USING FCPA JURISDICTION AS A MODEL FOR FORCED LABOR ENFORCEMENT

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ABSTRACT

Despite the proliferation of human rights frameworks and standards aiming to govern corporate conduct, the use of forced labor persists throughout global supply chains. Enforcement challenges and jurisdictional issues have hindered the effective governance of corporate conduct in the United States. The Foreign Corrupt Practices Act provides a guide for the creation of a more robust approach to the prosecution of corporate forced labor offenses. This article expands upon previous scholarship on the application of human rights standards to multinational corporations and proposes tangible legal and policy changes that would better combat forced labor in the global economy.

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I. INTRODUCTION

Globally, forced labor generates an estimated $150 billion in profits each year.[1] Despite international and domestic efforts to address forced labor in corporate supply chains, 25 million adults and children worldwide are currently coerced or threatened into providing labor and services.[2] The international community, domestic governments, and civil society organizations have considered a range of methods to prevent corporate reliance on forced labor. Thus far, no method has provided the overhaul of global supply chains needed to eradicate forced labor.

In their 2021 article, Professors Pierre-Hugues Verdier and Paul Stephan advocate for a criminal enforcement regime to address the human rights violations of multinational corporations.[3] They consider the benefits of an FCPA-based model and argue for the drafting of new legislation the explicitly applies to corporations. This paper expands upon Verdier and Stephan's framework and

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1. *Federal Efforts to Prevent Imports Produced Using Forced Labor from Entering the U.S.*, U.S. GOVERNMENT ACCOUNTABILITY OFFICE (2021), https://www.gao.gov/blog/federal-efforts-prevent-imports-produced-using-forced-labor-entering-u.s.

2. *Id.*

3. Pierre-Hugues Verdier & Paul Stephan, *International Human Rights and Multinational Corporations: An FCPA Approach*, 101 BOSTON UNIV. LAW REV. 1359 (2021).

considers how the FCPA can inform the creation of a regime that addresses forced labor. It argues that the existing Trafficking Victims Protection Act, with additional amendments and enhanced guidance, can effectively hold multinational corporations accountable for the use of forced labor in their supply chains.

Part I of this paper discusses the existing systems that address forced labor in corporate supply chains and the need for a criminal enforcement regime. Part II explains how the more recently enacted Trafficking Victims Protection Act (TVPA) could has promise as a tool for criminal enforcement but lacks the structure necessary to prosecute multinational corporations successfully. Part III analyzes the history of the Foreign Corrupt Practices Act and its success in promoting corporate accountability. Part IV discusses how the FCPA regime can serve as a model for forced labor enforcement under the TVPA and offers a proposal to address gaps in the TVPA. Finally, Part V considers potential challenges to the proposed regime based on recent FCPA caselaw and foreign policy considerations.

II. EFFORTS TO COMBAT FORCED LABOR IN GLOBAL SUPPLY CHAINS

A. Rise of Global Attention to Forced Labor

The onset of globalization in the 1980s changed the nature of industrial supply chains.[4] Multinational corporations began to shift production to developing countries, where they could benefit from a lower-wage labor force and abundant raw materials.[5] This allowed many U.S. companies to increase their profit margins and output levels.[6] It also allowed them to move significant portions of their operations outside of U.S. jurisdiction. As a result, corporations have largely avoided liability for overseas forced labor in their supply chains.

Human rights advocates and journalists have increasingly exposed the use of forced labor in global industries, prompting heightened attention to the issue.[7] Modern consumers have learned of the prevalence of forced labor in cocoa production, fishing, and

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4. Lindsey Roberson & Johanna Lee, *The Road to Recovery After Nestlé: Exploring TVPA as a Promising Tool for Corporate Accountability*, COLUMBIA HUM. RIGHTS LAW REV. ONLINE (2021).

5. *Effects of Economic Globalization,* NATIONAL GEOGRAPHIC, https://education.nationalgeographic.org/resource/effects-economic-globalization (last visited Oct. 19, 2022).

6. *Id.*

7. Jennifer Green, *Closing the Accountability Gap in Corporate Supply Chains for Violations of the Trafficking Victims Protection Act*, 6 BUS. HUM. RIGHTS J. 449 (2021).

mining, among other industries.[8] Partially in response to these reports, the international community and domestic governments have devoted considerable resources to anti-human trafficking initiatives.

Over the last two decades, the international community has developed a legal infrastructure to address the many forms of human trafficking. The United Nations has addressed forced labor issues through multiple declarations and protocols. The 2000 United Nations Global Compact set forth principles against forced labor as well as a clear definition of the crime of forced labor.[9] The Global Compact defines forced labor as "any work or service that is exacted from any person under the menace of penalty, and for which that person has not offered himself or herself voluntarily."[10] A uniform definition helps ensure that states can work more collaboratively to address a common cause.

In addition to adopting principles against forced labor, the United Nations has encouraged the use of law enforcement to combat these crimes. The 2000 United Nations Convention against Transnational Organized Crime[11] and its supplement, The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (The Protocol),[12] laid a foundation for states to hold perpetrators accountable for their crimes. In 2011, the United Nations Human Rights Council endorsed the United Nations Guiding Principles on Business and Human Rights, which furthered outlined state responsibilities to address human rights abuse by corporations, including the use of forced labor.

These frameworks represent a global commitment to investigate and prosecute forced labor in supply chains. However, prosecutions remain rare. The U.S. State Department estimates that only about 0.2 percent of global slavery cases lead to prosecutions each year.[13] In the United States, civil society and border control agencies

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8. *Seafood Slavery*, CENTER FOR AMERICAN PROGRESS, https://www.americanprogress.org/article/seafood-slavery/; Rachel Siegel & Peter Whoriskey, *Cocoa's Child Laborers*, WASHINGTON POST, June 5, 2019, https://www.washingtonpost.com/graphics/2019/business/hershey-nestle-mars-chocolate-child-labor-west-africa/.

9. *Principle Four: Labour*, UNITED NATIONS GLOBAL IMPACT, https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-4.

10. *Id.*

11. *UN Convention against Transnational Organized Crime and the Protocols Thereto*, UNITED NATIONS: OFFICE ON DRUGS AND CRIME (15 Nov. 2000), https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html (Trafficking Convention).

12. U.N.G.A. res. 55/25, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, (Nov.15, 2000).

13. Peter Williams & Philip Langford, *The Case for Perpetrator Accountability to Combat Human Trafficking*, COUNCIL ON FOREIGN RELATIONS, (2021).

continue to take primary responsibility for addressing the corporate use of forced labor.

B. U.S. Efforts to Combat Forced Labor

1. Civil Society Initiatives

In the United States, human rights advocates and civil society groups have worked to promote corporate accountability for forced labor in supply chains. To do this, they have primarily focused on two avenues: corporate social responsibility and civil litigation. Neither has resulted in a comprehensive enforcement regime.

a. Corporate Social Responsibility

Corporate social responsibility encourages companies to take voluntary measures out concern for their role in a society.[14] These initiatives have left too much discretion to companies themselves, often promoting soft standards and voluntary due diligence at the expense of concrete change.[15] Today, industry best practices require companies to consider human rights in their operations and implement procedures to minimize risks of violations.[16] However, the standards are rarely binding and have minimal, if any, state-sponsored oversight.[17] Frequently, companies can project a human rights-conscious image through philanthropy and due diligence initiatives, without making substantive efforts to eradicate forced labor in their supply chains. As a result, corporate social responsibility measures lack the force necessary to persuade companies to abandon existing, profitable practices that exploit workers.

b. Alien Tort Statute Litigation

Historically, advocates looking to hold corporations accountable for forced labor have filed civil lawsuits on behalf of trafficked individuals. However, these civil suits relied on a statute that recent jurisprudence has rendered nearly obsolete. The Alien Tort Statute (ATS) was enacted in 1789 and formed the foundation of human rights litigation in the United States since 1980.[18] The ATS gives federal courts jurisdiction where "an alien" sues for a tort

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14. Green, *supra* note 7, at 458.
15. Roberson & Lee, *supra* note 4, at 17.
16. Green, *supra* note 7, at 457.
17. *Id.* at 458-59.
18. *Seafood Slavery*, *supra* note 8; Siegel & Whoriskey, *supra* note 8.

"committed in violation of the law of nations or of a treaty of the United States.[19] Effectively, the statute allows foreign individuals to sue for violations of international law committed against them.

In the early years of ATS litigation, many plaintiffs secured large settlements against multinational corporations for forced labor and other human rights offenses. Eventually, courts grew increasingly skeptical of these cases due to the antiquated nature of the ATS, the difficulty of determining whether violations of customary international law created private rights of action, and the risks that ATS cases posed to separation of powers and foreign relations.[20] Recent Supreme Court caselaw has curtailed the scope of the ATS so significantly that it no longer provides a valid pathway for corporate accountability.[21]

2. Federal Government Initiatives

Federal government attention to forced labor has long focused on the evaluation of goods at the import stage. The United States banned the import of products made with forced labor in the 1930s. Section 307 of the Tariff Act of 1930 prohibits the entry of "[a]ll goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country . . . by forced labor or/and indentured labor."[22] U.S. Customs and Border Protection (CBP), an agency within the U.S. Department of Homeland Security (DHS), holds primary responsibility for enforcing Section 307, which entails seizing and destroying covered goods when they arrive at U.S. ports.

However, the original statute contained a loophole that allowed many products to continue to enter the United States. Section 307 permitted the import of products made with forced labor if no comparable product was made in the United States or if domestic production levels did not meet domestic demand.[23] Thus, Section 307 rarely denied the entry of products in the decades after its enactment. Between 1930 and the mid-1980s, the International Trade Commission estimates that the statute blocked products on about ten occasions.[24] As globalization replaced domestic manufacturing, more importers could invoke Section 307's

19. 28 U.S.C. § 1350.
20. Verdier & Stephan, *supra* note 3, at 1362.
21. *See generally* Nestlé USA v. Doe, 593 U.S. 628 (2021).
22. 19 U.S.C. § 1307.
23. Christopher A. Casey et al., *Section 307 and Imports Produced by Forced Labor,* CONGRESSIONAL RESEARCH SERVICE (2022).
24. *Id.*

exception, claiming that domestic production could not meet demand for their goods.[25]

In 2015, Congress closed the loophole in Section 307. Through the Trade Facilitation and Trade Enforcement Act, Congress made clear that corporations could no longer use domestic demand and production levels as an excuse to import goods produced with forced labor.[26] The change has enabled CBP to make increasing use of Section 307.[27]

However, inconsistent enforcement and information have continued to prevent Section 307 from eradicating forced labor in U.S. imports. To enforce Section 307, CBP officials have often relied on nongovernmental organizations and media for tips and information.[28] Yet, these civil society groups have reported that they are not fully aware of the information CBP requires for investigation and what tips are most useful.[29] In addition, CBP has emphasized limited resources and the difficulties of analyzing evidence in complex global supply chains as barriers to enforcement.[30]

In 2021, Congress passed its most targeted piece of legislation aimed at addressing forced labor under the Section 307 regime. The Uyghur Forced Labor Prevention Act (UFLPA) was enacted in December 2021 and went into effect in June 2022, in response to the genocide and use of forced labor against Uyghur and other Turkic Muslim minorities in the Xinjiang region of China.[31] Given the widespread arbitrary detention and forced labor of Uyghur people in the region, the UFLPA created a rebuttable presumption that all goods produced "wholly or in part" in Xinjiang are the product of forced labor, and thus barred under Section 307.[32] Companies can overcome the presumption only by "clear and convincing evidence" that the imports are legally sourced.[33]

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25. *Id.*

26. *Id.*

27. *Id.*

28. *Federal Efforts to Prevent Imports Produced Using Forced Labor from Entering the U.S.*, *supra* note 1.

29. *Id.*

30. Casey, et al., *supra* note 23.

31. Antony Blinken, *Implementation of the Uyghur Forced Labor Prevention Act*, U.S. DEPARTMENT OF STATE (June 21, 2022), https://www.state.gov/implementation-of-the-uyghur-forced-labor-prevention-act/; Connor O'Steen, *U.S. and Multilateral Policy Options to Address Abuses Against Uyghurs in Xinjiang*, JUST SECURITY (July 30, 2020), https://www.justsecurity.org/71621/u-s-and-multilateral-policy-options-to-address-abuses-against-uyghurs-in-xinjiang/.

32. Marti Flacks & Madeleine Songy, *The Uyghur Forced Labor Prevention Act Goes into Effect*, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES (June 27, 2022), https://www.csis.org/analysis/uyghur-forced-labor-prevention-act-goes-effect.

33. *Id.*

While the UFLPA only recently went into effect, the response of law firms shows that laws like the UFLPA can spark robust compliance initiatives.[34] Within a week of the law's effective date, several of the United States' largest law firms issued press releases and blog posts about the new regulations.[35] They emphasized the need for supply chain due diligence, as well as movement away from production in Xinjiang.[36] The UFLPA provides an example of how country or regional designations can address forced labor in practice.

However, regionally focused legislation like the UFLPA is likely politically viable in very few contexts. Congress passed the UFLPA in response to egregious human rights violations that made global headlines. In addition, the United States' fraught relationship with China enables it to take a firmer stance than it would with other foreign powers. Finally, even if Congress could muster the political will in other areas, piecemeal country-based legislation is time consuming and likely to leave gaps in enforcement. For the federal government to truly address forced labor, it must take a new approach.

a. Need for Criminal Enforcement

Though civil society and federal government initiatives in the U.S. have raised awareness of the prevalence of forced labor and encouraged corporations to relocate portions of their operations, they have failed to result in an overhaul of global supply chains. To ensure corporate accountability for these crimes, the U.S. Department of Justice (DOJ) must initiate criminal investigations and prosecutions.

1) Advantages of Criminal Enforcement

Criminal enforcement offers several advantages over previous methods of addressing forced labor. First, global supply chains are

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34. David E. Bond, Allison Kepkay, and Matt Solomon, *Uyghur Forced Labor Prevention Act*: *Commercial Implications*, *Compliance Challenges and Responses*, WHITE & CASE (Oct. 3, 2022), https://www.whitecase.com/insight-alert/uyghur-forced-labor-prevention-act-commercial-implications-compliance-challenges-and.

35. Lars-Erik A. Hjelm et al., *International Trade and Customs Alert*: *New UFLPA Compliance Guidance*: *An Overview for US Importers and Supply Chain Partners*, AKIN GUMP (June 27, 2022), https://www.akingump.com/en/news-insights/international-trade-and-customs-alert-new-uflpa-compliance-guidance-an-overview-for-us-importers-and-supply-chain-partners.html; David E. Bond, *US Authorities Begin Enforcement of Uyghur Forced Labor Prevention Act and Issue Guidance for Importers*, WHITE & CASE (June 28, 2022), https://www.whitecase.com/insight-alert/us-authorities-begin-enforcement-uyghur-forced-labor-prevention-act-and-issue.

36. Hjelm et. al, *supra* note 35.

so complex that any regime must incentivize corporations to take their own measures to eliminate forced labor. A credible threat of prosecution "would provide the stick to encourage firms to implement compliance programs effectively."[37] To avoid the significant financial and reputational risks that come with criminal charges, corporations would have incentives to investigate forced labor in their supply chains and hold the individuals involved accountable.[38] With only a few prosecutions, prosecutors could signal the need for corporations to implement more robust initiatives to address forced labor in their operations.

Second, criminal enforcement will provide a more consistent set of standards than a mix of voluntary initiatives, civil litigation, and import bans. Inconsistent application of measures to combat forced labor creates legal uncertainty that poses challenges to firms and could otherwise disrupt beneficial trade.[39] Clear instructions on the behavior and operations that give rise to liability will create a more effective regime.

Third, due to its expertise in corporate criminal investigations and human trafficking investigations more broadly, the DOJ is best suited to take the lead on enforcement of forced labor crimes. DOJ's Human Trafficking Prosecution Unit, created in 2007, is a specialized unit dedicated to the prosecution of those who commit sex trafficking and forced labor offenses.[40] DOJ investigators also have a variety of unique tools at their disposal, including the ability to seek warrants, issue searches, and collect extraterritorial evidence through partnerships with foreign law enforcement agencies.[41]

Fourth, because criminal prosecutions against corporations rarely go to trial,[42] DOJ could resolve supply chain violations efficiently, without getting engulfed in the lengthy litigation processes that have plagued civil suits against multinational corporations.[43] Assuming that forced labor charges would follow the same pattern as other corporate crimes, companies under criminal

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37. Verdier & Stephan, *supra* note 3, at 1412.

38. *Id*. at 1409.

39. *Id*. at 1376.

40. *Human Trafficking Prosecution Unit (HTPU)*, U.S. DEP'T JUST. (May 22, 2023), https://www.justice.gov/crt/human-trafficking-prosecution-unit-htpu.

41. Verdier & Stephan, *supra* note 3.

42. Brandon L. Garrett, *The Changing Face of Corporate Prosecutions*, CHAMPION, Sept.–Oct. 2016, at 48, 49 (2016).

43. *See* Chip Pitts, *Chevron Found Guilty in $8 Billion Ecuadorian Human Rights and Environmental Case*, AMNESTY INT'L (Feb. 15, 2011), https://www.amnestyusa.org/blog/chevron-found-guilty-in-8-billion-ecuadorian-human-rights-and-environmental-case/ (explaining the eighteen-year litigation process that preceded that decision).

investigation would likely cooperate with DOJ and settle their cases.

Finally, criminal enforcement can account for the harm caused to victims through mandatory restitution. U.S. anti-trafficking law already requires that defendants compensate victims for the lost earnings and harm caused. Application of this requirement to cases against corporations would ensure that victims receive compensation for the abuse they suffer, even under a regime focused on criminal enforcement.

The above considerations indicate that criminal prosecutions of forced labor violations would provide an avenue to promote widespread corporate accountability and compliance.

2) Government Support for Criminal Enforcement

In addition to its practical benefits, criminal enforcement against corporate violators will likely enjoy broad support from the federal government. In 2019, DHS announced a new enforcement initiative aimed at enabling prosecutions of businesses profiting from forced labor.[44] DHS's Homeland Security Investigations (HSI) division has partnered with non-governmental organizations to gather data and information that it will pass along to DOJ.[45] If, after investigation by HSI, DHS has probable cause to believe that a company knew or acted in reckless disregard of the fact that it was financially benefitting from the use of forced labor in its supply chain, prosecutors may press charges against that company.[46] DOJ's Human Trafficking Prosecution Unit has also declared that its labor trafficking program has "never been stronger." [47] The initiative has yet to announce any charges or convictions. However, agencies' indications that they are preparing for forced labor enforcement suggests new federal support for the initiative.

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44. *ICE HSI Global Trade Investigations Division partners with Liberty Shared to combat forced labor*, U.S. IMMIGR. AND CUSTOMS ENF'T (July 31, 2019), https://www.ice.gov/news/releases/ice-hsi-global-trade-investigations-division-partners-liberty-shared-combat-forced.

45. Nancy A. Fischer et al., *DHS's New Criminal Enforcement Initiative to Prosecute Corporations for Forced Labor*, PILLSBURY (Aug 5, 2019), https://www.pillsburylaw.com/en/news-and-insights/dhs-new-criminal-enforcement-initiative-to-prosecute-corporations-for-forced-labor.html (Aug. 5, 2019).

46. *Id.*

47. Human Trafficking Prosecution Unit (HTPU), *supra* note 40.

III. CORPORATE LIABILITY UNDER THE TRAFFICKING VICTIMS PROTECTION ACT

In recent years, Congress has attempted to set the stage for the prosecution of corporations through expansion of the Trafficking Victims Protection Act (TVPA). Though the TVPA was not originally designed to address global supply chain issues, it has promise as a tool to hold corporations accountable for abuse. However, the current TVPA regime lacks the infrastructure to secure convictions in complex extraterritorial prosecutions.

A. Evolution of the Trafficking Victims Protection Act

In 2000, Congress enacted the Trafficking Victims Protection Act (TVPA). The TVPA and its subsequent reauthorizations form the foundation of the anti-human-trafficking regime in the United States.[48] Originally, the TVPA provided criminal liability for a narrow range of human trafficking crimes.[49] However, with each reauthorization, Congress criminalized a broader range of trafficking offenses and provided for private rights of action trafficking victims.

The TVPA's original criminal provision governing forced labor established liability for "[w]hoever knowingly provides or obtains the labor or services of a person by" force, serious harm, abuse of law, or any scheme designed to cause the person to think that they or another person would suffer harm if they did not perform the labor or services.[50] In subsequent reauthorizations, Congress made amendments that are critical to corporate liability.[51]

First, Congress extended liability under the criminal forced labor provision to anyone 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 any of the means [of forced labor offenses], 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."[52] Thus, criminal liability can arise both for those who benefit from forced labor, as well as for those who directly subject a person to forced

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48. Heather J. Clawson et al., *Prosecuting Human Trafficking Cases: Lessons Learned and Promising Practices*, ICF INT'L (June 30, 2008).

49. Elżbieta M. Goździak & Kathleen M. Vogel, *Palermo at 20: A Retrospective and Prospective*, 6 J. HUM. TRAFFICKING 109, 116 (2020).

50. 18 U.S.C. § 1589.

51. Sara Sun Beale, *The Trafficking Victim Protection Act: The Best Hope for International Human Rights Litigation in the U.S. Courts?*, 50 CASE WEST. RSRV. J. INT'L. L. 17, 25 (2018).

52. 18 U.S.C. § 1589.

labor. Second, Congress created extraterritorial jurisdiction for any offense if the defendant is a U.S. citizen or legal permanent resident, or if the defendant is "present" in the United States, regardless of the defendant's nationality.[53] Third, Congress created civil liability for forced labor offenses.[54] Thus, the modern TVPA assigns criminal and civil liability to a broad range of domestic and extraterritorial conduct.

It is generally accepted that the TVPA's provisions apply equally to U.S. corporations.[55] The Dictionary Act provides a default rule that a statute does not need to be explicit in extending itself to corporate conduct.[56] However, the extent to which the TVPA applies to foreign corporations or extraterritorial supply chain conduct is much less clear.[57] To prosecute foreign corporations under the TVPA, DOJ would need to show that they are "present" in the U.S., a standard with ambiguous caselaw in the criminal context.[58] As it currently stands, the TVPA leaves too much ambiguity about which corporate conduct it covers to effectively target multinational corporations.

B. Challenges to Prosecution: Gaps in the TVPA

Despite Congress's intention to broaden DOJ's enforcement abilities, DOJ has undertaken few forced labor prosecutions against corporations.[59] Those that have occurred often target forced labor in individual and family homes, not global supply chains.[60]

Because of the scarcity of forced labor prosecutions against multinational companies, civil TVPA caselaw best exposes the difficulties that prosecutors would face in establishing corporate criminal liability. As courts have walked back the scope of the ATS, some plaintiffs have looked to the TVPA as an alternative for civil suits on behalf of those subjected to forced labor overseas.[61] The

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53. 18 U.S.C § 1596(a) (2008).
54. 18 U.S.C. § 1590 (2000).
55. Roberson & Lee, *supra* note 4, at 15.
56. 1 U.S.C. § 1 (1947).
57. Beale, *supra* note 51, at 42.
58. *Id.*
59. Alexandra Levy, *Federal Human Trafficking Civil Litigation: 15 Years of the Private Right of Action*, THE HUMAN TRAFFICKING LEGAL CENTER (2018), https://www.htlegalcenter.org/wp-content/uploads/Federal-Human-Trafficking-Civil-Litigation-1.pdf; *2022 Trafficking in Persons Report*, UNITED STATES DEPARTMENT OF STATE (2022), https://www.state.gov/reports/2022-trafficking-in-persons-report/.
60. U.S. Department of Justice: Civil Rights Division, *supra* note 40.
61. Roberson & Lee, *supra* note 4; Sarah Bessell & Bekah Carey, *Nestlé & Cargill v. Doe Series: Shielding American Corporations from Liability Undermines the United States' Moral Authority*, JUST SECURITY (Dec. 21, 2020), https://www.justsecurity.org/73916/nestle-cargill-v-doe-series-shielding-american-corporations-from-liability-undermines-the-united-states-moral-authority/.

TVPA's civil forced labor provision is largely analogous to its criminal forced labor provision, and therefore provides a useful guide to demonstrate the limitations in the statute's drafting.

Two main issues have emerged as courts have attempted to apply the civil forced labor provision to multinational corporations. First, the TVPA's application to those with a "presence" in the United States has failed to establish jurisdiction over foreign corporate defendants. Second, the complex nature of global supply chains has made it difficult for plaintiffs to prove a corporation's "knowledge" of or "reckless disregard" of benefits received from forced labor in its supply chain.

One particular case illustrates the challenges that prosecutors would face in establishing corporate liability under the current TVPA. In *Ratha v. Phatthana Seafood*, Cambodian plaintiffs sued under the TVPA, alleging that they were subjected to forced labor at seafood processing factories in Thailand.[62] The defendants were two Thai companies alleged to have forced the workers to process seafood, and one Thai company and one U.S. company who imported the seafood Phatthana produced.[63]

The district court in Ratha granted summary judgment in favor of the corporate defendants, holding that the plaintiffs had failed to present a triable issue of fact.[64] On appeal, the Second Circuit affirmed, demonstrating a deep reluctance to apply the TVPA to global supply chain issues. First, the court held that it did not have jurisdiction over the Thai defendants because they were not "present" under the meaning of the TVPA. The court explained that "[n]either had any address, employees, or physical presence in the United States during the period at issue" in the case and that selling products for distribution in the United States did not meet the "purposeful direction" test required for jurisdiction.[65]

Next, the court considered whether the U.S. based companies knew that the Thai companies engaged in forced labor. It determined that government and media reports on the prevalence of forced labor in the Thai fishing industry were not sufficient to establish knowledge of abuse because they did not mention the supplier specifically and the U.S. companies had not violated any clear industry standards.[66] The court concluded that knowledge was established only for the time period after which a whistleblower report on forced labor at the factory was published in a Cambodian

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62. Ratha v. Phatthana Seafood Co., 35 F.4th 1159, 1166 (9th Cir. 2022).
63. *Id.* at 1165-66.
64. Roberson & Lee, *supra* note 4 at 28.
65. *Ratha*, 35 F.4th at 1169, 1172.
66. *Id.* at 1179-80.

news outlet.[67] However, the court did not find the companies liable for any conduct that occurred after they became aware of the report because it was not clear that they had obtained a benefit from the marketing of seafood or secured a competitive advantage.[68]

The Ratha case sets a nearly unobtainable standard for corporate liability under the TVPA. It excludes foreign corporations unless they extensively target U.S. territory and applies a knowledge standard that can seemingly be met only through published whistleblower reports. In addition, the court's conclusion that the companies did not obtain a benefit through their operation poses a problem for prosecutors. Because the benefits obtained through global supply chain operations are often subtle, tying forced labor to a direct benefit is difficult.

Thus, the pitfalls the Ratha plaintiffs experienced inform how the federal government must adapt its approach to the TVPA to apply it to multinational companies.

IV. FCPA AS A MODEL FOR CORPORATE ACCOUNTABILITY

The Foreign Corrupt Practices Act (FCPA) enforcement regime shows that it is possible to create robust enforcement mechanisms for crimes that occur in complicated global supply chains. Like forced labor, corruption and bribery are often shielded by subsidiaries or foreign contractors and involve opaque financial transactions. When the executives of the company at issue did not personally commit the illegal conduct, it is challenging to prove corporate involvement in a violation. Yet, the DOJ and the SEC have successfully enforced the FCPA and incentivized widespread corporate compliance programs.[69]

A. History of the FCPA

The FCPA was enacted in 1977 in response to growing concerns of corporate involvement in corruption and bribery.[70] In the mid-1970s, allegations emerged that several major U.S. companies had made direct or indirect payments to foreign government officials or foreign political parties as part of their business operations.[71] These

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67. *Id.* at 1176.
68. *Id.* at 1175-76.
69. Verdier & Stephan, *supra* note 3; Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. LAW REV. 1611 (2017).
70. Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO STATE LAW J. 929, 934 (2012).
71. *Id.*

payments drew the attention of Congress, who outlined the risks to national security that foreign corruption posed.

During a hearing, Senator Church, the head of the committee tasked with investigating the payments, declared: "U.S.-based corporations should not be allowed to weaken a friendly government through bribery and corruption while the United States is relying on that government as a stable sure friend in supporting our policies."[72] Senator Church added that the U.S. Government did not want "the defense priorities of our allies distorted by corporate bribery."[73]

Concerns of perverse economic incentives also animated the discussion around the FCPA. Senators noted that the payment of bribes allocates business to the most corrupt producer, and not the most efficient.[74] These concerns prompted the enactment of a broad anti-corruption initiative.

B. FCPA Enforcement Structure

Broadly, the FCPA prohibits the payment of bribes to foreign officials for the purpose of obtaining or retaining business. It is divided into two main subsets. First, the FCPA's Anti-Bribery Provisions bar the payment of a "thing of value" to an individual knowing that it will be paid to a foreign official to influence the official in an official act or to secure an advantage in obtaining or retaining business.[75] In addition to monetary payment, a "thing of value" can include charitable donations, travel expenses, loans, and gifts.[76] Second, the FCPA's Internal Controls Provisions require that any company trading on a U.S. stock exchange implement a system of controls to internally monitor its assets and prevent illegal payments in its operations.[77]

The DOJ and the SEC hold joint responsibility for the enforcement of the FCPA.[78]

Criminal violations of the FCPA carry severe penalties. Corporations may be fined up to $2 million for each count or up to twice the amount of the gain that resulted from the bribe.[79]

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72. 122 Cong. Rec. S6515–16 (daily ed. May 5, 1976).

73. *Id.*

74. S. Rep. No. 94-1031, at 3 (1976).

75. Daniel Margolis & James Wheaton, *Non-U.S. Companies May Also Be Subject to the FCPA*, FINANC. FRAUD LAW REP. 168 (2009).

76. *Id.*

77. *Wayback Machine archive of Spotlight on Foreign Corrupt Practices Act*, SEC (Nov. 14, 2012), https://web.archive.org/web/20130215134320/http://edgar.sec.gov/spotlight/fcpa.shtml

78. *Id.*

79. 15 U.S.C. § 78dd-2(g)(1); 18 U.S.C. § 3571(d) (1987).

Individual violators may face up to five years in prison and up to $250,000 per violation.[80] These penalties have led to the development of a robust culture of compliance and information sharing.

Corporations under investigation rarely want to endure the inevitable economic and reputational risks of taking their cases to trial. Consequently, corporations who violate the FCPA often cooperate and settle charges with the enforcing agency in the form of a plea agreement.[81] This process allows DOJ and the SEC to collect significant data from self-reporting, which fuels further investigations and enforcement.

DOJ and the SEC have created an enforcement mechanism that clearly conveys the risks to companies who engage in illegal practices overseas and incentivizes compliance with its terms. As a result, it can serve as a guide for a similar regime in the forced labor context.

V. FILLING TVPA ENFORCEMENT GAPS WITH FCPA-BASED MEASURES

Corruption and forced labor both implicate complex global supply chains, posing challenges to investigation. In both contexts, corporations have complained of the difficulty of monitoring the conduct of third-party suppliers or vendors. However, the FCPA's success in targeting corruption shows that the hurdles are not insurmountable in the forced labor context. The FCPA's approach to enforcement is particularly instructive for the TVPA's two main weaknesses: establishing jurisdiction and establishing knowledge of the prohibited conduct. A strategic enforcement regime, modeled off the FCPA, can help federal regulators implement a similarly successful plan to target forced labor.

A. Establishing Jurisdiction

The FCPA's approach to jurisdiction has contributed to its enforcement success and industry support. To prosecute corporate extraterritorial conduct, statutes must make clear which entities and individuals they cover. Congress should amend the TVPA, so it more clearly provides for jurisdiction over forced labor offenses that corporations carry out abroad.

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80. 15 U.S.C. § 78dd-2(g)(2); 18 U.S.C. § 3571(b)(3); 18 U.S.C. § 3571(d).

81. *Foreign Corrupt Practices Act: Enforcement Actions Dataset*, STANFORD LAW SCHOOL: FOREIGN CORRUPT PRACTICES ACT CLEARINGHOUSE, https://fcpa.stanford.edu/enforcement-actions.html.

1. Jurisdictional Reach of the FCPA

The FCPA's anti-bribery provisions enable investigation and prosecution of both domestic and extraterritorial acts. Through their three main categories of potential defendants, the anti-bribery provisions reach a broad range of conduct and individuals. First, they apply to all "domestic concerns," which covers companies organized under the laws of the United States or with a principal place of business in the United States, as well as officers, directors, employees, and agents of these companies.[82] Under the FCPA, these companies are likely also liable for actions of foreign companies with which they contract.[83] The domestic concerns category also includes U.S. citizens working for foreign firms and U.S. green card holders. Second, the anti-bribery provisions apply to all "issuers" who have a class of securities registered on a U.S. stock exchange, regardless of whether the company is American or foreign.[84] As with domestic concerns, this category includes the officers, directors, employees, and agents of these companies. Finally, the anti-bribery provisions apply to "any person" acting within U.S. territory. Foreign individuals who are not otherwise covered by the provisions may become liable under the FCPA if they engage in prohibited conduct within the United States.[85]

The federal government's approach to FCPA enforcement has shown that it can successfully prosecute multinational corporations for conduct that occurs overseas or at the hands of their subsidiaries.[86] The FCPA's drafting provides a clear jurisdictional basis that the DOJ and SEC use to bring charges. These agencies can prosecute non-U.S. companies and individuals under the "issuers" or "any person" categories for conduct occurring anywhere, as long as they demonstrate a slight nexus between the conduct at issue and the United States, such as routing funds through a U.S. bank about or sending an email through a U.S. server.[87] For U.S. companies and individuals, the agencies do not need to demonstrate a U.S. territorial nexus.[88]

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82. Lucinda A. Low et al., *Global Anti-Corruption Standard and Enforcement: Implications for Energy Companies,* 3.2 J. OF WORLD ENERGY L. & BUS. 166, 179 (2010)
83. *Id.* at 166, 180.
84. *See* 15 U.S.C. § 78(c)(a)(8).
85. Low et al., *supra* note 82, at 180.
86. Foreign Corrupt Practices Act: Enforcement Actions Dataset, *supra* note 81.
87. Low et al,, *supra* note 82, at 179.
88. *Id*. at 179.

As a result, large sanctions have been imposed against foreign and domestic corporations under the FCPA.[89] In 2008, Siemens AG, a German corporation, pleaded guilty to FCPA violations after the DOJ alleged a pattern of global bribery and illegal payments. Siemens agreed to a settlement that included $1.6 billion in penalties, disgorgement of profits, and fines, about $800 million of which was paid to U.S. authorities.[90] The DOJ asserted its jurisdiction because Siemens had stock listed on the New York Stock Exchange.[91] In 2019, Mobile Telesystems, a Russian company, paid an $850 million criminal penalty.[92] In 2020, Goldman Sachs, a U.S. company, admitted to FCPA violations and paid over $2.9 billion to authorities in the United States and elsewhere.[93] This standardized approach to prosecution has helped address political concerns that regulation would disproportionately disadvantage U.S. companies.

The FCPA's extraterritorial reach has enabled foreign governments to enact similar measures, which has reinforced and further standardized global corporate accountability.[94] Over the last decade, the DOJ has found new partners for its anti-bribery and anti-corruption initiatives.[95] Recently, the DOJ established the International Corporate Anti-Bribery Initiative to solidify and develop partnerships with foreign law enforcement counterparts.[96] The fight against corporate complicity in corruption is now a global venture.[97]

2. Proposed Jurisdictional Reach of the TVPA

The FCPA's jurisdictional bases are well-suited to the forced labor context. Thus, Congress should create an additional TVPA provision that provides jurisdiction over the extraterritorial conduct

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89. *Largest U.S. Monetary Sanctions by Entity Group*, STANFORD LAW SCHOOL: FOREIGN CORRUPT PRACTICES ACT CLEARINGHOUSE, https://fcpa.stanford.edu/statistics-top-ten.html.

90. *Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines*, U.S. DEPARTMENT OF JUSTICE (Dec. 15, 2008).

91. *Id.*

92. Michael S. Diamant et al., *FCPA Enforcement Against U.S. and Non-U.S. Companies*, 8 MICH. BUS. & ENTREPRENEURIAL L. REV. 353, 355 (2019).

93. *Former Goldman Sachs Investment Banker Convicted in Massive Bribery and Money Laundering Scheme*, U.S. DEPARTMENT OF JUSTICE (Apr. 8, 2022).

94. Frederick T. Davis, *Judicial Review of Deferred Prosecution Agreements: A Comparative Study*. 60 COLUM. J. TRANSNAT'L L. 751,754. (2021).

95. Deborah Meshulam & Melanie Garcia, *DOJ Plans to Make US Sanctions Enforcement "The New FCPA": Watch these Key Areas*, DLA PIPER (2022), https://www.dlapiper.com/en-us/insights/publications/2022/07/doj-plans-to-make-us-sanctions-enforcement-the-new-fcpa.

96. *Acting Assistant Attorney General Nicole M. Argentieri Keynote Address at the 40th International Conference on the Foreign Corrupt Practices Act*, DOJ (Nov. 29, 2023).

97. *Id.*

of U.S. companies, companies traded on a U.S. stock exchange, and the officers, directors, employees, and agents of those companies.

Currently, the TVPA provision for extraterritorial jurisdiction is not sufficient to capture the types of conduct that the FCPA has addressed. As the Ratha case shows, courts attempting to determine whether a corporation is "present" in the U.S. will likely require a higher standard of connection with the U.S. than trading on a U.S. stock exchange. An FCPA-style approach to jurisdiction will enable DOJ to pursue cases against companies who engage in forced labor, even if they are based overseas or work through subsidiaries.

In addition to enabling DOJ enforcement, this approach to jurisdiction can help secure support from U.S. industry. The FCPA's broad application gained the support of U.S. industry in part because it created a level playing field for domestic and foreign corporations.[98] At the time of the FCPA's enactment, U.S. companies feared being placed at a competitive disadvantage with foreign companies operating in countries where they were permitted to offer bribes to secure business opportunities.[99] Through enforcement against both foreign and domestic corporations, the FCPA was able to secure the support of U.S. industry.[100]

The TVPA could likely garner the same support through enforcement against foreign companies. Indeed, in the Ratha case, domestic shrimp fishers submitted declarations in favor of the plaintiffs, attesting to the competitive advantage and negative impact on U.S. industry that forced labor in Thai fishing posed.[101] Through assurances that the TVPA regime would capture foreign conduct, DOJ could convince domestic companies that accountability for forced labor was not a threat to their profitability.

Finally, FCPA-style jurisdiction would not disadvantage U.S. companies because foreign countries are already implementing similar initiatives. As mentioned above, the international community has already implemented measures to promote the criminalization of forced labor and corporate respect for human rights. These measures provide a helpful framework, but recent foreign laws go further in. The United Kingdom Modern Slavery Act, for example, requires that companies with sales of more than 36 million pounds publish annual statements on the risks of forced labor in their supply chains and the actions they have taken to address those risks. Notably, the provision applies to any company

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98. Brewster, *supra* note 69.
99. *Id.* at 1616.
100. *Id.* at 1617.
101. *Ratha*, 35 F.4th at 1176.

doing at least "some" business in the U.K.[102] Thus, even without changes in U.S. law, many domestic corporations who do business in the U.K will be required to address forced labor in their supply chains. Thus, applying the TVPA to U.S. companies and all companies on a U.S. stock exchange provides jurisdiction that is both effective and fair.

B. Establishing Knowledge

The FCPA enforcement regime has successfully addressed the issue that companies operating in complex international markets can easily plead ignorance of crimes that occur in their supply chains. Prosecutors should look to the FCPA's mens rea standard and accompanying guidance as they design a similar regime for the TVPA.

1. FCPA Approach to Establishing Knowledge

To establish the mens rea required for liability, the FCPA carefully defines "knowledge" and issues "red flags" guidance to further inform the decisions of corporations.

a. FCPA Definition of Knowledge

Under the FCPA, a person has the knowledge required for liability if he acts with the awareness that he is engaging in prohibited conduct, that the circumstances of prohibited conduct exist, or that a prohibited result is substantially certain to occur.[103] However, the statute also provides for a mens rea below that of absolute certainty. Knowledge is satisfied under the FCPA if a "person has a firm belief that such circumstance exists or that such result is substantially certain to occur." [104] If an offense requires knowledge of the existence of a particular circumstance, a person has requisite knowledge if he "is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist."[105] Thus, under the terms and definitions of the statute, a corporation or individual can be

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102. *Modern Slavery Act 2015*, https://www.legislation.gov.uk/ukpga/2015/30/contents/enacted.

103. *See* Section 30A(f)(2)(A) of the Exchange Act, 15 U.S.C. § 78dd-1(f)(2)(A); 15 U.S.C. §§ 78dd-2(h)(3)(A), 78dd-3(f)(3)(A).

104. *Id.*

105. *See* Section 30A(f)(2)(A) of the Exchange Act, 15 U.S.C. § 78dd-1(f)(2)(B); 15 U.S.C. §§ 78dd-2(h)(3)(A), 78dd-3(f)(3)(A).

prosecuted for engaging in conduct with the awareness of the high probability of an illegal bribe.

An FCPA guidance document elaborates on the mens rea standard that will establish liability. DOJ and the SEC together release a guide for corporations on how best to comply with the FCPA.[106] Among other things, the guide clarifies how the agencies will determine a person's knowledge of an FCPA violation. Specifically, the it explains that the "fact that a bribe is paid by a third party does not eliminate the potential for criminal or civil FCPA liability."[107] Thus, a person has the requisite knowledge if he engages with a third party "when he is aware of a high probability of the existence" of a bribery scheme, unless the person actually believes that the scheme does not exist.[108] This standard eliminates the possibility for companies to be willfully blind to corruption in their supply chains, and use that as an FCPA defense. A defendant cannot avoid liability through ignorance.

b. FCPA "Red Flags" Guidance

In addition to information on the FCPA enforcement regime, the FCPA resource guide includes a list of potential FCPA risks that companies should consider as they do business.[109] With regard to third-party dealings, the guide explains that the common red flags for corruption include excessive commissions or discounts to third party agents or distributors, a third party who is closely associated with a foreign official, and third-party requests for payment to offshore bank accounts.[110] Companies must also pay special attention to operations in countries that have a reputation for corruption.[111]

In addition to promoting corporate compliance with the FCPA, these red flags guide investigators as they evaluate how to proceed with a case. Due diligence and compliance are not affirmative defenses to an FCPA violation, but the Department of Justice considers them in its exercise of prosecutorial discretion.[112] Companies who ignore the red flags will struggle to assert that they did not know of or recklessly disregard the risk of an FCPA violation

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106. *FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act*, DEPARTMENT OF JUSTICE & SECURITIES AND EXCHANGE COMMISSION (2020), https://www.justice.gov/criminal-fraud/fcpa-resource-guide.

107. *Id.* at 22.

108. *Id.*

109. *Id.* at 23.

110. *Id.*

111. *Id.*

112. Verdier & Stephan, *supra* note 3, at 1403.

if they inevitably discover one later on.[113] Thus, companies incorporate FCPA guidance into their business models both to avoid FCPA violations themselves, as well as to preserve the opportunity to get the benefit of the doubt from investigators.[114] As a result, the red flags help enforcing agencies established knowledge without proving a direct awareness of an illegal payment.

2. Proposed Approach to Knowledge for the TVPA

Because multinational companies rarely directly subject workers to forced labor, prosecutors must find a way to establish liability for corporations who work through intermediaries. The FCPA's approach to mens rea can have that result. The TVPA should focus on clear drafting and standardized guidance to close loopholes in corporate accountability for forced labor.

a. Proposed Definition of Knowledge under the TVPA

Though the extension of the TVPA to those who benefit from forced labor intended to address corporate conduct, the provision is unlikely to have its intended effect the way it is currently drafted. As discussed above, the current criminal forced labor provision of the TVPA applies to those who knowingly subject a person to forced labor and those who knowingly benefit from participation in a venture that engages in forced labor.[115]

In the global supply chain context, "obtaining a benefit" is likely too nebulous a standard to apply.[116] The Ratha court's stringent analysis of a "benefit" also suggests that in some cases, corporations might be able to escape liability for forced labor simply because prosecutors could not show that the forced labor itself provided them with a benefit. In operations with multiple subsidiaries, contractors, and shareholders, it may be unclear how far the financial benefit extends, and consequently, who in the supply chain is liable under the TVPA.[117] Thus, perhaps counterintuitively, Congress should draft a corporate liability provision that removes liability for a "benefit" from participation in a venture.

Instead, the provision should focus only on the act of subjecting a person to forced labor. To account for conduct that occurs through

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113. David Burns & Erin Sullivan, *Navigating the FCPA's Complex Scienter Requirements*, BLOOM. FINANCE LP (2009), https://www.gibsondunn.com/navigating-the-fcpas-complex-scienter-requirements/.

114. *Id.*

115. 18 U.S.C. § 1589, *supra* note 50.

116. Beale, *supra* note 51, at 32.

117. *Id.* at 35.

third parties, the TVPA should mirror the FCPA's definition of knowledge. In the same way that the FCPA holds corporate actors liable when they engage in behavior while aware of a high probability that a bribe will be paid, the TVPA should hold corporate actors liable when they engage in behavior while aware of a high probability that individuals are or will be subjected to forced labor. Like the FCPA guidance, DOJ should issue TVPA guidance which makes clear that a company can be held liable for contracting with a third party when it knows forced labor will be used as part of the contract. Through a FCPA-style approach to mens rea, the TVPA can set a knowledge standard that prosecutors will be able to meet.

b. Proposed TVPA "Red Flags" Guidance

The difficulty plaintiffs have had establishing that corporate defendants knew of the presence of forced labor reveals a need for standardized guidance about regions and business models that present a high risk of forced labor. As DOJ and the SEC have done for the FCPA, DOJ should use "red flags" guidance in its efforts to establish the necessary knowledge for liability under the TVPA. The most practical way to issue guidance in the forced labor context would be to focus on what is already in existence.

In addition to creating civil and criminal liability for human trafficking crimes, the TVPA mandated two major initiatives for information collecting and reporting. They are the Trafficking in Persons Report released by the U.S. State Department and the List of Goods Produced by Child Labor or Forced Labor released by the U.S. Department of Labor. [118]

The Trafficking in Persons Report is an annual report that rates country practices based on their compliance with TVPA standards.[119] The report compiles data on the prevalence of forced labor in each country, as well as the country's current enforcement efforts and capacity.[120] Based on the findings, the report ranks each country on a scale from Tier 1 to Tier 3. Tier 1 countries criminalize human trafficking and tend to enforce those laws, while Tier 3 countries have a high prevalence of human trafficking issues and little to no enforcement.[121]

Similarly, the List of Goods Produced by Child Labor or Forced Labor compiles goods and source countries that DOL's Bureau of International Labor Affairs has reason to believe include child or

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118. Green, *supra* note 7, at 466.
119. *Id.*
120. 2022 Trafficking in Persons Report, *supra* note 59, at 44,52,54.
121. *Id.* at 52-5.

forced labor in their production.[122] The Bureau releases a new list each year, based on information collected through investigations and passed along by media and civil society.[123] It includes broad indicators of forced labor, as well as a table listing each country along with the goods known to be susceptible to forced labor in that country.[124]

Thus far, the Trafficking in Persons Report and List of Goods Produced by Child Labor or Forced Labor have served to raise awareness of the risks of forced labor and help corporations conduct their own risk assessments.[125] However, these sources provide a wealth of information that prosecutors could use to show established risks in a region.

A country specific approach to red flags best fits the forced labor context because forced labor, unlike bribes and corrupt payments, must involve physical victims, usually working in a foreign country. Thus, each country's tolerance of forced labor directly affects the risk that companies who set up operations in that country will benefit from forced labor in their supply chains.

However, within each country, certain industries are often especially notorious. The Trafficking in Persons Report and List of Goods include this information in country profiles and industry charts. They compile accounts of forced labor in particular sectors, in an effort to describe the unique issues each country faces. This industry-level information would allow DOJ to issue guidance at a more granular level. In environments where the risk of forced labor was high in certain sectors, but fairly low overall, DOJ could tailor its red flags to focus on the problem sectors, without affecting the country as a whole.

By releasing guidance that incorporates the Trafficking in Persons Report and List of Goods Produced by Child and Forced Labor, DOJ can convey to corporations that it is aware of forced labor in certain countries and production channels. Like the FCPA, DOJ can explain that it will look more skeptically on violations occurring in these sectors. Thus, if DOJ brings an enforcement action against a corporation for an alleged violation in an industry listed in the Trafficking in Persons Report and List of Goods, it will already have an advantage in proving that the company acted in reckless disregard of the risk of forced labor.

In addition, the Trafficking in Persons Report and List of Goods are good sources of guidance for the pragmatic reason that they are

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122. *List of Goods Produced by Child Labor or Forced Labor*, U.S. DEPARTMENT OF LABOR (2022), https://www.dol.gov/agencies/ilab/reports/child-labor/list-of-goods.

123. *Id.*

124. *Id.*

125. Green, *supra* note 7.

already funded. Each resource is updated each year and reflects the agency's most current information. Consequently, DOJ could translate the findings of the report into a format designed for compliance and enforcement initiatives, without engaging in its own time-consuming research.

As with the FCPA guidance, these red flags would address corporations who operate in high-risk sectors, but later claim ignorance of the conduct that occurred there.

VI. POLICY RISKS AND POTENTIAL LEGAL PITFALLS FOR THE NEW REGIME

Like any new regime in a transnational context, the proposed TVPA structure will face challenges. Most immediately, these include threats to jurisdiction and the influence of foreign relations concerns over trade determinations. However, neither rises to a level that should detract from the regime's overall efficacy.

A. Jurisdictional Challenges in Recent FCPA Cases

If forced labor cases do begin to go to trial, DOJ's view of its extraterritorial jurisdiction will be tested. In recent years, several FCPA cases against individuals have exposed limitations to the FCPA's expansive reach. In 2021, a court in the Southern District of Texas held that it did not have jurisdiction over a Swiss resident and citizen for her role in an illegal bribery scheme involving a Venezuelan company and its U.S. subsidiary, when none of the conduct occurred in the United States.[126] The court also found that the defendant was not an agent of a U.S. company, because there was not sufficient evidence that the U.S. subsidiary controlled her assignments.[127] Law firms representing FCPA defendants have noted that the case "serves as another reminder that defendants can achieve litigation success when they elect to challenge in court the DOJ's novel and aggressive interpretations of the FCPA or other federal criminal statutes."[128]

In 2014, Alstom SA, a French company, pleaded guilty to FCPA violations for bribes it paid to Indonesian officials in the hopes of

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126. Andrew Boutros et al., *Federal Court Rejects DOJ's Novel and Extraterritorial Effort To Extend FCPA Jurisdiction to Foreign Agents*, JD SUPRA (2021), https://www.jdsupra.com/legalnews/federal-court-rejects-doj-s-novel-and-6978776/.

127. *See* United States v. Rafoi-Bleuler, No. 4:17-CR-0514, Dkt. No. 255 (S.D. Tex. Nov. 10, 2021).

128. Boutros et al., *supra* note 126.

winning a power plant contract.[129] Alstom SA paid a $772 million penalty to DOJ as part of its plea agreement. However, DOJ's case against a former vice president of the company, Lawrence Hoskins, went to trial. Hoskins was not a U.S. citizen, was not employed by a U.S. company, and did not enter U.S. territory during his time working for Alstom.[130] Thus, none of the three traditional bases for FCPA jurisdiction over individual persons were present. DOJ first argued that it had jurisdiction over Hoskins on a theory of accomplice or co-conspirator liability.[131] However, the Second Circuit struck down that theory in 2018, holding that the FCPA does not apply to foreign nationals unless (1) their illegal acts occur in the United States, or (2) they act illegally extraterritorially as an officer, director, employee, or agent, of a U.S. company. Consequently, at trial, DOJ endeavored to show that Hoskins was an agent of Alstom US, a U.S.-based subsidiary and a jury found him guilty of FCPA violations. However, the district court granted Hoskins post-trial motion for acquittal on all counts, noting that DOJ failed to prove Alstom US was in sufficient control of Hoskins' actions to establish an agency relationship.[132] The Second Circuit upheld this interpretation in 2022.

The decision walks back DOJ's jurisdiction over foreign nationals, but it is important to note that DOJ succeed in securing a guilty plea from the corporation itself. In addition, with respect to individuals, the holding did not affect any of the FCPA's three traditional jurisdictional bases over individuals.

B. Foreign Policy Influence in TVPA Guidance

The issuance of guidance based on national and regional risks presented in the Trafficking in Persons Report does come with some drawbacks. Because the U.S. Department of State issues the report, it can be vulnerable to outside influence based on foreign relations concerns. The United States may be hesitant to expose forced labor in countries that serve as valuable allies. For example, after the 2022 Trafficking in Persons Report, Israel expressed its frustration at a Tier 2 ranking, as well as a report of a Palestinian woman who

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129. *Alstom Pleads Guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foreign Bribery Charges*, U.S. DEPARTMENT OF JUSTICE (December 22, 2014), https://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery.

130. *Second Circuit upholds Hoskins acquittal*, DLA PIPER, https://www.dlapiper.com/en/insights/publications/2022/08/second-circuit-upholds-hoskins-acquittal.

131. *Id.*

132. *Id.*

was allegedly denied status as a trafficking victim.[133] Consequently, the United States privately apologized to Israel. The report was not amended, but the incident suggests that the Trafficking in Persons report is not immune to diplomatic concerns. Elevating it to a guide for forced labor compliance may further politicize what is meant to be a data collection effort.

However, the risk of foreign relations and national security influence in forced labor guidance already exists, regardless of whether or not investigators use the Trafficking in Persons Report to determine red flags. The State Department already considers diplomatic issues in its publications, and the Department of Justice is not likely to bring prosecutions that would upset foreign relations. Indeed, the foundational basis of these laws (both FCPA and TVPA) is based in a national security justification: that allowing unchecked corruption or forced labor at a global level degrades the U.S. economy and market. Despite these potential hazards, the Trafficking in Persons report remains the best material to create global guidance.

VII. CONCLUSION

The FCPA has effectively addressed barriers to enforcement because it is clear about its jurisdictional basis and the activities that enforcing agencies consider to be high-risk. As a result, it provides multinational corporations with achievable compliance standards that they can implement to address illegal payments in their supply chains.

Like the FCPA, the TVPA must apply to extraterritorial conduct in clear and explicit terms if it is to become an effective tool for the eradication of forced labor in global supply chains. A consistent set of standards to establish liability will ensure that DOJ is justified in bringing enforcement actions and that courts understand the scope of their ability to adjudicate cases. Corporations facing TVPA charges are likely to settle cases and cooperate with government investigators, but they will not do so without a credible threat of prosecution from DOJ.[134] A jurisdictional amendment to the statute and "red flags" guidance put forth by agencies will ensure that the TVPA carries this credible threat. In turn, the regime will encourage companies to implement compliance programs and enforce internal standards.

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133. Barak Ravid, *U.S. Privately Apologized to Israel Over Human Trafficking Report*, AXIOS (2022), https://www.axios.com/2022/10/19/state-human-trafficking-report-israel-apology.

134. Verdier & Stephan, *supra* note 3, at 1392.