</sup> Commentators have expressed concern that corporations will purposefully remain oblivious to supply-chain labor practices so they can plead ignorance if a claim is brought.<sup>247</sup> The TVPRA does not criminalize or create liability for entities that are negligent of trafficking in the supply chain, only those that “knew or should have known” of the harmful, forceful, abusive, or manipulative conditions in which labor was obtained.<sup>248</sup> Courts’ interpretations of the facts sufficient to establish whether a corporation “should have known” of trafficking will greatly influence the incentive structure created by the TVPRA.<sup>249</sup>

However, the risk of a potential shareholder suit should alter the incentive structure for corporations to deter temptation to remain ignorant of supply-chain practices. Although proving that directors knew their failure to monitor was a violation of a fiduciary duty may be difficult,<sup>250</sup> even the fact that shareholders file a derivative suit may cause a deterrent effect or spur directors to implement greater monitoring and reporting oversight.<sup>251</sup> This additional litigation risk should alter the incentive structure to reject any desire to be intentionally oblivious to potential trafficking and instead require that a corporation actively determine that it complies with the TVPRA.

Rational disinterest of shareholders, though an issue in corporate governance at large, will not prevent the use of the shareholder derivative suit as a tool of corporate accountability.<sup>252</sup> Human rights activists may encourage shareholders to bring these suits

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Dryhurst, *supra* note 102, at 654–55 (“Theory predicts that corporations will structure their employment relationships to avoid liability by hiring thinly capitalized agents and avoiding direct control of those agents.”), with George & Smith, *supra* note 64, at 92 (“[B]usinesses can no longer turn a blind eye to the problem of child sex trafficking, because they run the risk of being held liable for their part in the problem simply because they should have known it was occurring.”).

246. See Dryhurst, *supra* note 102, at 662–63 (questioning the incentives the TVPRA creates).

247. See Pierce, *supra* note 51, at 594–96 (critiquing the financial benefit language for being insufficient to remedy the problem of corporate trafficking violations); Dryhurst, *supra* note 102, at 654–55 (describing concerns about corporate agency).

248. 18 U.S.C. § 1589 (2012); *supra* Section III.C.

249. See Dryhurst, *supra* note 102, at 662–63 (“The question remains whether the TVPA standard provides adequate incentives for the employer corporation to structure those relationships [between employer corporations and independent contractors] so as to reduce the probability of labor trafficking violations.”).

250. See *In re Caremark Int’l*, 698 A.2d 959, 967 (Del. Ch. 1996) (explaining that a claim of director failure to monitor “is possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment”).

251. Jara, *supra* note 222, at 216, 236–42.

252. See Morrissey, *supra* note 62, at 372 (describing “rational apathy” of shareholders).

or may become shareholders themselves in order to bring this derivative litigation.<sup>253</sup>

### C. *Appropriate Corporate Monitoring*

Corporations must take steps to assess, monitor, and report risks of human trafficking violations in their supply chains.<sup>254</sup> The disclosure requirements of the California Transparency in Supply Chains Act describe a good baseline of corporate best practices: corporations should verify product supply chains for indications of trafficking violations, audit suppliers for labor practices, require certification that materials were made free from trafficking violations, develop and maintain internal governance standards, and provide employee training on trafficking awareness.<sup>255</sup> There are three affirmative steps a corporation should take to fulfill its obligations to shareholders to minimize risks of human trafficking violations and the impact violations may have on the corporation: (1) implementing monitoring systems, (2) developing a human trafficking resolution or committee prepared to take enforcement action when aware of violations, and (3) giving adequate disclosure of risks.

The most important step for corporate boards to take is to adopt appropriate monitoring systems to help a corporation minimize risk of trafficking violations by keeping the board and key officers informed about labor practices used in its supply chain.<sup>256</sup> Because directors may be liable where there is “an utter failure to attempt to assure a reasonable information and reporting system exists,”<sup>257</sup> directors must, at the very least, have reporting systems in place to be informed about potential trafficking violations. The Delaware Supreme Court has

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253. Vandenberg, *supra* note 17, at 12 (encouraging creative lawyering techniques and the general pursuit of increased strategic litigation to fight trafficking crimes).

254. See Prelogar et al., *supra* note 218 (“Risk assessments are an important step in understanding the trafficking-related risks that exist in a company’s industry, particular operations, and supply chain.”).

255. See Erika R. George, *Influencing the Impact of Business on Human Rights*, in CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS IMPACTS, *supra* note 71, at 253, 276–79 (describing the California Transparency in Supply Chains Act); Todres, *supra* note 168, at 96–97 (same). These requirements are very similar to the Department of Labor’s “eight steps to an effective social compliance system.” Bureau of Int’l Lab. Affairs, *Reducing Child Labor and Forced Labor: A Toolkit for Responsible Business*, U.S. DEP’T LAB., <http://www.dol.gov/ilab/child-forced-labor/index.htm> (last visited Jan. 7, 2016) [perma.cc/C8XL-UHMU].

256. See, e.g., Williams & Conley, *supra* note 69, at 88 (explaining companies need adequate reporting mechanisms with regard to human rights violations). There is also a least-cost avoider argument that corporations should monitor supply chains because they are in the position to do so most effectively and cheaply. See Todres, *supra* note 168, at 86.

257. *In re Caremark Int’l*, 698 A.2d 959, 971 (Del. Ch. 1996).

approved of monitoring systems where corporate officers were required to approve of contracts, where an internal audit system was in place,<sup>258</sup> where the board had a compliance program, where there were written policies and procedures for compliance, and where a corporate department had responsibility “for the detection and reporting of suspicious activity.”<sup>259</sup> In contrast, a company with “no internal controls in place,” a company that had internal controls but did not monitor them, or a company that ignored “red flags” would not meet the standards required for good faith.<sup>260</sup>

Corporate boards should implement proper reporting systems to avoid corporate liability for failure to monitor supply-chain human trafficking effectively. Hypothetically, if benefitting from exceptionally low labor costs is sufficient to demonstrate reckless disregard of potential trafficking violations,<sup>261</sup> corporations should carefully monitor contracts with independent contractors for evidence of any indication of trafficking.<sup>262</sup> As previously addressed, adequate monitoring of supply-chain labor practices is also part of the board’s fulfillment of its fiduciary duties.<sup>263</sup> While the system of monitoring will vary based on each corporation’s structure and business practices, corporations will need to add corporate oversight in order to comply with the TVPRA.

Acting in accordance with good human rights practices may also require corporations to develop codes of conduct, resolutions, and enforcement plans that prioritize monitoring and eliminating human trafficking from the corporate supply chain.<sup>264</sup> Although resolutions or

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258. *Id.* at 963.

259. *Stone v. Ritter*, 911 A.2d 362, 371–74 (Del. 2006) (“[T]he Board received and approved relevant policies and procedures, delegated to certain employees and departments the responsibility for filing [Suspicious Activity Reports] and monitoring compliance, and exercised oversight by relying on periodic reports from them.”).

260. *See Rich ex rel. Fuqi Int’l v. Yu Kwai Chong*, 66 A.3d 963, 982–84 (2013).

261. *See Dryhurst*, *supra* note 102, at 662 (“[T]he terms of the labor contractor agreement can provide evidence that the employer corporation has obtained such favorable terms that the contractor would not agree to them in the absence of extortionate activity.”); *supra* notes 181–182 and accompanying text.

262. *See Prelogar et al.*, *supra* note 218 (“[C]ompanies should endeavor to conduct due diligence on third parties presenting potential risks throughout all levels of their supply chains. . . . Companies may achieve efficiencies by building anti-trafficking and other human rights-related vetting of third parties into their regular anticorruption due diligence and international regulatory screening procedures.”).

263. *Supra* Section IV.B.1.

264. MATTAR, *supra* note 91, at 9, 15; Robert N. Leavell, Corporate Social-Reform, *The Business Judgment Rule and Other Considerations*, 20 GA. L. REV. 565, 604–05 (1986) (explaining that corporate boards take action by passing resolutions); Daniel Thürer, *Soft Law*, in IX MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 269, 271 (Rüdiger Wolfrum ed., 2012) (“While codes of conduct may or may not be legally binding, it is a specific feature of soft law that is distinct from legally binding norms.”).

codes of conduct do not, alone, reduce the risk of potential TVPRA violations, they are a public demonstration to corporate suppliers, the corporation's shareholders, and the general public that the corporation is aware of the need to be concerned with trafficking violations and is prepared to monitor and confront those risks if necessary.<sup>265</sup>

Resolutions do not have to detail precisely how the monitoring should occur, as corporate managers may be in a better position to determine the best manner to carry out the day-to-day operations of monitoring.<sup>266</sup> Directors should consider the recommendations of the U.S. State Department in crafting an anti-trafficking policy:

Among other things, an effective policy: prohibits human trafficking and those activities that facilitate it—including charging workers recruitment fees, contract fraud, and document retention; responds to industry- or region-specific risks; requires freedom of movement for workers; pays all employees at least the minimum wage in all countries of operation, preferably a living wage; includes a grievance mechanism and whistleblower protections; and applies to direct employees, as well as subcontractors, labor recruiters, and other business partners.<sup>267</sup>

Individual corporations will have to determine how best to incorporate these recommendations, as they may vary based on the industry and the board's perception of the actual or perceived risk of corporate and suppliers' violations.

Additionally, resolutions should include a plan to train employees about common indicators of human trafficking so employees are better equipped to recognize signs should they be confronted with the possibility of a human trafficking violation.<sup>268</sup> A resolution or code of conduct should also include some methods of enforcement<sup>269</sup>—which may, in the most drastic circumstances, require a corporation to end the business relationship with one supplier altogether and report that supplier to the authorities.

Finally, corporations should disclose the efforts they are taking to minimize risk of human trafficking violations in the supply chain.<sup>270</sup>

265. See JOSEPH, *supra* note 63, at 8 (explaining codes of conduct may have public relations impacts and noting the need for additional action to make codes of conduct effective).

266. See Leavell, *supra* note 264, at 605.

267. TIP Report 2015, *supra* note 23, at 32.

268. See *id.*

269. See *id.* (describing the private sector's role in combating human trafficking); JOSEPH, *supra* note 63, at 8 (explaining that corporate codes of conduct are inadequate without "vigorous enforcement").

270. Furthermore, corporations must already provide information on how "their commercial activities can be associated with either conflict or corruption" under Dodd-Frank Wall Street Reform and Consumer Protection Act. George, *supra* note 255, at 257. An analysis of how the TVPRA expands corporate disclosure requirements under securities law is beyond the scope of this Note. There is currently not a federal law specifically requiring this disclosure. The Business Transparency on Trafficking and Slavery Act, which failed in subcommittee, would have impacted

California legislation already requires legally mandated disclosure of anti-trafficking policies for certain businesses.<sup>271</sup> Directors who encourage their corporation to proactively adopt this disclosure will be prepared if disclosure requirements expand to additional states or become federal requirements.<sup>272</sup>

## CONCLUSION

The initial flurry of ATS litigation encouraged human rights activists to pursue corporate accountability through litigation. Since the *Kiobel* Court limited the extraterritorial applicability of the ATS, these activists may look to the TVPRA as a tool to litigate for corporate accountability.<sup>273</sup> The current legal environment demonstrates a greater focus on combating trafficking.<sup>274</sup> Corporations must be aware of the potential use of the TVPRA and should adopt business practices that will safeguard them from liability should a suit arise. Corporations should be aware of the risk that negative publicity stemming from accusations of human rights violations, whether or not a suit is filed, may have on shareholder value.

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corporations with trafficking in the supply chain: “Under the proposal, issuers would have been required to include in their annual reports to the SEC a disclosure describing measures, if any, the company had taken to identify and address conditions of forced labor, slavery, human trafficking, and the worst forms of child labor within its supply chains.” *Id.* at 273. For a suggestion that federal securities laws may require disclosure of human trafficking information, see *Corporate Liability and Human Trafficking*, *supra* note 1, at 13–14.

271. See George, *supra* note 255, at 276–79 (describing the California Transparency in Supply Chains Act).

272. In the United Kingdom, the Modern Slavery Act of 2015 now mandates business with a certain amount of sales to disclose efforts made to reduce trafficking violations in their supply chain. TIP Report 2015, *supra* note 23, at 24. The Business Supply Chain Transparency on Trafficking and Slavery Act of 2015, which once failed in subcommittee but has been reintroduced, would expand companies’ disclosure obligations. George, *supra* note 255, at 273; *Corporate Liability and Human Trafficking*, *supra* note 1, at 14.

273. Stephens, *supra* note 71, at 199.

274. Congress recently passed the Justice for Victims of Trafficking Act, and the proposal of the End Modern Slavery Initiative Act has enthusiastic, bipartisan support. Erica Werner, *Senate Unanimously Passes Human Trafficking Bill, Setting Up Vote on Attorney General*, U.S. NEWS & WORLD REP. (Apr. 22, 2015, 5:21 PM), <http://www.usnews.com/news/politics/articles/2015/04/22/anti-human-trafficking-bill-expected-to-pass-senate> [<http://perma.cc/3M59-HDQ7>]. The bill, proposed by Sen. Bob Corker and introduced Feb. 24, 2015, would raise \$1.5 billion to support a grant-making foundation to fund efforts to combat modern slavery and trafficking. *End Modern Slavery Initiative Act*, CORKER.SENATE.GOV, <http://www.corker.senate.gov/public/index.cfm/end-modern-slavery-initiative-act> (last visited Oct. 12, 2015) [<http://perma.cc/ZT4R-9UK2>]. On July 10, 2015, the Senate Appropriations Committee approved funding for the bill. *Corker Applauds Funding for the End Modern Slavery Initiative in FY2016 State, Foreign Operations Appropriations Bill*, THE CHATTANOOGAN (July 10, 2015), <http://www.chattanooga.com/2015/7/10/303946/Corker-Appraises-Funding-For-The-End.aspx> [<http://perma.cc/6X6N-DNQQ>].

If concern about litigation under the TVPRA creates insufficient incentives for a corporation to monitor its supply chain, the risk of litigation with shareholders should create even higher incentives to eliminate human trafficking. This risk of derivative suits heightens corporate responsibility to not only comply with the TVPRA to abstain from recklessly disregarding or knowingly benefitting from human trafficking but to also take affirmative steps to monitor the supply chain for violations of trafficking laws. With the financial benefit provisions of the TVPRA, corporate directors' failure to monitor supply chains for indicators of human trafficking and failure to eliminate trafficking or terminate relationships with suppliers where it does exist are no longer acceptable business decisions.

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