

# REDEEMING GLOBALIZATION THROUGH UNFAIR COMPETITION LAW

*Sean A. Pager*<sup>†</sup> & *Eric Priest*<sup>\*</sup>

## TABLE OF CONTENTS

INTRODUCTION .....	2437
I. GLOBAL SUPPLY CHAINS AND THEIR DISCONTENTS.....	2444
A. <i>The Dark Side of Globalization</i> .....	2444
B. <i>How Global Supply Chains Undercut the Rule of Law</i> .....	2447
C. <i>The Failure of Existing Regulatory Paradigms</i> .....	2450
1. International Enforcement.....	2451
2. End Market Reform Initiatives .....	2454
a. Private Ordering .....	2454
b. End-Market Regulation .....	2456
c. Limitations of Existing Initiatives .....	2457
D. <i>Distinguishing the Unfair Competition Approach</i> .....	2459
II. A CLOSER LOOK AT THE UNFAIR COMPETITION MODEL .....	2461
A. <i>Location of Defendants</i> .....	2461
B. <i>Nature of the Plaintiffs' Claims</i> .....	2462
C. <i>Source of Law</i> .....	2463

---

<sup>†</sup> Professor, Michigan State University College of Law.

<sup>\*</sup> Associate Professor, University of Oregon School of Law. This Article benefited from comments received at the 2015 Harvard-Stanford-Yale Junior Faculty Forum at Harvard University and the 2016 International IP Roundtable at University of Nevada–Las Vegas. Special thanks to Annemarie Bridy, Anthony Colangelo, John Cross, William Dodge, Rochelle Dreyfuss, Frank Gevurtz, Wendy Gordon, Larry Helfer, Scott Hemphill, Howell Jackson, Sapna Kumar, Michael Rawling, Michael Sant’Ambrogio, Paul Stephan, Marketa Trimble, Michael Vandenberg, Timothy Webster, Christopher Whytock, and Jane Winn.

1.	Section 337 Actions in the International Trade Commission .....	2464
2.	State Unfair Deceptive Acts and Practices Statutes .....	2467
3.	Specialized State Unfair Competition Statutes .....	2468
4.	The Federal Trade Commission Act .....	2469
D.	<i>Applicability Beyond Intellectual Property</i> .....	2470
E.	<i>What Is Holding Unfair Competition Law Back?</i> .....	2473
F.	<i>Ad Hoc and Excessive Liability</i> .....	2476
G.	<i>Extraterritoriality Concerns</i> .....	2477
III.	CABINING LIABILITY THROUGH PRINCIPLED CONSTRAINTS .....	2478
A.	<i>Shared Global Norm</i> .....	2479
B.	<i>Domestic Market Harm</i> .....	2482
IV.	EXTENDING LIABILITY DOWN THE SUPPLY CHAIN .....	2483
A.	<i>The Need for Secondary Liability</i> .....	2484
B.	<i>Why Current Doctrine Fails to Hold Lead Firms Accountable</i> .....	2486
1.	Negligence .....	2487
2.	Gratuitous Undertaking .....	2487
3.	Aiding and Abetting .....	2488
4.	Strict Liability .....	2489
a.	Piercing the Corporate Veil .....	2489
b.	Vicarious Liability .....	2489
i.	Agency .....	2489
ii.	Joint venture .....	2490
5.	Summary .....	2491
C.	<i>The Case for Enterprise Liability</i> .....	2491
1.	Existing Tort Law Precedent Supporting Enterprise Liability .....	2493
a.	Products liability .....	2493
b.	Respondeat Superior .....	2495
c.	Ultrahazardous activities .....	2499
2.	The Unfair Competition Model Justifies a Systemic View of Supply Chain Accountability .....	2499

3. The Foreign Corrupt Practices Act: A Model of Enterprise Liability for Remediating Systemic Supply Chain Abuses .....	2501
D. <i>A Framework for Limiting Downstream Liability</i> .....	2502
E. <i>Bringing Enterprise Liability into Unfair Competition Law</i> .....	2509
1. Legislative Reform .....	2509
2. Executive Agency Adoption.....	2511
a. ITC Section 337.....	2511
b. FTC Section 5 .....	2513
c. Common-Law Adjudication.....	2514
F. <i>Enforcement Strategy and Internalization of Compliance Norms</i> .....	2516
CONCLUSION.....	2519

## INTRODUCTION

Globalization's seamless integration of manufacturing across extended supply chains has brought unprecedented efficiency to global economic production. The results often seem magical. Components sourced from dispersed suppliers in multiple countries are assembled into finished goods that arrive miraculously on our doorsteps at the click of a mouse.<sup>1</sup>

Globalization's magic has a less savory side, however. Outsourcing production to overseas suppliers allows manufacturers to save money while rendering the human and environmental costs invisible. Not only do such externalities magically disappear with distance, but a sophisticated corporate shell game ensures that legal accountability for such harms vanishes as well.<sup>2</sup>

Workers are crushed to death or burned alive in Bangladeshi garment factories, Chinese lakes and rivers are poisoned with chemicals, endangered species are incinerated in Borneo, and children are enslaved on Thai fishing boats. These and countless other atrocities pervade global

---

<sup>1</sup> See ERIK LOOMIS, *OUT OF SIGHT: THE LONG AND DISTURBING STORY OF CORPORATIONS OUTSOURCING CATASTROPHE* 14 (2015).

<sup>2</sup> *Id.* at 11–14, 18.

supply chains. They affect the clothes we wear, the foods we eat, and the brands we trust.<sup>3</sup>

Despite such tragedies, global outsourcing continues its business as usual, extracting cost savings with ruthless efficiency while turning a blind eye to the egregious violations that predictably result. Momentary bursts of bad publicity are defused by empty platitudes and fake reforms. Such cynical evasions of responsibility taint all of us—producers and consumers alike—with moral complicity for the grievous harms inflicted.

Proposals to reform global supply chains have proliferated and endless initiatives launched full of promise and fanfare.<sup>4</sup> Yet, nothing has come close to getting traction on the problem. We argue that unfair competition law could supply the missing link that puts in reach a viable solution.

Our unfair competition model recognizes that the pernicious effects of supply chain abuses go beyond ruined lives and a despoiled environment. The root cause is systemic: a hypercompetitive global marketplace exposes gaps in regulatory governance, sourcing production from countries with the weakest links. The result is a depressing race to the bottom that undercuts the global rule of law.

To be sure, lax regulation is not the only driver of outsourcing. Low wages provide their own lure. In contrast to such legitimate comparative advantages, this Article focuses on unfair trade practices involving violations of global regulatory standards—standards that source

---

<sup>3</sup> Even such iconic products as the Apple iPhone have been tarnished by links to sweatshop labor abuses, human rights atrocities, and environmentally destructive mining. See Joel Johnson, *1 Million Workers. 90 Million iPhones. 17 Suicides. Who's to Blame?*, WIRE (Feb. 28, 2011, 12:00 PM), <https://www.wired.com/2011/02/ff-joelinchina> [<https://perma.cc/EER7-XAZH>] (describing nets outside the Foxconn factory building where iPhones are assembled to prevent suicidal leaps by oppressed workers); Lynnley Browning, *Where Apple Gets the Tantalum for Your iPhone*, NEWSWEEK (Feb. 4, 2015, 2:56 PM), <http://www.newsweek.com/2015/02/13/where-apple-gets-tantalum-your-iphone-304351.html> [<https://perma.cc/76RR-DYSB>] (describing potential use in iPhones of “conflict minerals” mined by “warlords and mass rapists”); Jonathan Kaiman, *Rare Earth Mining in China: The Bleak Social and Environmental Costs*, GUARDIAN (Mar. 20, 2014, 10:30 AM), <https://www.theguardian.com/sustainable-business/rare-earth-mining-china-social-environmental-costs> [<https://perma.cc/4FBG-ZDRS>] (linking smartphones to toxic waste contamination).

<sup>4</sup> See *infra* Section I.C.2.

countries are legally committed to uphold. Where such regulatory shortcuts yield cost savings that confer a competitive advantage, they constitute unfair competition.

The systemic effects of such unfair practices are far from trivial.<sup>5</sup> As work flows from countries with high levels of regulatory compliance to those (typically in developing countries) where lax enforcement and widespread flouting of global norms prevail, the effect on the U.S. economy has been cataclysmic. Competition abroad has forced a steady decline in American working-class wages.<sup>6</sup> The U.S. manufacturing base has been decimated and rust-belt communities devastated.<sup>7</sup>

The political ramifications are equally toxic: capitalism and free trade are sullied by the abuses and evasion of responsibility. Workers in shuttered factories blame “cheat[ing]” foreigners for stealing their jobs.<sup>8</sup> The resulting anti-globalist backlash has brought us to the brink of a destructive global trade war.<sup>9</sup>

---

<sup>5</sup> See Peter Navarro *Is About to Become One of the World's Most Powerful Economists*, *ECONOMIST*, Jan. 21, 2017, at 18 (citing estimate that forty-one percent of China's competitive advantage stemmed from unfair trade practices); *infra* notes 37, 41–44 and accompanying text.

<sup>6</sup> See Branko Milanovic, *Why the Global 1% and the Asian Middle Class Have Gained the Most from Globalization*, *HARV. BUS. REV.* (May 13, 2016), <https://hbr.org/2016/05/why-the-global-1-and-the-asian-middle-class-have-gained-the-most-from-globalization> [<https://perma.cc/V53K-PN3A>]; Joseph E. Stiglitz, *Globalization and Its New Discontents*, *PROJECT SYNDICATE* (Aug. 5, 2016), <https://www.project-syndicate.org/commentary/globalization-new-discontents-by-joseph-e-stiglitz-2016-08> [<https://perma.cc/9Z92-CAXP>] (noting that in the United States, “[m]edian income for full-time male workers is actually lower in real (inflation-adjusted) terms than it was 42 years ago”).

<sup>7</sup> See Mark Broad, *Why Is Globalisation Under Attack?*, *BBC NEWS* (Oct. 6, 2016), <https://www.bbc.com/news/business-37554634> [<https://perma.cc/AT9P-RJNY>] (citing estimate that “Chinese imports explain 44% of the decline in employment” in U.S. manufacturing from 1990–2007). Nor is the U.S. service economy immune to competition from offshoring. Service industry jobs have already shifted overseas, and millions more white-collar jobs may be vulnerable. Lael Brainard & Robert E. Litan, *Services Offshoring, American Jobs, and the Global Economy*, 8 *PERSP. ON WORK* 9, 9–10 (2005).

<sup>8</sup> See Heather Long, *How China Doesn't Play Fair on Trade*, *CNN BUS.* (July 12, 2016, 12:50 PM), <https://money.cnn.com/2016/07/12/news/economy/china-trade-donald-trump/index.html> [<https://perma.cc/P4UY-4NNZ>].

<sup>9</sup> See Edward McClelland, *The Rust Belt Was Turning Red Already. Donald Trump Just Pushed It Along*, *WASH. POST* (Nov. 9, 2016, 12:13 PM), <https://www.washingtonpost.com/posteverything/wp/2016/11/09/the-rust-belt-was-turning-red-already-donald-trump-just-pushed-it-along> [<https://perma.cc/LES7-JNQ3>]; Shawn Donnan & Jeff Kearns, *Things Are Not Going to Plan in Trump's U.S. Trade Deficit Wars*, *BLOOMBERG* (Sept. 5, 2018, 7:45 PM),

Free trade has brought prosperity to millions, and its underlying economics remain sound. Shifting unskilled production to lower-wage countries makes sense. Yet, free trade only works if everyone agrees to respect a common set of global rules, ensuring a level playing field. Such rules exist. The challenge remains enforcement.<sup>10</sup> Without the means to enforce global standards, free trade becomes unfair, and those who lose out cry foul. Globalization becomes the whipping child of populist politicians, leading anti-globalist policies to triumph at liberalism's expense.

Left unreformed, globalization's dark side could therefore prove its undoing. Indeed, recent evidence suggests that deglobalization is already well underway.<sup>11</sup> As protectionism and xenophobic nationalism spread, all of us will emerge the poorer.<sup>12</sup> Nor is the harm confined to economics. By undermining multilateral institutions and cooperation, antiglobalism threatens the viability of global governance itself.<sup>13</sup>

Yet, what if globalization could be reinvented in a fairer guise? Global supply chains are globalization's seamy underbelly. Their persistent abuses exemplify the unfair trade practices that animate antiglobalism. Reforming supply chains would thus redress a core antiglobalist grievance while restoring justice and fairness to economic globalization.

Unfair competition has the potential to succeed where rival approaches have failed. The failure of prior efforts can be boiled down to

---

<https://www.bloomberg.com/news/articles/2018-09-05/things-are-not-going-to-plan-in-trump-u-s-trade-deficit-wars> [<https://perma.cc/BB22-RFR3>] (noting signs that "Trump's trade wars are starting to hit economic growth, not just at home but around the world").

<sup>10</sup> See *infra* Section I.C.2.

<sup>11</sup> See Joshua Kurlantzick, *The Great Deglobalizing*, BOS. GLOBE (Feb. 1, 2015, 12:12 AM), <https://www.bostonglobe.com/ideas/2015/02/01/the-great-deglobalizing/a8TNmTd7pZNNtjhcK5hBZP/story.html> [<https://perma.cc/F4T7-SDVG>].

<sup>12</sup> Ruchir Sharma, *When Borders Close*, N.Y. TIMES (Nov. 12, 2016), <https://www.nytimes.com/2016/11/13/opinion/sunday/when-borders-close.html> [<https://perma.cc/9ZWC-YF8W>] (noting that global trade as a share of world GDP has declined since 2008).

<sup>13</sup> See Peter S. Goodman, *The Post-World War II Order Is Under Assault from the Powers That Built It*, N.Y. TIMES (Mar. 26, 2018), <https://www.nytimes.com/2018/03/26/business/nato-european-union.html> [<https://perma.cc/K7T2-LJY5>] (describing how the anti-globalist backlash has undermined key pillars of the postwar global order).

two fundamental causes: (1) lack of enforcement, and (2) failure to address systemic causes. Unfair competition addresses both these deficiencies.

Enforcement failures represent the most obvious cause of supply chain misconduct. Suppliers perpetuate abuses because they can do so with impunity. Factory bosses evade inspections or buy off inspectors. Multinational companies structure their dealings to ensure plausible deniability for their suppliers' sins. International enforcement mechanisms remain toothless. And U.S. courts typically decline to apply U.S. law to deal with problems in faraway lands.<sup>14</sup>

While enforcement gaps explain why misconduct continues, the systemic effects of global competition ensure that abuses are pervasive and unavoidable. Cutting regulatory corners is often the only way for suppliers to make a profit. And even then, they risk losing out to less scrupulous competitors willing to push the envelope further. The result is a global race to extract cost savings on the backs of workers and the environment, a destructive climate which rewards cheating at the expense of honest businesses.<sup>15</sup>

The failure to address such structural drivers of misconduct has meant that existing reform efforts have compartmentalized supply chain abuses as discrete acts of malfeasance rather than the entirely predictable consequence of unregulated competition. Labor lawyers combat abusive sweatshops; environmentalists battle toxic waste dumping; human rights lawyers decry human trafficking on farms and fishing boats. Yet, all of these scourges emanate from the same underlying cause.

Focusing on the symptoms rather than the cause encourages U.S. policymakers to externalize the problem. They dismiss supply chain abuses as about a few bad actors in dodgy foreign jurisdictions rather than acknowledge the reality of a dysfunctional system whose abuses cut across industries and geographic regions—a system that institutionalizes cheating as the means to economic survival.

Framing the problem through an unfair competition lens both exposes its systemic nature and provides the tools to remedy it. The key insight is that cost savings arising from regulatory violations overseas typically pass down the global supply chain to benefit companies selling

---

<sup>14</sup> See *infra* Section I.C.1.

<sup>15</sup> See *infra* Section I.B.

the finished products in the U.S. market. Such ill-begotten savings unfairly undercut legitimate competitors—thereby engendering unfair competition.

Crucially, such unfair competition occurs *in the U.S. end market*. Establishing competitive harms in the U.S. market places such actions within U.S. jurisdiction, bringing them within the remit of a functioning legal system that can impose accountability for violations. Moreover, this enforcement strategy has real teeth: perpetrators risk being frozen out of the lucrative U.S. market.

Imposing legal accountability would force overseas producers to disgorge profits gained from regulatory shortcuts. Doing so would, in turn, level the playing field for U.S. companies. This systemic framing thus directly rebuts the “not my problem” attitude that has hitherto discouraged U.S. policy interventions. Shifting the focus from bad things happening in faraway lands to spotlight downstream effects domestically shows exactly why unfair trade *is* a U.S. problem: when foreigners flout global rules, U.S. companies and workers lose out.

Using unfair competition law to hold supply chain scofflaws accountable would also validate the underlying global norms and force producers to take them seriously. Moreover, providing such redress would afford a measure of justice to those powerless to seek relief in their home country and protect some of the world’s most vulnerable populations and environments.

Harnessing unfair competition law to sanction overseas misconduct is more than theoretical. Unfair competition has been successfully invoked in multiple cases and venues by U.S. companies and state attorneys general. While recent cases have involved intellectual property (IP) infringement,<sup>16</sup> the same theory of unfair competition can be applied to other legal violations.<sup>17</sup> From the collapsing factories of Bangladesh, to smoldering rainforests in Borneo, to child laborers toiling in Africa, a wide range of abysmal manufacturing practices could be targeted. Indeed,

---

<sup>16</sup> See *infra* Part II.

<sup>17</sup> See Michael Buckler & Beau Jackson, *Section 337 as a Force for “Good”? Exploring the Breadth of Unfair Methods of Competition and Unfair Acts Under § 337 of the Tariff Act of 1930*, 23 FED. CIR. B.J. 513, 553–58 (2014). Indeed, precedents for non-IP applications already exist. See *infra* notes 124–127 and accompanying text.



any illegal manufacturing practice that yields a material cost advantage could potentially be deemed unfair competition. Unfair competition thus offers a powerful tool to regulate conduct in foreign jurisdictions that are otherwise rife with enforcement challenges.

Finally, while targeting direct offenders would make an immediate impact, we argue that unfair competition law should aim higher. Realizing its full potential requires a mechanism to impose accountability across the entire supply chain. We explain how unfair competition's systemic focus supports a novel theory of enterprise liability that would hold multinational companies liable for their suppliers' misconduct.<sup>18</sup> Lead firms should no longer be permitted to turn a blind eye to predictable misconduct that benefits their enterprise at competitors' expense. Ensuring that accountability follows profits down the supply chain would force multinational firms to internalize their full social costs.

Holding multinational firms responsible for supplier misconduct has a further benefit: as central nodes in the supply chain, such lead firms occupy a gatekeeper role which makes them efficient enforcers. Imposing accountability will encourage them to propagate compliance reforms through their web of supplier contracts. Unfair competition law could thus drive private ordering reforms, turning defendants into compliance stakeholders who will adopt the mantle of enforcement themselves.<sup>19</sup>

Such a virtuous dynamic would yield lasting benefits. It would strengthen the rule of law and ensure that global producers compete on a level playing field. Reversing the destructive dynamics of global capitalism would also allay demand for counterproductive protectionism. Redeeming globalization in this way could thus help to defuse antiglobalism, laying the foundation for a more just and prosperous world.

The argument below proceeds as follows: Part I explains how supply chain abuses are a systemic feature of global commerce; it then describes the advantages that unfair competition offers over prior reform efforts. Part II provides an overview of unfair competition laws at both the state and federal level and explains how these laws could be deployed to target supply chain abuses overseas. Part III proposes a set of principled constraints to address concerns that unfair competition litigation could

---

<sup>18</sup> See *infra* Part IV.

<sup>19</sup> See *infra* Section IV.F.

be exploited for improper aims such as protectionism. Part IV shifts the focus from direct offenders to intermediaries further down the supply chain. It shows how multinational firms evade responsibility under existing secondary liability doctrines and proposes a novel theory of enterprise liability based on unfair competition law that would restore appropriate accountability.

### I. GLOBAL SUPPLY CHAINS AND THEIR DISCONTENTS

Prior to the nineteenth century, most people consumed goods that were produced locally. Consumers and producers moved in the same community and shared a natural concern for their mutual welfare.<sup>20</sup> Industrialization and improved transportation changed this. As production shifted to distant factories—first nationally and then increasingly on a global scale—a kind of moral blindness set in. Consumers delight in the low prices and abundant choice that globalization brings, while remaining oblivious to dire harms inflicted as a consequence.<sup>21</sup> As global manufacturing shifts to developing countries with weak regulatory norms, the result has been an outsourcing of human misery.

#### A. *The Dark Side of Globalization*

Global economic production is marred by grievous and widespread human rights violations, labor abuses, and environmental harms. The results often shock the conscience, as the following examples detail:

- In April 2013, an overcrowded, disintegrating factory building in Bangladesh collapsed on thousands of textile workers, killing 1127 and injuring more than 2500. Management had ordered workers to stay in the building

---

<sup>20</sup> See LOOMIS, *supra* note 1, at 120.

<sup>21</sup> See *id.* at 11–14.

despite clear warnings of impending disaster.<sup>22</sup> The “Rana Plaza” collapse was but one in a series of catastrophes that have plagued the Bangladeshi garment industry. Three million workers, mostly women, toil in “horrifically unsafe conditions” to produce clothes for leading Western retailers.<sup>23</sup>

- In West Africa, where seventy percent of the world’s cocoa is grown, an estimated 2.1 million children toil, harvesting cocoa for global chocolate brands including Hershey, Nestlé, and M&M Mars.<sup>24</sup> Many are slaves, kidnapped or purchased from their parents and trafficked to Ivory Coast, where they are forced to work eighty to one hundred hours per week.<sup>25</sup> Child slaves elsewhere in Africa and Asia mine resources such as oil, diamonds, gold, and other “conflict” minerals sold internationally. The proceeds from such exploitation often finance local wars.<sup>26</sup>
- Thailand’s massive fishing industry exploits tens of thousands of slave laborers to feed the West’s demand for cheap seafood.<sup>27</sup> Slaves—many underage—are forced to work twenty-hour shifts in inhumane and treacherous

---

<sup>22</sup> Tamanna Rubya, Note, *The Ready-Made Garment Industry: An Analysis of Bangladesh’s Labor Law Provisions After the Savar Tragedy*, 40 *BROOK. J. INT’L L.* 685, 685–86 (2015); Jim Yardley, *Report on Deadly Factory Collapse in Bangladesh Finds Widespread Blame*, *N.Y. TIMES*, May 23, 2013, at A5.

<sup>23</sup> Marc Bain & Jenni Avins, *The Thing that Makes Bangladesh’s Garment Industry Such a Huge Success Also Makes It Deadly*, *QUARTZ* (Apr. 24, 2015), <http://qz.com/389741/the-thing-that-makes-bangladeshs-garment-industry-such-a-huge-success-also-makes-it-deadly> [<https://perma.cc/LHY9-9CLU>].

<sup>24</sup> Brian O’Keefe, *Bitter Sweets*, *FORTUNE* (Mar. 1, 2016, 6:30 AM), <http://fortune.com/big-chocolate-child-labor> [<https://perma.cc/2GCT-YKRJ>].

<sup>25</sup> Amanda Gregory, *Chocolate and Child Slavery: Say No to Human Trafficking this Holiday Season*, *HUFFINGTON POST* (Oct. 31, 2013, 3:00 PM), [https://www.huffpost.com/entry/chocolate-and-child-slave\\_b\\_4181089?guccounter=1](https://www.huffpost.com/entry/chocolate-and-child-slave_b_4181089?guccounter=1) [<https://perma.cc/7HKF-GN58>].

<sup>26</sup> See Diane A. Desierto, *Leveraging International Economic Tools to Confront Child Soldiering*, 43 *N.Y.U. J. INT’L L. & POL.* 337, 356–58 (2011).

<sup>27</sup> *Slavery and Seafood: Here Be Monsters*, *ECONOMIST* (Mar. 12, 2015), <https://www.economist.com/international/2015/03/12/here-be-monsters> [<https://perma.cc/KX2Y-N4ZC>].

conditions.<sup>28</sup> Illegal Thai fishing fleets also precipitate “the collapse of entire marine ecosystems” by overfishing in protected waters, using banned nets to scoop up vast quantities of endangered sea life, and dumping waste overboard.<sup>29</sup> Thai fish end up in animal feedstock and pet foods of major U.S. brands such as Purina Meow Mix and Fancy Feast.<sup>30</sup>

- Palm oil, an ingredient in nearly half the products on American supermarket shelves, is a “leading driver of tropical deforestation, land grabbing and serious international human and labor rights violations.”<sup>31</sup> Colossal fires used to clear tropical rainforests for plantation use have spawned an “eco-apocalypse” in which endangered species are incinerated, pristine habitat is destroyed, indigenous peoples are displaced, and massive clouds of smoke and harmful gasses blanket Southeast Asia, causing respiratory

---

<sup>28</sup> Kate Hodal et al., *Revealed: Asian Slave Labour Producing Prawns for Supermarkets in U.S., U.K.*, GUARDIAN (June 10, 2014, 7:05 AM), <https://www.theguardian.com/global-development/2014/jun/10/supermarket-prawns-thailand-produced-slave-labour> [https://perma.cc/J3SW-HAX3].

<sup>29</sup> ENVTL. JUSTICE FOUND., PIRATES AND SLAVES: HOW OVERFISHING IN THAILAND FUELS HUMAN TRAFFICKING AND THE PLUNDERING OF OUR OCEANS 5, 12 (2015), [https://ejfoundation.org/resources/downloads/EJF\\_Pirates\\_and\\_Slaves\\_2015\\_0.pdf](https://ejfoundation.org/resources/downloads/EJF_Pirates_and_Slaves_2015_0.pdf) [https://perma.cc/MD82-ZVQD].

<sup>30</sup> Ian Urbina, “Sea Slaves”: *The Human Misery That Feeds Pets and Livestock*, N.Y. TIMES (July 27, 2015), <https://www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html> [perma.cc/W3SW-65W9]; Patrick Winn, *Fish Caught by Slaves May Be Tainting Your Cat Food*, WORLD (Dec. 30, 2016, 12:00 PM), <https://www.pri.org/stories/2016-12-30/fish-caught-slaves-may-be-tainting-your-cat-food> [https://perma.cc/A7UW-GR9N].

<sup>31</sup> RAINFOREST ACTION NETWORK, TESTING COMMITMENTS TO CUT CONFLICT PALM OIL 2 (2015), [https://www.ran.org/wp-content/uploads/2018/06/RAN\\_TESTING\\_COMMITMENTS\\_2015\\_FINAL.pdf](https://www.ran.org/wp-content/uploads/2018/06/RAN_TESTING_COMMITMENTS_2015_FINAL.pdf) [https://perma.cc/Z7MB-TSDQ].

illness and death.<sup>32</sup> The fires also produce up to ten percent of global CO<sub>2</sub> emissions, accelerating global warming.<sup>33</sup>

### B. *How Global Supply Chains Undercut the Rule of Law*

The harms described above—and a seemingly endless parade of similar ones—are so egregious that it seems unconscionable to ignore them. “There ought to be a law!” one might be tempted to exclaim. In fact, there is. All of the above abuses violate established international standards codified within binding international law. In most cases, the violations in question are also proscribed by local laws in the source countries. Laws exist; the real problem is lack of enforcement.

There are many reasons why countries fail to live up to their global commitments. In some cases, international treaties are signed as a publicity gambit without serious intent to comply.<sup>34</sup> Developing countries often lack the institutional capacity to enforce the law effectively or are hampered by corruption.<sup>35</sup> It is important to emphasize, however, that globalization is not a passive bystander in such regulatory malfeasance. Rather, the dynamics of global supply chains themselves operate to undermine compliance.

Improvements in information technology and management techniques in recent decades have allowed multinational companies to shift production across extended global supply chains. Disaggregating production inputs into discrete work orders enables them to be separately

---

<sup>32</sup> George Monbiot, *Indonesia Is Burning, So Why Is the World Looking Away?*, GUARDIAN (Oct. 30, 2015, 3:00 PM), <https://www.theguardian.com/commentisfree/2015/oct/30/indonesia-fires-disaster-21st-century-world-media> [<https://perma.cc/F97Y-62NZ>]; Brent Harris et al., *How to Save Indonesia's Forests*, N.Y. TIMES (Oct. 23, 2015), <http://www.nytimes.com/2015/10/24/opinion/how-to-save-indonesias-forests.html> [<https://perma.cc/7DY2-KNRR>].

<sup>33</sup> UNION OF CONCERNED SCIENTISTS, PALM OIL AND GLOBAL WARMING 2 (2013), [https://www.ucsusa.org/sites/default/files/legacy/assets/documents/global\\_warming/palm-oil-and-global-warming.pdf](https://www.ucsusa.org/sites/default/files/legacy/assets/documents/global_warming/palm-oil-and-global-warming.pdf) [<https://perma.cc/A6BJ-NXEZ>].

<sup>34</sup> In some countries, treaty ratification is associated with *worsened* practical conditions on the ground, in part because the goodwill purchased through ratification buys time for abuses to persist. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1940–41 (2002).

<sup>35</sup> Priya Deshingkar, *Extending Labour Inspections to the Informal Sector and Agriculture* 13–14 (Chronic Poverty Research Ctr., Working Paper No. 154, 2009).

sourced from different providers in multiple locations. Lead firms thus benefit from competitive bidding across a global market of competing suppliers to obtain the lowest possible price for each input. Short-term sourcing contracts ensure repeated rounds of competition for the same work. As prices are driven down to the barest minimum, suppliers are left with razor-thin profit margins at best—and often less than that.<sup>36</sup>

To turn any profit, the “winning” supplier has a strong incentive to cut regulatory corners in ways that save on operating costs. They may exploit workers by forcing them into mandatory (and uncompensated) overtime or pack them into overcrowded, unsafe factories. They may dump chemicals into the environment rather than pay extra for safe disposal, or they may pirate software to avoid license fees. Ignoring costly regulations can squeeze vital savings from operating costs while externalizing the harms.<sup>37</sup> Conversely, even factory owners who genuinely want to play by the rules may find it impossible to make a profit doing so. Raising prices is not an option because multinational lead firms can always find another, less scrupulous supplier willing to take over the contract.<sup>38</sup>

Local government officials might put a stop to such regulatory abuses, but corruption, business-friendly legal loopholes, and constrained government resources scuttle effective enforcement.<sup>39</sup> Further, even officials who *are* honest and motivated will rarely want to put the local factory out of business and cost the community jobs. Economic development routinely takes priority over regulatory compliance, undermining the rule of law.<sup>40</sup>

---

<sup>36</sup> See Kishanthe Parella, *Outsourcing Corporate Accountability*, 89 WASH. L. REV. 747 (2014).

<sup>37</sup> LOOMIS, *supra* note 1, at 10–12. Quantifying such illicit savings and the competitive advantage they engender presents methodological challenges. In some cases, the cost savings from regulatory violations are obvious. For example, using slave labor eliminates wage costs entirely. In other cases, the advantages conferred are harder to quantify. For example, how to value the benefits of employing illegal child labor.

<sup>38</sup> See *id.* at 19 (critiquing the “invisible hand of the market” driving outsourcing to avoid regulatory compliance costs); *id.* at 18–19 (“When price is the only factor that counts, the costs get pushed down onto workers in the form of low wages and unsafe factories.”).

<sup>39</sup> See Deshingkar, *supra* note 35, at 12–14.

<sup>40</sup> See, e.g., Naomi Jiyoung Bang, *Casting a Wide Net to Catch the Big Fish: A Comprehensive Initiative to Reduce Human Trafficking in the Global Seafood Chain*, 17 U. PA. J.L. & SOC. CHANGE

Of course, the choices made in one jurisdiction affect competitors elsewhere. Municipalities, too, feel pressure to cut regulatory corners or lose out on vital economic opportunities. As a result, global suppliers effectively compete over regulatory laxness as well as wage price.<sup>41</sup> Multinational companies can engage in a form of regulatory arbitrage: choosing the least scrupulous suppliers in the most lax jurisdictions because they offer the lowest costs.<sup>42</sup>

Even multinational companies are powerless to effectuate change. Reform-minded multinationals incur increased costs monitoring and enforcing supplier compliance that eat into profit margins. Competition from less fastidious rivals can make sustained reform commitments impractical.<sup>43</sup> Thus, even if everyone starts off committed to the specific regulatory aims at issue (human rights, worker safety, etc.), the pressure of global markets forces a “race to the bottom.”<sup>44</sup>

The political degradation wrought by this system cannot be cordoned off to faraway jurisdictions. The idea that externalizing the costs of production overseas makes them “someone else’s problem” is no longer tenable in the Age of Trump. Regulatory slackening overseas has led to job losses and political illegitimacy in the United States. As factories close and rust belt communities implode, resentment at corporate

---

221, 231 (2014). Indeed, some developing countries tie their hands in advance by entering into investor-state agreements that grant foreign multinational companies privileged status under local law. See Rachel J. Anderson, *Reimagining Human Rights Law: Toward Global Regulation of Transnational Corporations*, 88 DENV. U. L. REV. 183, 207–10 (2010).

<sup>41</sup> Indeed, in the Bangladeshi garment industry, local officials allegedly woo foreign businesses by explicitly touting lax enforcement. Bain & Avins, *supra* note 23.

<sup>42</sup> In the environmental realm, for example, several studies have found modest support for the so-called “pollution haven” hypothesis, which posits that multinational firms flock to developing countries to take advantage of a laxer regulatory climate. See Maoliang Bu & Marcus Wagner, *Racing to the Bottom and Racing to the Top: The Crucial Role of Firm Characteristics in Foreign Direct Investment Choices*, 47 J. INT’L BUS. STUD. 1032, 1052 (2016); Matthew A. Cole et al., *International Environmental Outsourcing*, 150 REV. WORLD ECON. 639, 641 (2014); Jean-Marie Grether et al., *Unravelling the Worldwide Pollution Haven Effect*, 21 J. INT’L TRADE & ECON. DEV. 131, 152 (2012); Gunnar S. Eskeland & Ann E. Harrison, *Moving to Greener Pastures? Multinationals and the Pollution Haven Hypothesis*, 70 J. DEV. ECON. 1, 21 (2003).

<sup>43</sup> Cf. S. Prakash Sethi et al., *Mattel, Inc.: Global Manufacturing Principles (GMP)—A Life-Cycle Analysis of a Company-Based Code of Conduct in the Toy Industry*, 99 J. BUS. ETHICS 483, 515 (2011) (multinational toy maker Mattel forced to disband supplier corporate responsibility initiative because competitors that did not incur such costs enjoyed a competitive advantage).

<sup>44</sup> LOOMIS, *supra* note 1, at 15, 20.

outsourcing for “selling out” the interests of ordinary Americans has sparked a backlash against free trade.<sup>45</sup>

In short, multinational companies, local suppliers, workers, and governments alike are trapped in a dysfunctional system that prioritizes economic savings over social justice, sustainability, and the rule of law. Consumers gain access to cheap goods, purchased at the cost of domestic jobs and foreign suffering. The collateral damage from such dysfunction continues to escalate. Yet, rather than addressing the root problem, the proffered “cure” often entails self-defeating bouts of protectionism in which the whole world loses yet again.

### C. *The Failure of Existing Regulatory Paradigms*

That’s the problem in a nutshell. The question is how to fix it? Reforming supply chain defects is neither cheap nor easy. Companies find it easier to foster the illusion of progress than undertake the sustained commitment required to effectuate meaningful change. To overcome such structural impediments requires sustained, countervailing pressure. Therefore, the most basic need is for a mechanism to apply such countervailing pressure to comply with and enforce global regulatory norms. On the question of how best to effectuate such pressure, a huge literature exists for which space here permits only the briefest summary.

In general, there are three different levels at which such enforcement pressure could be supplied: locally at the source, internationally, or indirectly via the end market. The preceding analysis has already explained why local actors (both business and government) have a strong incentive to cut corners and turn a blind eye to violations—prioritizing economic growth and local employment over regulatory compliance. What about the other two options?

---

<sup>45</sup> See Broad, *supra* note 7.



## 1. International Enforcement

International law is not self-implementing. Normally, we depend on local sovereigns to implement their international obligations.<sup>46</sup> Where local actors fail, can international organizations take up the slack? In general, the answer is no. Most international organizations are weak institutions with little to no enforcement power. The few international organizations empowered to monitor compliance with U.N. human rights, labor, and environmental treaties generally lack remedial authority beyond “naming and shaming” miscreants.<sup>47</sup> Moreover, even

---

<sup>46</sup> Robert E. Scott & Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 WIS. L. REV. 551, 598–99 (2004).

<sup>47</sup> See Shima Baradaran & Stephanie Barclay, *Fair Trade and Child Labor*, 43 COLUM. HUM. RTS. L. REV. 1, 18–20 (2011). Such institutions include the International Labor Organization (ILO), Human Rights Council (HRC), United Nations Environmental Programme (UNEP), and Organisation for Economic Co-operation and Development (OECD). Among these, ILO arguably has the greatest supervisory authority, with mandatory reporting requirements on member states and a well-developed, multi-tiered system for receiving complaints and investigating alleged violations. See S.J. Rombouts, *The International Diffusion of Fundamental Labour Standards: Contemporary Content, Scope, Supervision and Proliferation of Core Workers' Rights Under Public, Private, Binding, and Voluntary Regulatory Regimes*, 50 COLUM. HUM. RTS. L. REV. 78, 126–31 (2019). The remedies for violations, however, are generally limited to publishing investigatory findings and committee recommendations. *Id.*; Tiana O’Konek, *Corporations and Human Rights Law: The Emerging Consensus and Its Effects on Women’s Employment Rights*, 17 CARDOZO J.L. & GENDER 261, 270–72 (2011). Even the most severe remedy ordered in ILO history—in 2000, against Myanmar for endemic forced labor—invoked indirect measures and has been criticized as largely toothless and a missed opportunity. See Rombouts, *supra*, at 128 & n.234. The OECD provides detailed guidelines to multinational enterprises for responsible supply chain conduct in the areas of human rights, labor rights, and the environment. See *The OECD Guidelines*, OECD WATCH, <https://www.oecdwatch.org/oecd-ncps/the-oecd-guidelines-for-mnes> [perma.cc/V78L-XJ5S]. The Guidelines are implemented at the national level through a mandatory, state-backed dispute resolution system for aggrieved stakeholders and multinational companies. See Ronald C. Brown, *Due Diligence “Hard Law” Remedies for MNC Labor Chain Workers*, 22 UCLA J. INT’L L. & FOREIGN AFF. 119, 143–44 (2018) (describing OECD “National Contact Points”). While the Guidelines are lauded as the first multilateral initiative to regulate corporate supply chain conduct, see O’Konek, *supra*, at 269, their voluntary, non-binding nature and spotty implementation have resulted in a “poor track record in dealing with the social, environmental and economic problems” that afflict the vulnerable populations they aim to protect. OECD WATCH, *ASSESSING THE CONTRIBUTION OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES TO RESPONSIBLE BUSINESS CONDUCT* 7–8 (2010). The HRC has been similarly criticized for lacking enforcement authority beyond naming and shaming. See, e.g., Sarah Joseph & Eleanor Jenkin, *The United Nations Human Rights Council: Is the United States Right to Leave This Club?*, 35 AM. U. INT’L L. REV. 75, 83 (2019) (“The

such purely moral sanctions are often undermined by resource constraints, bureaucratic delays, or global politics.<sup>48</sup> Yet, national governments are rarely willing to cede such enforcement powers to international bodies even in the best of times. In an age of “America first,” the prospect of effective mechanisms for world economic governance remains a distant pipe dream.

Given these enforcement failures at the international and local levels, perhaps other national governments besides the source country could step in to fill the gap? Until recently, the Alien Tort Statute (ATS) appeared to offer the most promising tool for redressing serious injustice abroad because it expressly creates subject matter jurisdiction in U.S. courts for violations of international law.<sup>49</sup> Since 1980, federal courts had been interpreting the ATS to allow foreign citizens to seek U.S. remedies for human rights abuses and other international law violations committed outside the United States, including wrongful death, torture, and slavery.<sup>50</sup> In 2013, the U.S. Supreme Court effectively put an end to such litigation in *Kiobel v. Royal Dutch Petroleum Co.*, which limited the ATS to tortious conduct occurring on U.S. territory.<sup>51</sup> Expressing concerns about “the danger of unwarranted judicial interference in the conduct of foreign policy,” the Court justified its ruling by invoking the presumption against extraterritorial application of U.S. statutes.<sup>52</sup> In 2018, the Supreme Court gutted the ATS even further by holding that the statute cannot be used to sue foreign corporations.<sup>53</sup> A grab-bag of other

---

[U.N. Human Rights] Council’s powers of ‘enforcement’ lie in the process of naming and/or shaming a State that is engaged in human rights abuses.”)

<sup>48</sup> Patrick J. Keenan, *Financial Globalization and Human Rights*, 46 COLUM. J. TRANSNAT’L L. 509, 537 (2008).

<sup>49</sup> The ATS provides federal “jurisdiction [over] any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350 (2018).

<sup>50</sup> See *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980). Although the ATS was enacted in 1789, it had hitherto remained obscure and little used.

<sup>51</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013).

<sup>52</sup> *Id.* at 116. By contrast, unfair competition law has already survived a challenge based on the presumption against extraterritoriality. See *infra* note 98 and accompanying text.

<sup>53</sup> *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018). While *Jesner* leaves open the possibility that ATS suits could apply to U.S. corporations, this may provide little recourse for supply chain abuse

tort and contract-based liability theories have been equally unsuccessful, as multinationals usually succeed in characterizing their suppliers as independent contractors to whom they have no duty or ability to control.<sup>54</sup>

Plaintiffs and commentators have explored various alternative bases for asserting jurisdiction over foreign violations in U.S. courts.<sup>55</sup> However, the doctrinal hurdles remain formidable, including challenges based on personal jurisdiction, standing, non-transitory actions, and forum non conveniens.<sup>56</sup> Plaintiffs relying on substantive U.S. law must also overcome the presumption against extraterritoriality invoked in *Kiobel*. Indeed, in recent decades the U.S. Supreme Court seems to be on a mission to block access to federal courts for claims arising from extraterritorial conduct.<sup>57</sup> Attempts to hold multinationals secondarily liable for their suppliers' torts are typically dead ends because U.S.-based companies carefully engineer sufficient legal separation from their suppliers and subsidiaries.<sup>58</sup> In many cases, the victims of supply chain injustices may also lack the capacity to bring an action in a distant U.S. forum or may be deterred by fears of retaliation.<sup>59</sup> In short, the substantive, procedural, and practical barriers to enforcing overseas

---

victims because U.S. corporations normally separate themselves legally from their suppliers' misconduct. See discussion *infra* Part IV.

<sup>54</sup> See, e.g., *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 680–81 (9th Cir. 2009); see also 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, 1048–50, 1054–82 (2013); Lara Blecher, *Codes of Conduct: The Trojan Horse of International Human Rights Law?*, 38 COMP. LAB. L. & POL'Y J. 437, 460–62 (2017) (reviewing cases).

<sup>55</sup> See, e.g., Seth Davis & Christopher Whytock, *State Remedies for Human Rights*, 98 B.U. L. REV. 397, 440–44 (2018); Roger P. Alford, *The Future of Human Rights Litigation After Kiobel*, 89 NOTRE DAME L. REV. 1749, 1767–70 (2014).

<sup>56</sup> See Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081 (2015) (summarizing the barriers such doctrines pose and the way U.S. courts have deployed them systematically to deny relief over extraterritorial actions).

<sup>57</sup> Several recent Supreme Court rulings evince a highly restrictive approach to personal jurisdiction in cases involving extraterritorial claims. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 882–85 (2011); *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017); *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

<sup>58</sup> See *infra* Part IV.

<sup>59</sup> See Gwynne L. Skinner, *Expanding General Personal Jurisdiction over Transnational Corporations for Federal Causes of Action*, 121 PENN ST. L. REV. 617, 659–63 (2017).

violations of international standards in U.S. court are daunting and often insuperable.

## 2. End Market Reform Initiatives

By default, therefore, most recent efforts have focused on applying indirect pressure in the developed economies where most multinational companies are based, which typically also represent end markets where the products of tainted supply chains are sold. The aim is to incentivize multinational companies to bring their suppliers into compliance with global standards.

There is considerable logic to this approach. Multinational companies are the ringmasters of global outsourcing: their investment animates the supply chain, they often have considerable legal and economic leverage over suppliers and subsidiaries.<sup>60</sup> Moreover, unlike their overseas suppliers, multinational corporations are readily accessible to the courts and concerned citizens of developed nations.

The result has been a profusion of end-market strategies aimed at holding multinational companies accountable and enlisting them as change agents who will pressure their suppliers to reform. These strategies generally fall into two categories: private ordering initiatives and legal regulation aimed at coercing compliance by multinational companies. For the reasons we note below, however, all of these strategies have failed to meaningfully dent global supply chain abuse.

### a. Private Ordering

Private ordering initiatives come in numerous flavors.<sup>61</sup> Shaming campaigns employ public pressure to coerce multinational companies to

---

<sup>60</sup> See Parella, *supra* note 36, at 764–66.

<sup>61</sup> See Michael P. Vandenberg & Ben Raker, *Private Governance and the New Private Advocacy*, 32-FALL NAT. RESOURCES & ENV'T 45 (2017) (canvassing in the environmental governance context the merits and disadvantages of many of the private ordering initiatives discussed in this Section). For a theoretical analysis and critique of private ordering strategies in the labor context, see Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 967 (2007).

address abusive supply chain practices.<sup>62</sup> Certification regimes engage the public directly by deploying “marks of rectitude” on end products that testify to ethical production practices from “fair trade” to environmental sustainability.<sup>63</sup> Myriad voluntary corporate responsibility codes advance noble promises and inspirational rhetoric.<sup>64</sup> And a new wave of “socially responsible investing” (SRI) seeks to promote corporate social responsibility through financial markets and shareholder proxy votes.<sup>65</sup>

---

<sup>62</sup> See Vandenberg & Raker, *supra* note 61, at 47; Galit A. Sarfaty, *Human Rights Meets Securities Regulation*, 54 VA. J. INT'L L. 97, 100 (2013); Marcia Narine, *From Kansas to the Congo: Why Naming and Shaming Corporations Through the Dodd-Frank Act's Corporate Governance Disclosure Won't Solve a Human Rights Crisis*, 25 REGENT U. L. REV. 351 (2013).

<sup>63</sup> See Margaret Chon, *Marks of Rectitude*, 77 FORDHAM L. REV. 2311 (2009). Fair trade certification marks appear on consumer goods ranging from coffee to bananas to garments to sports balls. See Caroline Thompson, *Ethical Consumerism as a Human Rights Enforcement Mechanism: The Coffee Cultivation Model*, 24 TRANSNAT'L L. & CONTEMP. PROBS. 161, 184–85 (2014); Onno Kuik, Note & Comment, *Fair Trade and Ethical Labeling in the Clothing, Textile, and Footwear Sector: The Case of Blue Jeans*, 11 ILSA J. INT'L & COMP. L. 619, 633–34 (2005). SA8000 (a social accountability standard for workplace conditions), Fair Labor Association, Rainforest Alliance, Sustainable Forestry Initiative, and Forest Stewardship Council are other well-known certification regimes designed to signal to consumers the socially and environmentally responsible provenance of goods. See Chon, *supra*, at 2342; Lee A. Tavis, *Corporate Governance and the Global Social Void*, 35 VAND. J. TRANSNAT'L L. 487, 508 (2002); Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 IND. J. GLOBAL LEGAL STUD. 401, 413–17 (2001); Tim Bartley, *Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards*, 12 THEORETICAL INQUIRIES L. 517, 526–27 (2011); Karen Bradshaw Schulz, *New Governance and Industry Culture*, 88 NOTRE DAME L. REV. 2515, 2526–39 (2013).

<sup>64</sup> See Kevin T. Jackson, *Global Corporate Governance: Soft Law and Reputational Accountability*, 35 BROOK. J. INT'L L. 41, 77 (2010). One such standard, the U.N. Global Compact, has been signed by more than 10,000 companies in 166 countries since its launch in 2000. See UNITED NATIONS GLOBAL COMPACT, <https://www.unglobalcompact.org> [<https://perma.cc/3V34-PKJX>].

<sup>65</sup> See Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 U. COLO. L. REV. 731, 741–42 (2019). The effect of SRI initiatives on supply chain abuses is doubtful as the “social responsibility” criteria tracked by such initiatives often include issues of limited relevance to supply chain contexts. See CASEY O'CONNOR & SARAH LABOWITZ, PUTTING THE “S” IN “ESG”: MEASURING HUMAN RIGHTS PERFORMANCE FOR INVESTORS 18 (2017). Moreover, since SRI strategies apply pressure through shareholder initiatives, they fail to reach private companies altogether, including many large privately-held multinational corporations such as Koch Industries, Cargill, M&M Mars, and Dell.

### b. End-Market Regulation

Strategies to address supply chain abuses through end-market regulation also abound. Transparency and mandatory disclosure laws require corporations to disclose misconduct in their supply chain and describe their efforts to combat it.<sup>66</sup> The hope is that airing their dirty laundry will pressure corporations to undertake meaningful reform.

Several laws also target specific supply chain abuses by regulating the importation of end products produced through illicit practices. Marine conservation-oriented regulations target unsustainable fishing methods.<sup>67</sup> Section 1307 of the Tariff Act of 1930 (“Forced Labor Statute”) outlaws importation into the United States of goods produced overseas using convict labor or forced labor.<sup>68</sup> The Lacey Act imposes a broad importation ban on any animal or plant product—including meats, seafood, wood, and paper products—sourced in violation of *any* law of the country in which they were harvested.<sup>69</sup> The penalties for violating these regimes can be severe. For example, Lacey Act violations can result in forfeiture of goods, million-dollar fines, and imprisonment.<sup>70</sup>

---

<sup>66</sup> The 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) requires that firms whose supply chains involve certain “conflict” minerals publicly divulge their due diligence and sourcing. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1502, 1504, 124 Stat. 1376 (2010); Sarfaty, *supra* note 62, at 98. Another widely cited transparency law is the California Transparency in Supply Chains Act of 2010, which requires companies to disclose efforts to eradicate slavery and human trafficking from their supply chains. See California Transparency in Supply Chains Act, Cal. Civ. Code § 1714.43(a)(1) (West 2012); Adam S. Chilton & Galit A. Sarfaty, *The Limitations of Supply Chain Disclosure Regimes*, 53 STAN. J. INT’L L. 1, 14–20 (2017). President Obama signed an executive order in 2012 requiring similar disclosures by federal contractors. See Strengthening Protections Against Trafficking in Persons in Federal Contracts, 77 Fed. Reg. 60,029 (Sept. 25, 2012).

<sup>67</sup> See, e.g., Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998); Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381AB/R (adopted May 16, 2012).

<sup>68</sup> 19 U.S.C. § 1307 (2018).

<sup>69</sup> 16 U.S.C. § 3372(a) (2018).

<sup>70</sup> See Emily Kaldjian & Charles Victor Barber, *\$13 Million Fine for Lumber Liquidators Shows U.S. Lacey Act’s Clout*, WORLD RESOURCES INST. (Oct. 14, 2015), <https://www.wri.org/blog/2015/10/13-million-fine-lumber-liquidators-shows-us-lacey-act-s-clout> [<https://perma.cc/EV3P-E3V6>]; Joe Luppino-Esposito, *The Lacey Act: From Conservation to Criminalization*, HERITAGE

### c. Limitations of Existing Initiatives

All of these initiatives represent variations on a single, sound premise: they exploit U.S. end-market leverage over global supply chains to address malfeasance abroad.<sup>71</sup> They suffer from two basic flaws, however. First, they offer at best piecemeal solutions to a systemic problem. Like the proverbial blind men describing the elephant, these tactics tend to address supply chain abuse in industry-specific or subject-matter-specific silos. Mandatory disclosure laws and certification regimes each narrowly target one type of supply chain abuse, such as conflict diamonds or child labor on cocoa plantations. Statutory importation bans similarly target particular types of abuse (forced labor) or particular classes of products (e.g., plant and animal products).

Second, and more fatally, all of these initiatives suffer from a lack of effective enforcement. Powerful incentives exist for corporations and their contractors to evade voluntary conduct standards, and they do so easily with little consequence.<sup>72</sup> Multinational companies proclaim high ethical standards in conduct codes while simultaneously constructing an exotic web of subsidiaries and holding companies to ensure they are legally distanced from supplier malfeasance.<sup>73</sup> Even scrupulous firms struggle to hold their suppliers to the standards enshrined in their own codes, due to logistical hurdles and rampant cheating in the inspection process.<sup>74</sup> Public shaming initiatives and certification schemes founder

---

FOUND. (May 7, 2012), <https://www.heritage.org/report/the-lacey-act-conservation-criminalization> [<https://perma.cc/7LWD-TBG2>].

<sup>71</sup> Scholars of all stripes have weighed in with their own proposals to reform transnational supply chains. Most paint within the same lines as the strategies described above (and thus suffer from the same flaws and fundamental lack of accountability), or else require extensive, controversial, and ultimately improbable changes to the law. *See, e.g.*, Parella, *supra* note 36 (labor rights context); Sarfaty, *supra* note 62, at 115–24 (human rights context); Michael P. Vandenberg, *Climate Change: The China Problem*, 81 S. CALIF. L. REV. 905 (2008) (environmental context); Baradaran & Barclay, *supra* note 47, at 5–6; Mitchell F. Crusto, *Green Business: Should We Revoke Corporate Charters for Environmental Violations?*, 63 LA. L. REV. 175, 196–213 (2003); Bang, *supra* note 54, at 1083–84 (arguing lead firms should be jointly liable).

<sup>72</sup> Frank Emmert, *Labor, Environmental Standards and World Trade Law*, 10 U.C. DAVIS J. INT'L L. & POL'Y 75, 156–61 (2003).

<sup>73</sup> *See* Douglas M. Branson, *Holding Multinational Corporations Accountable? Achilles' Heels in Alien Tort Claims Act Litigation*, 9 SANTA CLARA J. INT'L L. 227, 243 (2011).

<sup>74</sup> *See, e.g.*, Stephanie Clifford & Steven Greenhouse, *Fast and Flawed Inspections of Factories Abroad*, N.Y. TIMES (Sept. 1, 2013), <http://www.nytimes.com/2013/09/02/business/global/>

on consumer caprice and indifference, and, at best, merely reset the cycle of conduct-code whitewashing.<sup>75</sup> Mandatory disclosure laws impose minimal consequences for noncompliance, and companies can easily bury the requisite disclosures deep on their websites and shift blame to “rogue” contractors while reaffirming nonbinding commitments to improve.<sup>76</sup>

In theory, targeted legislation, such as the Forced Labor Statute and Lacey Act, could provide deterrence and accountability. In practice, these regulations are subject to enforcement by overworked, understaffed government agencies vulnerable to industry capture and prone to deprioritizing malfeasance in faraway lands—all but ensuring underenforcement.<sup>77</sup> Moreover, the narrow scope of such bespoke legislation falls far short of a systemic solution.

---

superficial-visits-and-trickery-undermine-foreign-factory-inspections.html [https://perma.cc/UF79-8GK8]; Parella, *supra* note 36, at 774–79.

<sup>75</sup> Thompson, *supra* note 63, at 188 (“[A]s of 2011, fair trade coffee represented only 2 percent of the total coffee market.”). The ultimate efficacy of certification regimes is also disputed. See Amrita Narlikar & Dan Kim, *Unfair Trade: The Fair-Trade Movement Does More Harm than Good*, FOREIGN AFF. (Apr. 4, 2013), <https://www.foreignaffairs.com/articles/africa/2013-04-04/unfair-trade> [https://perma.cc/CLT6-DTDE] (alleging that fair trade schemes leave most poor workers worse off).

<sup>76</sup> See Jena Martin, *Hiding in the Light: The Misuse of Disclosure to Advance the Business and Human Rights Agenda*, 56 COLUM. J. TRANSNAT’L L. 530 (2018). For example, four years after passage of the Dodd-Frank Act, just twenty-three percent of reporting companies declared their product supply chain to be free of conflict minerals. Browning, *supra* note 3.

<sup>77</sup> For example, despite its facial breadth and nearly century-long history, the Forced Labor Statute has been a bit player, sporadically and minimally enforced. See Trevor Sutton & Avery Siciliano, *Seafood Slavery: Human Trafficking in the International Fishing Industry*, CTR. FOR AM. PROGRESS (Dec. 15, 2016, 5:00 AM), <https://www.americanprogress.org/issues/green/reports/2016/12/15/295088/seafood-slavery> [https://perma.cc/W7HK-36FZ]; Juliana Geran Pilon, *Tariff Act of 1930: Taking a Stand Against Slave Labor*, HERITAGE FOUND. (Feb. 8, 1984), <https://www.heritage.org/report/tariff-act-1930-taking-stand-against-slave-labor> [https://perma.cc/BMC5-96PG]. Since 2000, only fourteen detention orders have issued. See *Withhold Release Orders and Findings*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/trade/trade-community/programs-outreach/convict-importations/detention-orders> [https://perma.cc/2P4A-YC45]. Although almost all of those orders have come after 2015, indicating a welcome recent spike in enforcement, Forced Labor Statute enforcement remains anemic compared to the enormous scope of the problem. See INT’L LABOR ORG. & WALK FREE FOUND., GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE



In short, all of these approaches lack the means to impose systemic accountability that spans the entire gamut of supply chain misconduct backed by a credible threat of meaningful consequences for transgressions. This is not to say that the above initiatives have no value. On the contrary, they provide important institutional frameworks around which reform initiatives *could* be implemented. However, what is missing is an effective enforcement tool to motivate compliance. We argue that unfair competition can supply such a vehicle. As we explain below, by imposing legal accountability that motivates firms to adopt and implement rigorous supply chain standards, unfair competition law can act as a force multiplier that enables such initiatives to reach their full potential.<sup>78</sup>

#### D. *Distinguishing the Unfair Competition Approach*

To summarize, a vast array of policy initiatives and scholarly proposals have sought to end supply chain misconduct and fingered the end market as the promising focus of reform. Yet, their primary downfall is a lack of effective enforcement. Efforts to revise existing law to provide accountability mechanisms face the obstacles inherent in expanding regulation. The best that seemingly could be hoped for is piecemeal progress in a handful of narrow domains.

The unfair competition model examined in this Article follows the same general outline as these existing efforts: it seeks to leverage U.S. control over its end market to address malfeasance abroad. Yet, it offers numerous crucial advantages over the other approaches discussed and could thus prove a game changer. In particular, unfair competition law:

- provides a basis for binding, legal (not just voluntary) enforcement and accountability via a well-established norm flexible enough to target a variety of malfeasance;
- utilizes laws already in place;

---

10 (2017) (“An estimated 16 million people were in forced labour in the [global] private economy in 2016.”).

<sup>78</sup> See *infra* Section IV.F.

- supplies a meaningful enforcement mechanism with powerful remedies including exclusion from the U.S. market;
- provides a general-purpose solution that spans a wide range of regulatory domains;
- offers a flexible, decentralized enforcement approach that can be pursued by both state and federal officials, as well as private actors;
- does not rely on NGOs, agency regulators, or other chronically underfunded or distracted actors, but instead enlists a powerful new set of agents in the service of global enforcement: commercial competitors who have a financial interest in taking on their overseas rivals; and
- “localizes” the action in the U.S. end market where the unfair competition is felt, rather than overseas where the underlying violation occurs, solving the jurisdictional barriers and extraterritoriality objections that typically bar such cases from U.S. courts.

Equally important, the unfair competition model provides a normative foundation for U.S. policymakers to act. It supplies a systemic framing of the problem that reveals how supply chain participants are trapped in a dysfunctional system by competitive market pressures. Moreover, rather than locating the harms overseas, unfair competition actions show how regulatory failures abroad distort competition in the U.S. domestic market, harming U.S. companies and workers. Such a systemic framing, we argue, opens the door to more aggressive assertions of U.S. extraterritorial jurisdiction and expanded intermediary liability.<sup>79</sup> Imposing such accountability on supply chain scofflaws would allay the complaints against “unfair trade” that antiglobalists wield to discredit globalization. As such, it could yield systemic benefits that go far beyond the supply chain context.

---

<sup>79</sup> See *infra* Parts III–IV.

## II. A CLOSER LOOK AT THE UNFAIR COMPETITION MODEL

The unfair competition approach described in this Article is more than academic conjecture. Since 2009, eighteen enforcement actions have been brought at both state and federal levels against a total of nineteen foreign defendants.<sup>80</sup> The most recent judgment came in August 2017.<sup>81</sup> All of these actions were premised on “theft” of trade secrets or proprietary software by overseas producers who exported goods to the United States. A wide range of manufacturing industries were represented, including producers of commercial aircraft, industrial cranes, toy robots, fashion apparel, tires, petroleum valves, and barbecue grills.<sup>82</sup>

Nearly all of the actions resulted in successful outcomes for the plaintiffs, including multi-year exclusion orders barring the defendants’ goods from the U.S. market, fines ranging from \$750,000 to \$3.2 million, or settlements yielding payments reportedly ranging from \$10,000 to \$10 million.<sup>83</sup> Importantly, the settlements have typically required compliance commitments and/or licensure going forward, in some cases subject to continued audits.

### A. Location of Defendants

Although the small number of actions makes it dangerous to generalize, the targeting to date is instructive: of the nineteen defendants targeted by unfair competition suits, sixteen were located in South or East

---

<sup>80</sup> See *infra* Figure 2. Many of the actions targeted multiple corporate affiliates/subsidiaries, which are not included in this total.

<sup>81</sup> *California v. Ningbo Beyond Home Textile Co.*, No. BC499771, 2013 WL 271542 (Cal. Super. Ct. Aug. 4, 2017).

<sup>82</sup> See James R. Hagerty & Shira Ovide, *Microsoft Pursues New Tack on Piracy; Software Maker Forges Alliances with State Attorneys General*, WALL ST. J. (Mar. 16, 2014, 7:30 PM), <http://www.wsj.com/articles/SB10001424052702303287804579443442002220098> [<https://perma.cc/87RV-NPFV>]; Nat’l Ass’n of Att’ys Gen., *Pirates, Thieves, and Trolls*, NAAGAZETTE, <http://www.naag.org/publications/naagazette/volume-8-number-8/pirates-thieves-and-trolls.php> [<https://perma.cc/7AYX-GBHZ>]; see also *infra* Figure 2 (listing the industries subject to ITC unfair competition enforcement actions).

<sup>83</sup> See Arthur M. Mitchell III et al., *The Emerging Risks of Unauthorized IP in Your Supply Chain and How You Should Respond—Part II*, 26 INTELL. PROP. & TECH. L.J. 3, 7 (2014); *infra* Figure 2.

Asia. The country featured most predominantly is the People's Republic of China—home to ten of the allegedly unfair actors. Three actions focused on Thailand, two targeted India, and one Taiwan. Brazil (two actions) and Turkey (one action) account for the remaining defendants. The actions are thus concentrated in jurisdictions characterized by high rates of piracy and—not coincidentally—ineffective enforcement.<sup>84</sup> Both the U.S. government and U.S. companies have tried a variety of public and private initiatives to improve IP enforcement in these markets without success.<sup>85</sup> However, there are signs that unfair competition may prove a game-changer: in some cases, the unfair competition actions brought to the table parties who previously had very little inclination to settle infringement claims.<sup>86</sup>

#### B. *Nature of the Plaintiffs' Claims*

While use of unfair competition law in these cases is premised on a violation of IP rights, the actions do not merely replicate the structure of an IP infringement claim. IP laws afford rights to the IP owner. Unfair competition laws, by contrast, protect competitors and market integrity. While the IP owner could be one of these competing manufacturers, ownership of the underlying IP is not necessarily a precondition to bring an unfair competition suit.<sup>87</sup> Indeed, the state law enforcement actions were all instigated by the state attorneys general offices.<sup>88</sup>

---

<sup>84</sup> Cf. OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2016 SPECIAL 301 REPORT (2016).

<sup>85</sup> See, e.g., Eric Priest, *Acupressure: The Emerging Role of Market Ordering in Global Copyright Enforcement*, 68 SMU L. REV. 101, 169, 217–18, 228–31 (2015).

<sup>86</sup> See, e.g., *Louisiana Attorney General Leads Crackdown on Software Piracy*, INSURANCENEWSNET.COM (Mar. 7, 2014), <https://insurancenewsnet.com/oarticle/Louisiana-Attorney-General-Leads-Crackdown-on-Software-Piracy-a-470787#.XtquYC-z3OS> [<https://perma.cc/6WX7-7GJJ>].

<sup>87</sup> Section 337 represents an apparent exception in that the ITC appears to restrict standing to bring unfair competition claims alleging trade secret misappropriation to owners or possessors of the secrets at issue. *In re Certain Activity Tracking Devices, Systems, & Components Thereof*, USITC Order No. 55, Inv. No. 337-TA-963 (Apr. 27, 2016).

<sup>88</sup> See NAT'L ALL. FOR JOBS & INNOVATION, STATE AGS TARGET IP THEFT TO STRENGTHEN FAIR COMPETITION AMONG MANUFACTURERS (2014) (on file with authors).

It is also important to emphasize that the IP infringement occurred solely in the production process overseas. The end products that were exported to the United States did not themselves infringe any IP rights. (If they had, then a direct claim under U.S. IP law would have arisen.) Because the infringement took place on foreign soil, U.S. IP law would not normally apply because IP laws—like most U.S. laws—are territorially bounded. Instead, the IP laws of the foreign state where the infringement occurred would govern any claim, and the enforcement action would most likely have to be brought in the foreign jurisdiction.<sup>89</sup> Bringing an unfair competition action thus effectively converts what would have been a foreign claim under foreign law into a U.S. claim based on U.S. unfair competition law.

### C. *Source of Law*

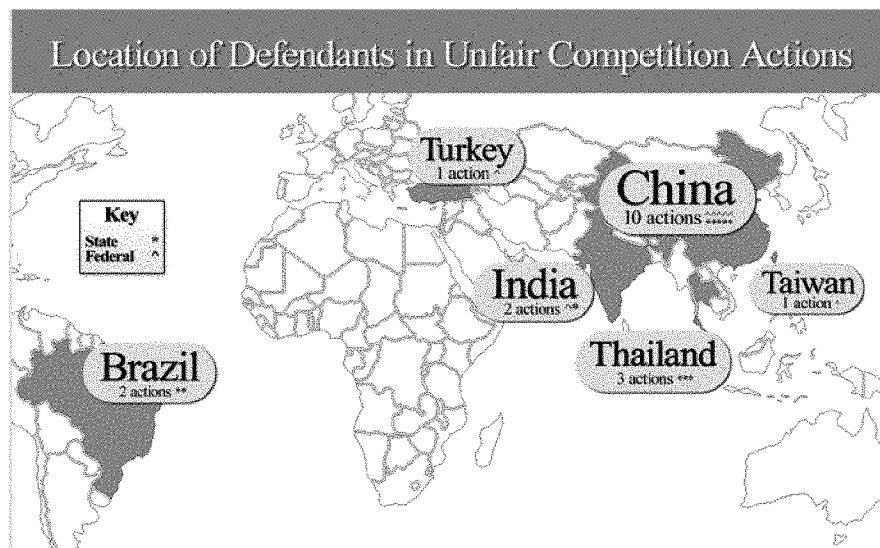
Thus far, this Article has treated the unfair competition actions as a singular phenomenon. Yet, actions to date have employed three different sources of unfair competition law. These include: (1) section 337 of the 1930 Tariff Act, (2) general state unfair competition statutes, and (3) specialized state unfair competition statutes targeting “theft” of information technology by manufacturers. In addition, another source of unfair competition law bears mention: (4) section 5 of the Federal Trade Commission Act (FTCA), which, although not yet used in the context discussed here, remains potentially in the mix.<sup>90</sup> These different sources of law are each subject to their own peculiar enforcement regimes, substantive requirements, and remedies.

---

<sup>89</sup> See *Voda v. Cordis Corp.*, 476 F.3d 887, 900–03 (Fed. Cir. 2007); *Subafilms, Ltd. v. MGM-Pathe Commc'ns Co.*, 24 F.3d 1088, 1095–98 (9th Cir. 1994). *But see* 35 U.S.C. § 271(g) (2018) (providing limited exception for imports of direct products of a patented process).

<sup>90</sup> 15 U.S.C. § 45(a) (2018).

Figure 1: Number and Location of Collateral Unfair Competition Defendants



### 1. Section 337 Actions in the International Trade Commission

Under section 1337(a)(1)(A) of the 1930 Tariff Act, the International Trade Commission (ITC) has the authority to block imports into the United States arising from “[u]nfair methods of competition.”<sup>91</sup> To grant relief, the ITC must determine that the unfair conduct has the threat or effect of “substantially injur[ing] an industry in the United States.”<sup>92</sup>

Section 337 actions usually begin with a complaint filed by an aggrieved competitor. However, the ITC has the authority, rarely used, to initiate proceedings sua sponte.<sup>93</sup> The proceedings are a hybrid between private litigation and agency investigations, conducted on an expedited

<sup>91</sup> 19 U.S.C. § 1337(a)(1)(A), (d)(1) (2018) (prohibiting “[u]nfair methods of competition and unfair acts in the importation of articles . . . into the United States”).

<sup>92</sup> *Id.* “Prevent[ing] the establishment of such an industry” or “restrain[ing] or monopoliz[ing] trade and commerce” in the United States also qualify as redressable injuries. *Id.*

<sup>93</sup> 19 U.S.C. § 1337(b)(1) (2018).

schedule.<sup>94</sup> The normal remedy for a section 337 violation is an exclusion order barring the unfairly produced goods from the U.S. market.<sup>95</sup>

Thus far, complainants have filed nine actions under section 337 to block the importation of products made by overseas manufacturers using misappropriated trade secrets.<sup>96</sup> All nine ITC actions have succeeded for the plaintiff, resulting in four fully litigated judgments finding violations, two consent orders, and three default judgments.

The leading case among these, *TianRui Group Co. v. International Trade Commission*,<sup>97</sup> went to the Federal Circuit Court of Appeals, which upheld a final judgment for the plaintiffs at the ITC. At issue in the case was the ITC's exclusion of imported steel wheels made using trade secrets misappropriated in China. The Federal Circuit upheld the application of section 337 to overseas misappropriation, explicitly finding congressional intent to overcome the normal presumption against extritorial application of federal law.<sup>98</sup>

---

<sup>94</sup> *Young Eng'rs, Inc. v. U.S. Int'l Trade Comm'n*, 721 F.2d 1305, 1315 (Fed. Cir. 1983); Jonathan J. Engler, *Section 337 of the Tariff Act of 1930: A Private Right-of-Action to Enforce Ocean Wildlife Conservation Laws?*, 40 ENVTL. L. REP. NEWS & ANALYSIS 10513, 10517 (2010).

<sup>95</sup> Engler, *supra* note 94, at 10517–18.

<sup>96</sup> See *infra* Figure 2.

<sup>97</sup> *TianRui Grp. Co. v. Int'l Trade Comm'n*, 661 F.3d 1322 (Fed. Cir. 2011).

<sup>98</sup> *Id.* at 1329.

Figure 2: International Trade Commission Investigations Involving Extraterritorial Misappropriation of Trade Secrets as a Form of Unfair Competition

<b>Federal Unfair Competition Actions (ITC §337 Investigations)<sup>#</sup></b>			
<b>Investigation Name</b>	<b>Year</b>	<b>Country of Primary Respondent</b>	<b>Outcome</b>
Certain Cast Steel Railway Wheels, Certain Processes For Manufacturing Or Relating To Same And Certain Products Containing Same	2009	China	Respondent violated §337; 10-year limited exclusion order issued. Federal Circuit affirmed in <i>TianRui Grp. Co. v. Int'l Trade Comm'n</i> , 661 F.3d 1322 (Fed. Cir. 2011).
Certain DC-DC Controllers and Products Containing Same	2012	Taiwan	Respondent violated §337; fined \$750,000.
Certain Paper Shredders, Certain Processes for Manufacturing or Relating to Same		China	Parties settled.
Certain Electric Fireplaces, Components Thereof	2013	China	Respondent defaulted.
Certain Robotic Toys and Components Thereof		China	Parties settled.
In the Matter of Certain Rubber Resins and Processes for Manufacturing the Same	2014	China	Respondent violated §337; 10-year limited exclusion order issued.
Certain Stainless Steel Products, Certain Processes for Manufacturing or Relating to Same, and Certain Products Containing Same		India	Respondent violated §337, 16.7-year limited exclusion order issued.
Certain Crawler Cranes and Components Thereof	2015	China	Respondent violated §337.
Certain Opaque Polymers		Turkey	Respondent violated §337; 25-year limited exclusion order issued.
<p><sup>#</sup><i>TianRui Grp. Co. v. Int'l Trade Comm'n</i>, 661 F.3d 1322, 1329 (Fed. Cir. 2011) (reviewing and affirming ITC determination); <i>Certain Opaque Polymers</i>, USITC Inv. No. 337-TA-883 (Apr. 17, 2015); <i>Certain DC-DC Controllers and Products Containing Same</i>, USITC Inv. No. 337-TA-698 (June 8, 2012); <i>Certain Electric Fireplaces</i>, USITC Inv. Nos. 337-TA-791, 337-TA-826 (May 29, 2013); <i>Certain Rubber Resins and Processes for Manufacturing Same</i>, Inv. No. 337-TA-849 (Feb. 26, 2014); <i>Certain Paper Shredders, Certain Processes for Manufacturing or Relating to Same</i>, USITC Inv. No. 337-TA-863 (Dec. 20, 2012); <i>Certain Robotic Toys and Components Thereof</i>, USITC Inv. No. 337-TA-869 (Jan. 4, 2013); <i>Certain Crawler Cranes and Components Thereof</i>, USITC Inv. No. 337-TA-887 (Apr. 16, 2015); <i>Certain Stainless Steel Products, Certain Processes for Manufacturing or Relating to Same and Certain Products Containing Same</i>, USITC Inv. No. 337-TA-933 (Sept. 5, 2014).</p>			



## 2. State Unfair Deceptive Acts and Practices Statutes

Most states, including California, Florida, Massachusetts, and Missouri, have enacted broad statutes prohibiting unfair competition and/or unfair acts.<sup>99</sup> Almost all provide for public enforcement, typically by the state attorney general. Many also provide for a private right of action. The provisions of the statutes vary considerably in their scope, standing and injury requirements, and remedies. However, most allow a wide panoply of remedies including injunctive relief, damages, civil penalties, and, in extreme cases, punitive damages.<sup>100</sup>

To date, state law unfair competition statutes have furnished the basis for enforcement actions against ten overseas defendants (two of which were based on the specialized IP statutes described below). The targeted defendants were all alleged to have used unlicensed software in producing goods overseas that were exported to the forum state market. Almost all of the concluded cases have resulted in settlements and licensing by the defendant.<sup>101</sup>

---

<sup>99</sup> See Andrew F. Popper, *Beneficiaries of Misconduct: A Direct Approach to IT Theft*, 17 MARQ. INTELL. PROP. L. REV. 27, 36 (2013); see also NAT'L ALL. FOR JOBS & INNOVATION, PROTECTION OF INTELLECTUAL PROPERTY RIGHTS UNDER STATE CONSUMER PROTECTION LAWS (2016) (identifying thirty-nine states with "broad unfairness prohibitions" in their state consumer protection laws, and four states with "somewhat broad unfairness provisions") (on file with the authors). At least twenty-three states have enacted a "Baby FTC Act" modeled after section 5 of the FTCA. See *39 State Attorneys General Pledge to Combat Piracy, an Unfair Method of Competition*, PERKINS COIE (Nov. 16, 2011), <https://www.perkinscoie.com/en/news-insights/39-state-attorneys-general-pledge-to-combat-piracy-an-unfair.html> [<https://perma.cc/P6MP-DRPN>].

<sup>100</sup> See generally CAROLYN L. CARTER ET AL., UNFAIR AND DECEPTIVE ACTS AND PRACTICES (9th ed. 2016) [hereinafter NCLC TREATISE].

<sup>101</sup> See Nat'l Ass'n of Att'ys Gen., *supra* note 82.

Figure 3: Attorneys General Address Foreign IP Theft with Unfair Competition Actions

State Unfair Competition Actions				
State Initiated	Year	Product	Country of Primary Defendant	Results
Louisiana	2012	Barbecue grills	China	Settled for \$250,000 and agreement to purchase software licenses.
Massachusetts		Seafood	Thailand	Settled for \$10,000 and agreement to purchase software licenses.
Washington	2013	Aircrafts	Brazil	Settled for \$10 million and agreement to purchase software licenses.
California		Apparel	China & India	Indian defendant settled for \$10,000 and commitment to audit future software use; case against Chinese defendant pending.
Tennessee		Tire manufacturer	Thailand	Claim settled (terms undisclosed).
Oklahoma	2014	Petroleum equipment manufacturer	China	Agreement to purchase software.
Maryland		Fabricated metals manufacturer	China	Demand letter sent; matter still pending.
Arkansas		Canned food	Thailand	Agreement to purchase software.
Kentucky		Ceramic tiles	Brazil	Agreement to purchase software..

A California trial court issued the only merits judgment that resulted from these actions (albeit on a default basis) in 2017 in *Ningbo*. That court imposed a \$3.2 million civil fine on a Chinese t-shirt manufacturer for its extensive exports to the California market of apparel produced using pirated software.<sup>102</sup>

### 3. Specialized State Unfair Competition Statutes

Three states—Louisiana, Utah, and Washington—have enacted specialized statutes that focus specifically on IP theft in addition to their general unfair competition statutes.<sup>103</sup> Louisiana and Washington have each successfully invoked their statutes to sanction a foreign manufacturer for use of pirated software overseas. (These actions are

<sup>102</sup> *California v. Ningbo Beyond Home Textile Co.*, No. BC499771, 2013 WL 271542, at \*14–15, \*42–43 (Cal. Super. Ct. Aug. 4, 2017).

<sup>103</sup> LA. STAT. ANN. § 51:1427 (2019); UTAH CODE ANN. § 13-5a-102 (2019); WASH. REV. CODE ANN. § 19.330.020 (2019).

included in Figure 3's table above.) The Washington State action was notable for its choice of defendant: the Brazilian aircraft manufacturer, Embraer, is a multibillion-dollar enterprise whose regional jets are widely exported to the United States and global markets. Embraer settled in 2013 and reportedly agreed to pay a ten million dollar penalty and to license Microsoft software going forward.<sup>104</sup>

The Washington State specialized statute is also notable because it comprises a more complex statutory scheme than the other laws considered here. Although the applicability of this statute is limited to IP contexts, several of its provisions offer instructive examples, including (a) a notice and cure provision;<sup>105</sup> (b) extension of liability to third-party intermediaries, including retailers, who sell products manufactured using infringing technology;<sup>106</sup> and (c) in rem jurisdiction.<sup>107</sup>

#### 4. The Federal Trade Commission Act

Section 5 of the FTCA grants the Federal Trade Commission (FTC) extremely broad powers to prohibit “[u]nfair methods of competition in or affecting commerce.”<sup>108</sup> In November 2011, attorneys general from thirty-six states and three U.S. territories sent a letter to the commissioners of the FTC urging the FTC to use its section 5 authority to address unfair competition arising from exports to the United States produced using pirated software.<sup>109</sup> Commentators, including David Kappos, former Director of the U.S. Patent and Trademark Office, numerous congressmen, and two state legislatures have all weighed in to

---

<sup>104</sup> Mitchell III et al., *supra* note 83, at 7.

<sup>105</sup> No action may be commenced until the rightsholder of the stolen IP notifies the defendant in writing and identifies the stolen IP and the law allegedly violated. After the defendant receives notice, it has ninety days to either rebut the allegations or cure them through licensure. WASH. REV. CODE ANN. § 19.330.050.

<sup>106</sup> In other words, the statute authorizes secondary liability for downstream intermediaries who purchased from the actual wrongdoers. *Id.* § 19.330.080.

<sup>107</sup> *Id.* § 19.330.070.

<sup>108</sup> 15 U.S.C. § 45(a) (2018).

<sup>109</sup> Press Release, Nat'l Ass'n of Att'ys Gen., Letter to Federal Trade Commission Commissioners and the Director of the Bureau of Competition (Nov. 4, 2011).

support FTC intervention in this realm.<sup>110</sup> However, the FTC remained noncommittal in response, and thus far, it has not initiated any such actions.<sup>111</sup>

#### D. *Applicability Beyond Intellectual Property*

Although recent cases have all involved unlawful use of technology, their underlying theory of unfair competition is not specific to infringement of IP rights. Any violation of law during the production process that confers a downstream cost advantage could potentially be actionable. For example, while Massachusetts' case against a Thai seafood distributor turned on software piracy, the Thai fishing fleet has been linked to many other violations, including illegal fishing practices, use of forced labor, and even maritime piracy.<sup>112</sup> All of these violations represent regulatory shortcuts that potentially save money. To the extent such savings can be shown to yield quantifiable advantages in the U.S. market, arguably they too constitute unfair competition.

The federal unfair competition standards enshrined in section 337 and section 5 employ broad, open-ended language that Congress intended to apply to novel and unforeseen scenarios.<sup>113</sup> Indeed, Congress deliberately chose "the broader and more flexible phrase 'unfair methods of competition'" to escape the narrow construction given to unfair competition at common law and allow room for progressive development

---

<sup>110</sup> See David J. Kappos & Gregory R. Baden, *Combating IP Theft Using Unfair Competition Law*, N.Y. L.J. (May 6, 2013), [http://www.cravath.com/files/Uploads/Documents/Publications/3409818\\_1.pdf](http://www.cravath.com/files/Uploads/Documents/Publications/3409818_1.pdf) [<https://perma.cc/K429-79XS>]; Popper, *supra* note 99, at 36.

<sup>111</sup> Letter from Jon Leibowitz, Chairman, Fed. Trade Comm'n, to Rob McKenna, Attorney Gen., State of Wash. (Mar. 13, 2012).

<sup>112</sup> See Urbina, *supra* note 30; ENVTL. JUSTICE FOUND., *supra* note 29; NAT'L ALL. FOR JOBS & INNOVATION, *supra* note 88 (describing Massachusetts unfair competition action against Thai seafood distributor).

<sup>113</sup> *FTC v. R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 310–12 (1934).

of the standard over time.<sup>114</sup> This new phrase was seen as “broad enough to prevent every type and form of unfair practice.”<sup>115</sup>

Most general state unfair competition statutes mirror the federal standards, employing broad language designed to proscribe unfair methods of competition in any form.<sup>116</sup> Many of the state laws also include explicit statements of legislative intent calling for a liberal construction of the statutory language.<sup>117</sup> Thus, on their face, these unfair competition statutes appear plausible vehicles to pursue the types of supply chain misconduct described above.

To be sure, neither the FTC nor ITC have used the full extent of their authority to sanction unfair competition. ITC section 337 cases have focused on intellectual property rights and those outside IP have generally involved deception or disparagement.<sup>118</sup> FTCA section 5 cases generally focus on consumer protection rather than competitive abuses, and the relatively few competition cases it has brought under section 5 centered on claims that fell within the ambit of federal antitrust law.<sup>119</sup>

However, Supreme Court precedent squarely rejects the idea that unfair competition should be reduced to a closed set of paradigm cases.<sup>120</sup> Congress conferred broad discretion upon both the FTC and ITC to apply unfair competition standards to meet evolving societal needs, and courts have emphasized that these open-ended standards should not be confined to the contours set by existing precedent, but must remain flexible to redress novel forms of competitive abuses.<sup>121</sup> Such progressive development comports with a longstanding tradition of unfair competition law functioning as “a flexible legal instrument [that] adapts itself to technological, social and political changes” in order to promote

---

<sup>114</sup> *Id.*

<sup>115</sup> See *Suprema, Inc. v. Int'l Trade Comm'n*, 796 F.3d 1338, 1350 (Fed. Cir. 2015) (quoting S. REP. NO. 67-595, at 3 (1922)).

<sup>116</sup> See, e.g., S. REP. NO. 67-595, at 3 (1922) (describing section 337 as “broad enough to prevent every type and form of unfair practice”).

<sup>117</sup> See NCLC TREATISE, *supra* note 100, § 2.1.3 & n.139 (providing numerous examples).

<sup>118</sup> See Jay H. Reiziss, *The Distinctive Characteristics of Section 337*, 8 J. MARSHALL REV. INTELL. PROP. L. 231, 235 n.27 (2009) (summarizing case law).

<sup>119</sup> William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 935–37 (2010).

<sup>120</sup> *FTC v. R. F. Keppel & Bro. Inc.*, 291 U.S. 304, 312–14, 312 n.2 (1934).

<sup>121</sup> *Id.* at 311–14; *In re Von Clemm*, 229 F.2d 441, 443–44 (C.C.P.A 1955).

justice.<sup>122</sup> Accordingly, in principle, the basis for deploying federal unfair competition law to regulate supply chain abuses seems clear, as several commentators have averred.<sup>123</sup>

In the case of state unfair competition law, established precedent for targeting supply chain abuses outside the IP context already exists. California unfair competition law was successfully pled in several supply chain cases filed in the 1990s and early 2000s. In *Bureerong v. Uvawas*, a 1996 suit by immigrant garment workers alleged violation of California's unfair competition statute, Business & Professions Code section 17200 based on forced labor allegations. The case survived a motion to dismiss before settling for over \$4.5 million.<sup>124</sup>

*Bureerong* involved an alleged "sweatshop" operating on California soil. However, two subsequent suits—*Doe I v. Unocal Corp.* and *Bowoto v. ChevronTexaco Corp.*—alleged unfair competition based on human rights abuses against workers overseas. In both cases, California state courts rejected the defendant's motion for summary adjudication on the section 17200 claim, despite its extraterritorial nature.<sup>125</sup> *Unocal* ended in settlement.<sup>126</sup> In *Bowoto*, the defendant oil company denied complicity and ultimately prevailed on a jury verdict rejecting the claim that it had

---

<sup>122</sup> 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 1:16 (4th ed. 2017). Indeed, unfair competition law has proved a fertile source of legal innovation over the years from which many novel causes of action have emerged from trademark infringement to false advertising to trade secret misappropriation. Cf. Annette Kur, *What to Protect, and How? Unfair Competition, Intellectual Property, or Protection Sui Generis*, in INTELLECTUAL PROPERTY, UNFAIR COMPETITION AND PUBLICITY: CONVERGENCES AND DEVELOPMENT 11, 19 (Nari Lee et al. eds., 2014).

<sup>123</sup> See Buckler & Jackson, *supra* note 17, at 513 n.1 (summarizing commentary).

<sup>124</sup> *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1477 (C.D. Cal. 1996); Scott L. Cummings, *Hemmed in: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. 1, 26–28 (2009) (describing settlement of \$4.5+ million suit involving unfair competition claim among others).

<sup>125</sup> *Doe I v. Unocal Corp.*, Nos. BC 237 980, BC 237 679, 2002 WL 33944506 (Cal. Super. Ct. June 11, 2002); *Bowoto v. ChevronTexaco Corp.*, No. CGC-03-417580, 2008 WL 3048896 (Cal. Super. Ct. Jan. 31, 2008).

<sup>126</sup> See *Doe I v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (granting stipulated motion to dismiss).

“aid[ed] and abett[ed]” the Nigerian military in carrying out the abuses.<sup>127</sup>

#### E. *What Is Holding Unfair Competition Law Back?*

Some may wonder, given unfair competition’s potential to bring much needed accountability to global supply chains, why has it not been used more already? The answer to this question is not entirely clear. However, several possible explanations suggest themselves.

First, the setback in *Bowoto* hints at part of the answer. Because Chevron was not directly responsible for the massacre of protestors alleged in that case, plaintiffs had to show that the company knowingly aided and abetted the actual perpetrators in their wrongdoing. As noted, they ultimately failed to persuade the jury. Moreover, even to bring this claim required piercing the veil between Chevron USA and its overseas subsidiary, an onerous hurdle to overcome.<sup>128</sup>

As Part IV explains, such barriers pose daunting obstacles under current law. Astute corporate counsel have learned from *Bowoto* and other early cases to engineer legal barriers that insulate them from the wrongs of their suppliers and affiliates. Given the diffuse nature of global supply chains, such barriers often make it impossible to hold multinational companies accountable for the misconduct from which they profit. Part IV proposes a novel theory of enterprise liability to overcome such obstacles.

That said, even accepting the barriers to intermediary liability at face value, there are still plenty of worthwhile, viable claims to be made against direct malfeasors. Indeed, the Embraer case demonstrates that even multi-billion dollar global enterprises can be caught in an unfair competition net.<sup>129</sup> Moreover, with direct marketing by foreign manufacturers increasingly prevalent in the e-commerce era, the pool of potential targets has probably grown. Accordingly, barriers to intermediary liability offer only a partial explanation why unfair competition law remains relatively underutilized.

---

<sup>127</sup> *Bowoto v. Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2010).

<sup>128</sup> See *infra* notes 187–192 and accompanying text.

<sup>129</sup> See *supra* note 104 and accompanying text (reporting ten million dollar settlement of unfair competition claim against Brazilian aircraft manufacturer).

A second reason may be lack of familiarity. Unfair competition belongs to a relatively obscure branch of private commercial law. It is hardly the first place a human rights or environmental activist would think to go. Such activists focus on ensuring accountability for perpetrators. Thinking about effects on competitors requires the ability to abstract away from the immediate injustices at hand and reframe the problem in commercial terms. Adopting such a systemic view may be neither intuitive nor morally appealing.

Furthermore, the ITC, in particular, is a highly specialized agency whose workload is dominated by intellectual property claims. The FTCA is better known. However, without a private right of action, FTCA enforcement remains bounded by conflicting agency priorities and resource constraints. Moreover, unfair competition claims have gone out of fashion in recent decades for reasons that will be elaborated below. As a result, the FTC has emphasized consumer protection, rather than competition, in wielding its section 5 authority.<sup>130</sup>

Mirroring the FTC, state unfair competition cases, too, have focused heavily on consumer protection, rather than on regulating competition between businesses. Perhaps as a result, recent supply chain cases have focused unfair competition claims on consumer deception rather than targeting the abuses directly.<sup>131</sup> Moreover, some states limit the scope for business-to-business claims or otherwise construe their unfair competition statutes narrowly to redress consumer injuries.<sup>132</sup> That said, the statutory authority in many states to police competitive abuses remains robust and undiminished.<sup>133</sup> Accordingly, additional explanations for its lack of use are required.

A third reason may be constraints on who can bring these claims. Standing to bring private unfair competition claims generally is limited to competitors who have suffered injury. This can pose collective action problems where multiple competitors are affected, but none wants to

---

<sup>130</sup> Kovacic & Winerman, *supra* note 119, at 935.

<sup>131</sup> See, e.g., *Hodsdon v. Mars, Inc.*, 891 F.3d 857 (9th Cir. 2018); *Dana v. Hershey Co.*, 180 F. Supp. 3d 652 (N.D. Cal. 2016); *McCoy v. Nestle USA, Inc.*, 173 F. Supp. 3d 954 (N.D. Cal. 2016).

<sup>132</sup> See NCLC TREATISE, *supra* note 100, § 2.4.5.2.

<sup>133</sup> See, e.g., *Panag v. Farmers Ins. Co. of Wash.*, 204 P.3d 885, 891–92 (Wash. 2009). See generally NCLC TREATISE, *supra* note 100, § 2.4.5.2.



incur the costs of enforcement unilaterally, allowing the others to free ride on their investment. Alternatively, in some sectors, all the principal actors may be equally complicit, and none wishes to throw the first stone. As noted, public enforcers often have other priorities. This leaves supply chain activists and NGOs as the parties most vested in stamping out abuses. Yet, they typically lack standing to bring unfair competition claims directly.

Fourth, as noted, until recently environmental and human rights reformers focused their energies on bringing claims under the ATS.<sup>134</sup> The drastic curtailment of ATS jurisdiction has prompted a reassessment and renewed interest in alternatives based on state law claims, of which unfair competition law comprises one component.<sup>135</sup> Accordingly, a shift in enforcement priorities may be underway.

Fifth, evidentiary hurdles inhibit many potential supply chain claims based on unfair competition. Beyond the inherent resource demands of transnational litigation, it can be difficult to quantify supply chain abuses in terms of cost advantages and competitive impacts. For example, *Bowoto* involved army massacres of protestors blocking Chevron's oil drilling in the Nigerian delta. The commercial advantage to Chevron was manifest. However, calculating the economic value of such abuses, let alone tracing its downstream effects on competition in the U.S. market, can be daunting.<sup>136</sup>

Such hurdles should not be exaggerated. Plenty of supply chain abuses from forced labor to environmentally destructive mining yield clear cost advantages that can be readily quantified and linked to downstream market impacts. However, such cases may not have been prioritized for transnational litigation to date.<sup>137</sup>

---

<sup>134</sup> More generally, as the previous Part detailed, supply chain reformers have pursued multiple strategies in which litigation forms only one component.

<sup>135</sup> See, e.g., Davis & Whytock, *supra* note 55.

<sup>136</sup> These obstacles led to dismissal on summary judgment of the RICO claims in *Bowoto*. See *Bowoto v. Chevron Corp.*, 481 F. Supp. 2d 1010, 1015 (N.D. Cal. 2007) (“Plaintiffs present no evidence that killing or otherwise suppressing protestors saves defendants money, or otherwise increases their profit margin. Plaintiffs therefore fail to present evidence that defendants gained a competitive advantage in the United States, or impacted the U.S. economy . . .”).

<sup>137</sup> Here, too, the ATS has arguably had a biasing effect. ATS claims typically require state action; hence, the focus has been on abuses by the military and similar high-profile malfeasance. Such

This brings us to a final set of reasons that unfair competition has been underutilized as a tool to redress supply chain misconduct. As noted, unfair competition claims have generally gone out of fashion outside the consumer context. Competitive abuses affecting businesses are instead dealt with using federal antitrust statutes. While unfair competition law was intended as a backstop to antitrust to catch competitive abuses that those statutes could not reach, as the scope of federal antitrust law expanded over time the need for such backstop authority receded.<sup>138</sup>

That has left a residual set of competitive injury scenarios that fall squarely outside of the conventional antitrust domain. The amorphous and ill-defined nature of this set has made courts reluctant to grant unfair competition relief for fear of acting in an ad hoc and unprincipled basis. As the following Section elaborates, the open-ended nature of the unfair competition standard has, in effect, become an obstacle to its own further development.

#### F. *Ad Hoc and Excessive Liability*

In recent decades, federal courts have resisted efforts by the FTC to justify novel applications of section 5's unfair competition prohibition on the ground that allowing the FTC carte blanche authority to enforce ad hoc determinations of "unfairness" could lead to "arbitrary or capricious administration of § 5."<sup>139</sup> As the Second Circuit admonished in its 1984 "Ethyl" decision, the "Commission owes a duty to define the conditions under which conduct . . . would be [deemed] unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability."<sup>140</sup> Accordingly, federal tribunals applying unfair competition statutes need to formulate objective criteria to distinguish legitimate conduct from actionable violations.

---

iconic cases, however, may not lend themselves to the quantifiable commercial impacts needed for an unfair competition claim.

<sup>138</sup> Kovacic & Winerman, *supra* note 119, at 938–39.

<sup>139</sup> E.I. Du Pont de Nemours & Co. v. FTC, 729 F.2d 128, 138 (2d Cir. 1984).

<sup>140</sup> *Id.* at 139.

As Part III explains, locating such objective criteria in the supply chain context is not hard. As noted, the egregious misconduct described in this Article—labor abuses, human rights violations, environmental destruction—already violates existing law. Therefore, liability imposed based on such transgressions would hardly arise out of the blue. Indeed, the notion that unlawful acts can be deemed per se “unfair” has considerable support in unfair competition law.<sup>141</sup>

Yet, even so, it would be unreasonable for every minor violation of a local ordinance overseas to give rise to an unfair competition action in America. Committing to such collateral enforcement of foreign law in such an unqualified manner would be problematic on several levels. Doing so would open the floodgates to transnational claims, clogging the dockets of U.S. courts and agencies.<sup>142</sup> It could encourage harassment of foreign competitors, burdening them with the costs and distractions of defending unfair competition claims lodged in a distant U.S. court. And it could also encourage litigation tourism, inviting foreign plaintiffs to forum shop. Finally, use of unfair competition law could be abused for protectionist purposes. Such perceived unilateral aggression could trigger retaliation that risks sparking a larger trade war.

### G. Extraterritoriality Concerns

Such concerns over transnational liability implicate a broader set of issues related to extraterritorial jurisdiction. Expansive assertion of U.S. law over conduct taking place overseas is problematic on many levels. Courts are generally reluctant to meddle in the turf of foreign sovereigns and worry that such interventions could roil international relations in ways that raise separation of power concerns.<sup>143</sup> Such concerns are

---

<sup>141</sup> See, e.g., Engler, *supra* note 94, at 10515 (“Under § 337, all that is required for an act to be ‘unfair,’ and thereby justiciable, is that it be contrary to U.S. federal or state law.”); CAL. BUS. & PROF. CODE § 17200 (2019) (making unlawful business practices explicitly actionable); N.Y. EXEC. LAW § 63(12) (McKinney 2019) (same); NCLC TREATISE, *supra* note 100, §§ 3.2.6–3.2.7, 4.3.9.

<sup>142</sup> Cf. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 257 (2010) (questioning merits of devoting “the precious resources of United States courts and law enforcement agencies [to regulate extraterritorial conduct] . . . rather than leave the problem to foreign countries”); *id.* at 270 (worrying the United States could become a “Shangri-La” for transnational litigation).

<sup>143</sup> *Id.* at 269; *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115–17 (2013); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727–28 (2004).

particularly acute where private actors are advancing claims that may privilege private agendas over the public interest.<sup>144</sup>

As we saw, analogous concerns over extraterritorial jurisdiction led the Supreme Court to drastically curtail the scope of the ATS. The Court did so in two ways. First, in *Sosa*, the Court restricted ATS claims to those alleging violations of international law norms that are “specific, universal, and obligatory.”<sup>145</sup> Second, in *Kiobel*, the Court restricted actions to those “where the claims touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application.”<sup>146</sup> The restrictive tenor of these rulings in the ATS context serve as cautionary examples against pushing unfair competition law too far in transnational supply chain cases. At the same time, as Part III explains, they provide instructive guideposts suggesting a basis from which analogous restrictions in the unfair competition context can be devised.

### III. CABINING LIABILITY THROUGH PRINCIPLED CONSTRAINTS

In short, despite the acknowledged, open-ended nature of unfair competition law, courts have often been reluctant to expand liability into new domains for fear of acting in an ad hoc, unprincipled manner. They have sought objective criteria to determine unfairness both to avoid being burdened by a deluge of claims and to give fair warning to businesses. Furthermore, the transnational context of supply chain cases raises additional concerns related to extraterritorial jurisdiction that counsel restraint. We propose two limiting principles that together will assuage concerns about unbridled liability in unfair competition actions: (1) the underlying violation must violate a global norm, and (2) the violation must result in demonstrable harm in the United States.

---

<sup>144</sup> *Sosa*, 542 U.S. at 727.

<sup>145</sup> *Id.* at 732 (quoting *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994)); *Kiobel*, 569 U.S. at 117.

<sup>146</sup> *Kiobel*, 569 U.S. at 124–25.

### A. *Shared Global Norm*

Concerns about unchecked liability motivated Judge Moore, dissenting in the *TianRui* decision at the Federal Circuit, to conjure up a parade of horrors that authorizing extraterritorial unfair competition claims would sanction. Judge Moore warned that:

The potential breadth of this holding is staggering. Suppose that goods were produced by workers who operate under conditions which would not meet with United States labor laws or workers who were not paid minimum wage or not paid at all—certainly United States industry would be hurt by the importation of goods which can be manufactured at a fraction of the cost abroad because of cheaper or forced labor.<sup>147</sup>

Yet, in conflating “cheaper” with “forced” labor, Judge Moore mixes two very different cases that arguably demand disparate treatment.

There is no global minimum wage, and the United States therefore has no principled basis to object to the use of cheap labor overseas. In absence of a global norm, each country has the sovereign right to regulate wages according to local conditions. For the United States to unilaterally determine that wages are “too low” in a particular country despite their lawfulness under local law smacks of legal imperialism.<sup>148</sup>

By contrast, the prohibition on forced labor represents a global norm.<sup>149</sup> Accordingly, the United States has every right to object to forced labor as an unfair method of competition and accordingly bar the importation of any goods thereby produced. Many other forms of supply chain misconduct, including child labor abuses, human trafficking, and illegal land seizures similarly violate clearly established global norms

---

<sup>147</sup> *TianRui Grp. Co. v. Int’l Trade Comm’n*, 661 F.3d 1322, 1338 (Fed. Cir. 2011) (Moore, J., dissenting).

<sup>148</sup> The converse case, enforcing a foreign standard that has no U.S. domestic analog, would be just as problematic. For example, it is illegal for businesses to operate on Sunday in some countries. Yet, it would be hypocritical for the United States to sanction a company violating a Sunday closure ordinance overseas as an unfair method of competition when the United States does not itself enforce comparable restrictions. Holding foreign companies to a standard from which U.S. companies are exempt could also violate the national treatment principle in international trade law. See General Agreement on Tariffs & Trade art. III, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

<sup>149</sup> See Abolition of Forced Labour Convention (No. 105), June 25, 1957, 320 U.N.T.S. 291.

recognized by the United States and virtually the entire world.<sup>150</sup> To the extent that violations of such minimum standards of commercial morality yield competitive advantages that undercut legitimate businesses, such practices represent unfair competition.<sup>151</sup> Enforcing such norms extraterritorially can be defended as upholding a mutual commitment to the shared global standard.

Indeed, the very notion of transnational “unfairness” arguably assumes such a shared binding norm. To say that a legal violation in one country *unfairly* distorts competitive conditions in another implicitly assumes that the global regulatory playing field would—and should—otherwise be level. Yet, in the absence of a global commitment to comply with a binding norm, the regulatory playing field is *not* level, nor should anyone expect it to be.<sup>152</sup> It is only the existence of a global commitment to the shared norm that creates a justified expectation of regulatory uniformity.<sup>153</sup> Only then can one say that competitive advantages gained through noncompliance are unfair. By issuing a remedy under such

---

<sup>150</sup> On child labor, see Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, T.I.A.S. No. 13045, 2133 U.N.T.S. 161. On trafficking, see International Covenant on Civil and Political Rights art. 8, Dec. 16, 1966, 999 U.N.T.S. 171; Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Nov. 15, 2000, T.I.A.S. No. 13127, 2237 U.N.T.S. 319. On land seizure, see G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 17 (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 17, Dec. 16, 1966, 999 U.N.T.S. 171; Convention Concerning Indigenous and Tribal Peoples in Independent Countries arts. 14–18, June 27, 1989, 1650 U.N.T.S. 383 (prohibiting seizures of indigenous peoples’ land).

<sup>151</sup> *Cf.* *FTC v. R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 313 (1934) (“A method of competition which casts upon one’s competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt . . . [represents] the kind of unfairness at which the [federal unfair competition law] was aimed.”).

<sup>152</sup> Regulatory heterogeneity is not only the baseline norm as a matter of positive law, it is also normatively desirable that, as an expression of democratic sovereignty, different countries can choose diverse policy courses. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (celebrating regulatory heterogeneity as facilitating “laborator[ies] of democracy”).

<sup>153</sup> International acceptance would normally be demonstrated through a multilateral treaty. In some cases, customary international law or widespread adoption in national law could also suffice. While this threshold falls short of *Sosa*’s “specific, universal, and obligatory” standard, some degree of unilateralism is arguably justified when coupled with a requirement of significant territorial effects discussed *infra* Section III.B.

circumstances, the United States is thus securing to its manufacturers the benefits of the level playing field to which they are entitled.

Adopting a principle limiting transnational unfair competition claims to those based on conduct that clearly violates widely established global norms falls within the license for common law development of unfair competition law that existing statutes contemplate.<sup>154</sup> It provides an objective basis by which to assess unfairness that would anchor such determinations in a set of principled criteria. Conforming U.S. unfair competition law to international consensus in this manner would insulate the United States against “charges that it is imposing its own idiosyncratic view of acceptable conduct on the rest of the world.”<sup>155</sup>

Restricting unfair competition claims to those based on shared global norms would also answer concerns over unpredictable and excessive liability. Most obviously, restricting the set of norms eligible for transnational enforcement would alleviate concerns over runaway litigation and concomitant abuses. It would also provide clearer guidance to global businesses as to the applicable standards going forward. Businesses that engage in and profit from illicit practices that contravene them therefore can hardly claim to be blindsided when they are held accountable for their transgressions.<sup>156</sup> Reducing the volume of claims also ratchets back the scope for extraterritorial meddling, even as the globally accepted nature of the underlying norms burnishes the normative justifiability of the interventions.

To be sure, imposing this restriction would mean that some truly abysmal practices would evade unfair competition scrutiny in the absence of a clearly established global norm. Accepting such a tradeoff is arguably the price of securing international legitimacy. Adhering to established

---

<sup>154</sup> See *Keppel*, 291 U.S. at 310–12. A fortiori, as expert agencies, the ITC and FTC have even broader discretion to implement their statutory authority flexibly to advance the public interest, and courts will accord *Chevron* deference to rules that they adopt. See, e.g., *Suprema, Inc. v. Int’l Trade Comm’n*, 796 F.3d 1338, 1352 (Fed. Cir. 2015)

<sup>155</sup> Chimène I. Keitner, *The Three C’s of Jurisdiction over Human Rights Claims in U.S. Courts*, 113 MICH. L. REV. FIRST IMPRESSIONS 67, 69 (2015).

<sup>156</sup> Nor can the mere fact of prior enforcement failures justify expectations of impunity. Businesses are supposed to comply with the law regardless of whether or not they face credible enforcement threats, and the salience of such widespread norms cannot plausibly have escaped notice. Cf. *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 139 (2d Cir. 1984) (positing “absence of an independent legitimate business reason” for noncompliance as prerequisite for unfair competition liability).

norms would burnish the normative justifiability of extraterritorial claims and restrict the total volume of such interventions, thereby reducing the risk of provoking rancor and reprisals. The potential for opportunistic actors to unilaterally redefine unfair competition in a self-serving manner that advances protectionist agendas further underscores the wisdom of adopting such a principled constraint.

### B. *Domestic Market Harm*

The existence of a shared norm alone does not suffice to justify extraterritorial jurisdiction. Equally important from a global legitimacy standpoint is a second criterion: a substantive connection to the forum state. Where a transnational unfair competition claim targets unlawful conduct overseas, this connection must be established through evidence of competitive harm in the forum state end market.

In *Kiobel*, the requirement that “claims touch and concern the territory of the United States” was justified doctrinally to rebut the presumption against extraterritorial application of federal law.<sup>157</sup> Evidence of market harm serves a similar function here.<sup>158</sup> However, establishing injury to the forum state market has further benefits. Such “objective territoriality” supplies a justification for exercising extraterritorial jurisdiction under customary international law: where extraterritorial conduct causes domestic harm, the injured country has a legitimate basis to regulate the problem at its extraterritorial source.<sup>159</sup>

This requirement, too, flows logically from an understanding of transnational unfairness that underlies these cases. Where a global regulatory norm imposes specific compliance costs, noncompliance may yield an unfair advantage. However, the resulting unfairness only assumes a *transnational* dimension where such unfair advantages flow downstream to affect the competitive conditions in a foreign market.<sup>160</sup>

---

<sup>157</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124–25 (2013).

<sup>158</sup> *See TianRui Grp. Co. v. Int’l Trade Comm’n*, 661 F.3d 1322, 1329 (Fed. Cir. 2011).

<sup>159</sup> *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (AM. LAW INST. 1987).

<sup>160</sup> By contrast, where the benefits of the violation are realized only locally and the effects confined to national borders, other countries have no reason to object.



To justify the application of U.S. unfair competition law therefore requires proof of a material injury experienced in the U.S. market.

Proof of harm to the U.S. market is a formal requirement of a section 337 action for unfair competition in the ITC.<sup>161</sup> A similar requirement applies to transnational enforcement of FTCA section 5.<sup>162</sup> Injury requirements vary in state unfair competition law, as do standards governing extraterritorial application. However, generally a substantial connection to the forum state is required to fall within the statutory ambit.<sup>163</sup> Proof of downstream competitive injuries to the forum state market establish this nexus and should be explicitly required to support transnational supply chain claims.

Requiring proof of downstream market harm will significantly restrict the range of unfair trade practices that can be successfully challenged in a transnational unfair competition claim. As noted, not all supply chain abuses are easily quantifiable in terms of cost advantages and competitive impact, and mustering the relevant evidence may be daunting.<sup>164</sup> Yet, once again, the value of such principled constraints arguably outweighs their costs.

A transnational injury requirement alleviates concerns over unfair and excessive liability because only violations at a sufficient scale to yield transnational effects will be actionable. Doing so would put extraterritorial unfair competition actions on a principled basis that focuses on the most deserving claims and ensures predictability to businesses. Coupled with the global acceptance requirement, such constraints would also minimize the potential for unfair competition claims to be abused by opportunistic actors as a pretext for harassment or protectionism.

#### IV. EXTENDING LIABILITY DOWN THE SUPPLY CHAIN

As Part I illustrates, supply chain abuses remain the scourge of economic globalization. These abuses persist mainly because they produce cost savings and increased profits for companies further down

---

<sup>161</sup> 19 U.S.C. § 1337(a)(1)(A) (2018).

<sup>162</sup> 15 U.S.C. § 45(a)(4)(A)(i) (2018).

<sup>163</sup> See NCLC TREATISE, *supra* note 100, § 2.2.11.3.2.

<sup>164</sup> See *supra* note 130 and accompanying text.

the supply chain. For several reasons explained below, it would be helpful to hold such downstream entities accountable for their suppliers' misconduct. Yet, existing doctrines of secondary liability impede such accountability. While not insuperable, such barriers restrict the range of supply chain misconduct that could be targeted using unfair competition law. In this Part, we propose a novel theory of enterprise liability that would force multinational firms to take responsibility for policing their suppliers.<sup>165</sup>

#### A. *The Need for Secondary Liability*

As we have seen, unfair competition law offers a compelling model to target supply chain abuses, leveraging access to U.S. markets to provide both U.S. jurisdiction and the prospect of a meaningful remedy. This is most evident when the primary wrongdoer is an international firm that exports directly to the United States<sup>166</sup> Yet, much of global production is sourced from local businesses that are one or more steps removed from the end market. Accordingly, to realize its full potential, the unfair competition law model needs a way to reach such remote defendants—factory and fishery bosses, plantation owners, etc.—and pressure them directly or indirectly to reform.

Unfortunately, the barriers to suing foreign defendants directly in the United States are high. Recent Supreme Court decisions have

---

<sup>165</sup> On its face, such a departure from existing doctrine seems in tension with the adherence to established norms advocated in Part III. However, the extraterritoriality concerns implicated in assigning secondary liability are much more attenuated. Rather than determining the circumstances in which the United States can legitimately sanction violations by an overseas supplier occurring on foreign soil, here the legitimacy of regulating the primary conduct is assumedly established. Imposing secondary liability on a downstream entity merely addresses the issue of who else might be held accountable. The downstream entity will typically operate one step removed from the territory of the foreign sovereign as the entity directly importing goods to the U.S. market. As such, U.S. law may properly determine the substantive rules for liability. See Graeme B. Dinwoodie et al., *The Law Applicable to Secondary Liability in Intellectual Property Cases*, 42 N.Y.U. J. INT'L L. & POL. 201, 216–19 (2009).

<sup>166</sup> As noted, there is no shortage of such firms to target, including some big fish such as Embraer.

tightened the requirements for personal jurisdiction in transnational cases.<sup>167</sup> Furthermore, suing entities in far-flung locales presents practical hurdles, including difficulties serving process and identifying the proper defendant.<sup>168</sup>

Given these impediments, the logical solution is therefore indirect enforcement: targeting the multinational lead firms that typically operate at the end of the value chain, bringing goods to U.S. markets. Such firms' moral responsibility for supply chain abuses has long been advocated.<sup>169</sup> As central nodes in the supply chain web, lead firms instigate, coordinate, and derive the ultimate benefits of the upstream activity. As such, it is only fair that responsibility follow cost savings down the supply chain. Extending liability to lead firms prevents them from receiving an economic windfall derived from wrongful conduct upstream.<sup>170</sup>

More importantly, lead firm liability has the potential to significantly influence supplier behavior. Forcing lead firms to internalize the cost of harms their subordinates cause creates incentives to invest in prevention.<sup>171</sup> These effects are amplified given such firms' role as supply chain "gatekeepers" exercising power over a vast array of suppliers whose numbers can sometimes range in the tens of thousands. Expanding gatekeeper liability for supplier misconduct therefore has a multiplier effect that maximizes deterrence of future wrongdoing.<sup>172</sup>

Suing large intermediaries in the United States also has practical advantages: they are more accessible for personal jurisdiction purposes, afford the proverbial "deep pockets," and judgments against them are

---

<sup>167</sup> See *supra* note 57.

<sup>168</sup> Gwynne Skinner, *Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law*, 72 WASH. & LEE L. REV. 1769, 1802 (2015). While the ITC's in rem jurisdiction can circumvent some of these obstacles, its limits remain untested. See *infra* notes 270–283 and accompanying text.

<sup>169</sup> See JOHN RUGGIE, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS "PROTECT, RESPECT AND REMEDY" FRAMEWORK 14 (2011).

<sup>170</sup> See Alan O. Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2161, 2184 (2012).

<sup>171</sup> *Id.* at 2185–86.

<sup>172</sup> See Daryl J. Levinson, *Aimster and Optimal Targeting*, 120 HARV. L. REV. 1148 (2007).

readily enforceable.<sup>173</sup> Such lawsuits also generate negative publicity in markets where firms are susceptible to public pressure.<sup>174</sup>

Given the benefits of holding multinational lead firms liable for supplier misconduct, we advocate for a quasi-strict standard of enterprise liability. The remainder of this Part proceeds as follows: We first canvass the difficulties plaintiffs face when seeking to extend liability to lead firms under existing doctrine. We then argue for an enterprise liability model that would hold supply chain intermediaries more strictly accountable for upstream misconduct. We demonstrate that such a model represents a logical extension of existing precedent and explain why unfair competition provides a compelling rationale to support its adoption. Finally, after making the case for expanded liability, we outline limiting principles to ensure its application remains fair and well bounded, addressing the judicial misgivings that have constrained existing doctrine.

#### B. *Why Current Doctrine Fails to Hold Lead Firms Accountable*

Aware of their allure as litigation targets, multinational companies ensconce themselves in a transnational lattice of subsidiaries and middlemen that act as multilayer liability firewalls.<sup>175</sup> Human rights plaintiffs and corporate social responsibility activists have devoted significant effort to penetrating these liability barriers.<sup>176</sup> They have employed a wide range of theories to demonstrate an actionable link between the lead firm and torts committed by an upstream affiliate, including: aiding and abetting, negligence, vicarious liability, and corporate veil-piercing. However, courts have construed these doctrines narrowly, allowing multinationals ample license to evade responsibility.

---

<sup>173</sup> See Bang, *supra* note 54, at 1056.

<sup>174</sup> Vanessa R. Waldref, *The Alien Tort Statute After Sosa: A Viable Tool in the Campaign to End Child Labor*, 31 BERKELEY J. EMP. & LAB. L. 160, 190–91 (2010).

<sup>175</sup> Cf. Branson, *supra* note 73, at 243 (offering example of multinational defendant shielded from liability by as many as three hundred subsidiaries globally).

<sup>176</sup> See generally Skinner, *supra* note 168.

## 1. Negligence

Human rights plaintiffs have advanced a host of negligence-based theories including negligent hiring, negligent supervision, and negligent retention.<sup>177</sup> Most of these cases founder on difficulties in establishing that the defendant multinational owed any duty to protect the victims from harms caused by its supplier. In general, one has no duty to protect third parties from harm caused by another, unless a “special relation” exists that imposes a duty to control the wrongdoer.<sup>178</sup> In the supply chain context, the most plausible duty-imposing special relationship arises where the multinational lead firm affirmatively creates the risk of harm to the victim. However, such scenarios are rare.<sup>179</sup>

Moreover, multinational lead firms are liable only for foreseeable torts of an upstream affiliate, and courts are often reluctant to hold the multinationals’ conduct was a proximate cause of intentional wrongdoing.<sup>180</sup> By engineering a legal separation between themselves and upstream affiliates, multinationals can thus turn a blind eye to misconduct.

## 2. Gratuitous Undertaking

Supply chain plaintiffs have also alleged that intermediaries who undertake to police their supply chains—through public pledges or supplier contracts—should face liability if they act negligently in doing so.<sup>181</sup> However, such claims have invariably failed. It is difficult to establish that the mere issuance of corporate conduct codes amounts to a legally actionable undertaking. Sophisticated companies ensure that their codes and supplier conduct provisions cannot be reasonably interpreted

---

<sup>177</sup> See *Doe I v. Unocal Corp.*, Nos. BC 237 980, BC 237 679, 2002 WL 33944506 (Cal. Super. Ct. June 11, 2002).

<sup>178</sup> See RESTATEMENT (SECOND) OF TORTS § 315 (AM. LAW INST. 1965).

<sup>179</sup> Cf. *Unocal*, 2002 WL 33944506 (denying liability despite defendant firm’s knowledge of ongoing violations where firm did not create the risk and lacked operational control).

<sup>180</sup> See David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1, 26–27 (2003).

<sup>181</sup> See, e.g., *Doe v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 684 (9th Cir. 2009); RESTATEMENT (SECOND) OF TORTS § 324A (AM. LAW INST. 1965).

as legally binding commitments.<sup>182</sup> The codes either outline vague aspirations or are expertly structured to maximize social responsibility optics while minimizing liability. Courts also worry about the chilling effect on voluntary reforms if corporations are punished for taking proactive steps to address supply chain misconduct, and they are reluctant to burden companies with excessive monitoring.<sup>183</sup>

### 3. Aiding and Abetting

Multinational lead firms are unlikely to be directly implicated as sole or joint tortfeasors in supplier misconduct.<sup>184</sup> However, supply chain plaintiffs often argue that the multinational firm bears indirect liability for aiding and abetting the torts of its supplier.<sup>185</sup> This requires showing that the multinational knowingly and substantially contributed to the harm.<sup>186</sup> Courts have set a high bar in construing these requirements: the multinational firm must know of the tortious conduct and directly facilitate it by providing logistical or financial support that specifically

---

<sup>182</sup> See Krista Bondy et al., *Multinational Corporation Codes of Conduct: Governance Tools for Corporate Social Responsibility?*, 16 CORP. GOVERNANCE: AN INT'L REV. 294 (2008). Labor standards spelled out in supplier contracts theoretically also open the door to third-party beneficiary claims under contract law, but so far to little avail. See *Wal-Mart Stores, Inc.*, 572 F.3d at 681 (holding supplier agreements did not create commitments on which the suppliers' employees could rely).

<sup>183</sup> See Madeleine Conway, *A New Duty of Care? Tort Liability from Voluntary Human Rights Due Diligence in Global Supply Chains*, 40 QUEEN'S L.J. 741, 780 (2015).

<sup>184</sup> See Guy Davidov, *Indirect Employment: Should Lead Companies Be Liable?*, 37 COMP. LAB. L. & POL'Y J. 5, 20–22 (2015) (noting that acts or omissions of lead firms usually do not meet the standard of causal responsibility for torts committed by upstream suppliers).

<sup>185</sup> See *Doe I v. Unocal Corp.*, Nos. BC 237 980, BC 237 679, 2002 WL 33944506 (Cal. Super. Ct. June 11, 2002); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258–59 (2d Cir. 2009).

<sup>186</sup> See RESTATEMENT (SECOND) OF TORTS § 876 (AM. LAW INST. 1979). Some courts hold that knowledge is insufficient, requiring that the intermediary act purposefully to further the tortious act. See Edna Chinyele Udobong, *Post-Kiobel: What Remedies Exist for Foreign Victims of Corporate Human Rights Violations?*, 11 LIBERTY U. L. REV. 559, 583–93 (2016).

underwrites it.<sup>187</sup> Mere generalized awareness of wrongdoing by a firm that transacts with the offender does not suffice.<sup>188</sup> As a result, multinational companies are careful to retain sufficient distance so that they can plausibly deny specific knowledge of or involvement in any misconduct.<sup>189</sup>

#### 4. Strict Liability

A showing of fault is not required to extend liability to an intermediary. In some circumstances, multinational firms can be held strictly liable for misconduct by upstream affiliates.

##### a. Piercing the Corporate Veil

As noted, multinational corporations operate through a complex network of subsidiaries that stretches the globe. In general, corporate law shields parent companies from a subsidiary's torts.<sup>190</sup> Piercing the corporate veil requires a high threshold: courts decline to pierce unless the subsidiary is virtually a sham entity with no functional independence.<sup>191</sup> Such claims are particularly unlikely in the supply chain context where multinationals employ multiple layers of subsidiaries to shield themselves from liability.<sup>192</sup>

##### b. Vicarious Liability

###### i. Agency

Supply chain plaintiffs have invoked agency principles to hold multinational lead firms answerable for their supplier's misconduct. Agency exists when the supplier is charged with performing tasks on the

---

<sup>187</sup> See *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228, 268–69 (S.D.N.Y. 2009); *Doe v. Exxon Mobil Corp.*, No. 01-1357 (RCL), 2015 U.S. Dist. LEXIS 91107, at \*28, \*45 (D.D.C. July 6, 2015).

<sup>188</sup> See *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1023–26 (9th Cir. 2014).

<sup>189</sup> We propose in Section IV.D that indirect liability under the unfair competition approach should incorporate a constructive knowledge standard to close this loophole.

<sup>190</sup> See Branson, *supra* note 73, at 243.

<sup>191</sup> See David Millon, *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*, 56 EMORY L.J. 1305, 1332 (2007).

<sup>192</sup> See Branson, *supra* note 73, at 228–29.

lead firm's behalf, and the lead firm has the ability to control the performance.<sup>193</sup> If so, the multinational is vicariously liable for torts the supplier commits while acting within the scope of its agency.<sup>194</sup> Vicarious liability typically requires a high level of control, however. The fact that the lead firm directs the subcontractor's work and monitors for quality is insufficient.<sup>195</sup> Courts look for "pervasive and continual" managerial control over the agent's performance.<sup>196</sup> Such control requirements are easy for alert corporate counsel to engineer around. Moreover, even if sufficient principal-agent control exists, the principal can still avoid liability for torts that occur outside what a court deems the scope of the agency.<sup>197</sup> Accordingly, most vicarious liability claims in global supply chains fail.

#### ii. Joint venture

A multinational firm can also be held vicariously liable when it partners with a foreign affiliate/supplier in a joint enterprise. A joint venture exists when two or more entities jointly undertake to operate a

---

<sup>193</sup> See *Bowoto v. ChevronTexaco Corp.*, 312 F. Supp. 2d 1229, 1239 (N.D. Cal. 2004); RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006).

<sup>194</sup> RESTATEMENT (SECOND) OF TORTS § 56 (AM. LAW INST. 1965).

<sup>195</sup> See *Davidov*, *supra* note 184, at 24.

<sup>196</sup> See *Bowoto*, 312 F. Supp. 2d at 1241 n.8 (citing *Sonora Diamond Corp. v. Superior Court*, 99 Cal. Rptr. 2d 824, 838 (Ct. App. 2000)); *Salkin v. United Servs. Auto. Ass'n*, 767 F. Supp. 2d 1062, 1068 (C.D. Cal. 2011); *Saaiman v. Am. Gen. Life Ins. Co.*, No. 18-cv-596-BTM-AGS, 2019 WL 1864858, at \*4 (S.D. Cal. Apr. 25, 2019).

<sup>197</sup> However, a principal may be vicariously liable for an agent's torts that occurred outside the scope of the principal's authority if the principal knowingly acquiesces in, or ratifies, the wrongdoing. For ratification to exist, the principal need merely accept or retain the benefits of the tortious conduct. See *Bowoto*, 312 F. Supp. 2d at 1247-48; *Doe I v. Unocal Corp.*, Nos. BC 237 980, BC 237 679, 2002 WL 33944505 (Cal. Sup. Ct., June 10, 2002). *Unocal* and *Bowoto* offer an expanded (and controversial) interpretation of the ratification doctrine, asserting that post-hoc ratification creates the agency relationship itself. Compare *Bowoto*, 312 F. Supp. 2d 1229 (subsequent ratification by the principal creates an agency relationship for liability purposes), and *Unocal*, 2002 WL 33944505 ("Agency can be established by a precedent authorization or by subsequent ratification."), with *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010) (principal-agent relationship a requisite for ratification liability), *rev'd on other grounds sub. nom. Doe I v. Nestle USA, Inc.*, 766 F.3d 1013 (9th Cir. 2014).



business, sharing control and profits.<sup>198</sup> Again, the requirement of a specific corporate relationship to support liability makes this theory easy enough for astute corporate counsel to navigate around.<sup>199</sup>

## 5. Summary

In short, the tort theories outlined above all suffer from shortcomings that hinder their ability to hold multinational lead firms accountable for supplier misconduct. Despite an ostensible commitment to social responsibility, counsel for large multinationals deliberately structure their relationships with foreign affiliates to evade liability, turning a blind eye to misconduct and eschewing responsibility. More to the point, the law *encourages* them to do so. Meaningful efforts to monitor or control suppliers expose multinationals to liability. Hands-off dealing and plausible deniability thus become hardwired into supply chain relationships.

### C. *The Case for Enterprise Liability*

Activists and commentators have passionately advanced countless proposals to force multinational firms to take greater ownership of supply chain misconduct.<sup>200</sup> Courts, however, have expressed serious misgivings about saddling companies with liability for their global suppliers.<sup>201</sup> Such misgivings reflect deep-seated concerns over the unfairness and impracticality of holding U.S. companies accountable for overseas misconduct. Is it fair to expect U.S. firms to police affiliates and suppliers scattered across distant lands, who may well number in the hundreds?<sup>202</sup> And why should U.S. courts intervene when the root problems originate on the turf of foreign sovereigns?

---

<sup>198</sup> See *April Enters., Inc. v. KTTV*, 195 Cal. Rptr. 421, 425 (Ct. App. 1983).

<sup>199</sup> Agnieszka A. McPeak, *Sharing Tort Liability in the New Sharing Economy*, 49 CONN. L. REV. 171 (2016).

<sup>200</sup> See, e.g., Virginia Harper Ho, *Of Enterprise Principles and Corporate Groups: Does Corporate Law Reach Human Rights?*, 52 COLUM. J. TRANSNAT'L L. 113 (2013) (advocating for expanded corporate law doctrines to impose accountability).

<sup>201</sup> See, e.g., *Doe v. Wal-Mart Stores, Inc.*, No. CV 05-7307 AG (MANx), 2007 U.S. Dist. LEXIS 98102, at \*15 (C.D. Cal. Mar. 30, 2007).

<sup>202</sup> See *id.*

Such judicial misgivings arguably reflect a fundamental misunderstanding of the causes of supply chain abuses. The tendency of U.S. courts to focus narrowly on malfeasance by specific “bad actors” abroad—scurrilous factory bosses in league with corrupt foreign officials—obscures the systemic nature of the problem. Yet, as Part I shows, the problems afflicting global supply chains transcend any particular actors and arise from the very structure of transnational outsourcing: competitive pressures compel both good and bad alike to cut corners to remain competitive.

Viewing supply chain misconduct as an inherent feature of modern global production lays the foundation for a systemic solution that would treat the activities of the entire enterprise as relevant to an analysis of liability. Such enterprise liability would hold multinationals accountable for the characteristic risks that arise from outsourcing work to foreign suppliers.<sup>203</sup> Because lead firms initiate and receive the ultimate benefits of activities that put supply chain workers at risk, it follows that they should bear the social costs connected to such risks. Activists have previously advocated for enterprise liability but lacked a coherent theory to justify it.<sup>204</sup> Our unfair competition model provides one. Moreover, as we explain next, imposing enterprise liability on global supply chains comports with existing tort law precedent for products liability, respondeat superior, and ultrahazards.

---

<sup>203</sup> Cf. Gregory C. Keating, *Products Liability as Enterprise Liability*, 10 J. TORT L. 41, 47 (2017). The use of “enterprise liability,” and what constitutes the “enterprise,” is not uniform across legal scholarship. Corporate law scholars sometimes use “enterprise liability” to distinguish between liability of a corporate person versus personal liability of its managers. See, e.g., Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857 (1984). Others employ “enterprise liability” to reference an expanded theory of vicarious liability in which liability flows not just vertically between parent and subsidiary but also horizontally between subsidiaries within the same corporate group. See Branson, *supra* note 73, at 244–45. In the products liability context, enterprise liability has a more specific meaning: harms caused by the enterprise should be borne by the enterprise as a matter of strict liability, see Keating, *supra*, at 56, and the “enterprise” for liability purposes is any entity engaged in manufacturing or selling the product. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. f (AM. LAW INST. 1965). We use “enterprise liability” in the products liability sense.

<sup>204</sup> See Meredith Dearborn, Comment, *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups*, 97 CALIF. L. REV. 195, 202–14 (2009).

### 1. Existing Tort Law Precedent Supporting Enterprise Liability

Enterprise liability forces disgorgement of unjustly enriching benefits realized at the expense of harm to others and thereby engenders full internalization of the costs of such harms within the enterprise's pricing of goods.<sup>205</sup> Such cost internalization encourages risk spreading and cost sharing across firms involved in the enterprise. This in turn encourages proactive investments to reduce future harms and places incentives to reduce risk in the hands of the entities best positioned to do so.<sup>206</sup>

#### a. Products liability

The paragon of enterprise liability is products liability—the body of law that holds all entities in the supply chain liable for harms their products cause.<sup>207</sup> Paralleling calls to expand supply chain liability today, products liability arose as a reaction to perceived limitations of the existing liability framework that left consumers under-protected and harms under-deterred.<sup>208</sup> Then as now, courts initially approached products liability with skepticism due to concerns about fairness and unbounded liability overwhelming courts and debilitating companies. Over time, however, products liability law moved from fault-based liability to strict enterprise liability.<sup>209</sup>

As industrialization shifted goods production from local to national economies, courts came to realize that existing doctrines grounded in warranty and negligence were inadequate to protect consumers from defective products. Requiring victims to single out discrete culpable actors among the many firms who may have had a hand in bringing a product to market engendered costly, erratic justice and arguably led to under-deterrence of risk.<sup>210</sup> Over time, courts abandoned their preoccupation with assigning fault and instead asked only whether a

---

<sup>205</sup> See Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

<sup>206</sup> Keating, *supra* note 203, at 47.

<sup>207</sup> See generally *id.*

<sup>208</sup> *Id.* at 46–47.

<sup>209</sup> *Id.* at 44–46.

<sup>210</sup> *Id.*

particular risk is “characteristic” of a given enterprise.<sup>211</sup> If so, every entity engaged in producing and bringing the product to market bears liability for resulting injuries, regardless of their individual culpability.

This shift to enterprise liability reflected a policy choice by courts to force defendants all along the supply chain to assume responsibility for predictable harms from defective products.<sup>212</sup> The liability baseline thus set, enterprise participants are free to reallocate the costs among themselves through contractual indemnity and insurance, using private ordering to reduce harm efficiently.<sup>213</sup> The internalization of social costs within market pricing, in turn, guides consumer product consumption choices toward more socially optimal outcomes.<sup>214</sup>

Arguably, the same dynamics that drove products liability toward strict enterprise liability are found in today’s supply chains, even as their scope has expanded from national to global. Global production results in predictable harms that arise from characteristic risks. The cost of those harms is largely eluded by producers and disproportionately borne by individual victims poorly situated to absorb the costs. The major difference is that, in the global context, the victims of supply chain abuse are found at the opposite end of the chain—instead of consumers bearing the cost of harms, workers and other source country stakeholders do so.

Consider two hypothetical scenarios to illustrate the point. In one, a battery manufactured by a Samsung supplier explodes in a Samsung cell phone, injuring a child in the end market. In another, a child working in violation of child labor laws is injured while mining rare earth minerals used to make the phone battery. Products liability law ensures that Samsung will be liable for the injury to the child in the first scenario, even though Samsung did not manufacture the battery and was not causally responsible for the accident. By contrast, in the second scenario, the law ensures Samsung is not liable to the juvenile employee unless Samsung

---

<sup>211</sup> *Id.* at 43–46.

<sup>212</sup> Victoria C. Dawson, *Who Is Responsible When You Shop Until You Drop?: An Impact on the Use of the Aggressive Marketing Schemes of “Black Friday” Through Enterprise Liability Concepts*, 50 SANTA CLARA L. REV. 747, 767–68 (2010).

<sup>213</sup> See Keating, *supra* note 203, at 47.

<sup>214</sup> See Calabresi, *supra* note 205, at 500–07.

knowingly assisted in the wrongdoing (rare) or enjoys an unusually high degree of operational control over the supplier.

Arguably, there is no moral distinction between these scenarios. Each case involves a victim of a harm that is entirely predictable and exhibits recurrent, entrenched characteristics specific to the enterprise and industry. Indeed, the systemic risks, enforcement failures, and under-deterrence are far more acute when it comes to foreign manufacturing. Companies have powerful incentives to minimize risks to consumers, even without legal liability: bad PR can cripple sales. Yet, these same companies face little or no accountability for the upstream harms they inflict by outsourcing production overseas. Instead, the structure of global production actively incentivizes regulatory shortcuts, denial of responsibility, and externalization of risk. These perverse incentives permeate the supply chain so pervasively that even well-intentioned actors cannot avoid complicity. Rather, the reality of global production dictates a dysfunctional race to the bottom that inflicts grievous harms by encouraging outsourcing to suppliers who engage in socially destructive practices.

The innocent victims of supply chain misconduct are poorly placed to absorb the injuries inflicted; by contrast, transnational corporations who engage in outsourcing could easily spread any increased liability costs incurred from suppliers across their operations and set them against the profits realized by the entire enterprise. Moreover, the internalization of such costs within supply chain pricing would provide a powerful incentive to mitigate the underlying source of harm and/or avoid dodgy suppliers altogether. In other words, supply chains offer a textbook candidate for enterprise liability.<sup>215</sup>

#### b. Respondeat Superior

Another paradigmatic example of enterprise liability is the respondeat superior rule by which employers bear strict liability for torts committed by employees. The rule allows liability to flow vicariously from employee to employer where (1) a specific type of employment relationship applies—namely, a closely supervised “master-servant”

---

<sup>215</sup> See generally *id.*, at 500–07, 519–27; GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 50–54 (1970).

relationship—and (2) where the “servant”-employee is acting within the scope of employment.<sup>216</sup>

Supply chain contractors are deliberately structured to avoid respondeat superior liability. Yet, courts have found grounds to extend respondeat superior liability in other cases that fall outside the normal contours of the rule. The logic animating such exceptions is instructive.

For example, although an employee’s daily commute is normally considered outside the scope of employment, courts have held that where a worker travels to an unusually distant work-site such travel *can* be considered within the scope of employment, making the employer liable under respondeat superior for traffic accidents caused by employee’s negligent driving en route to and from work.<sup>217</sup> In *Hinman*, the California Supreme Court explained that:

There is a substantial benefit to an employer in one area to be permitted to reach out to a labor market in another area or to enlarge the available labor market by [having employees travel long distances] . . . . It cannot be denied that the employer’s reaching out to the distant or larger labor market increases the risk of injury in transportation. In other words, the employer, having found it desirable in the interests of his enterprise . . . to go beyond the normal labor market . . . should be required to pay for the risks inherent in his decision.<sup>218</sup>

In outsourcing production to distant supply chain contractors, multinational companies similarly avail themselves of a “distant [and] larger labor market”<sup>219</sup> in ways that predictably increase the risk of societal injuries beyond the normal baseline risks of local/domestic production. While the risks implicated by global supply chains go well beyond transportation injuries, arguably, a similar logic should apply to force employers to internalize the “inherent” risks of their outsourcing decision.

---

<sup>216</sup> Calabresi, *supra* note 205, at 543–45.

<sup>217</sup> See *Hinman v. Westinghouse Elec. Co.*, 471 P.2d 988, 991–92 (Cal. 1970).

<sup>218</sup> *Id.* at 992.

<sup>219</sup> *Id.*

Further support for requiring employers to internalize inherent, foreseeable risks of employment can be found in another exception to the normal limits of the respondeat superior rule. In general, intentional torts are deemed outside the scope of employment. An exception applies, however, where the intentional tort can be considered a risk “inherent in the working environment.”<sup>220</sup> Courts have characterized such inherent risks as those that are a natural “‘outgrowth’ of the employment” relationship” or a “‘generally foreseeable consequence’ of the employer’s business.”<sup>221</sup> Where the risk of tortious injury is a “well known hazard” within a particular type of enterprise, then respondeat superior will apply, notwithstanding the intentional nature of the tortious conduct.<sup>222</sup>

The principle that employers should internalize the predictable and characteristic risks of their enterprise could be applied to the supply chain context as well. Supply chains, too, exhibit characteristic patterns of abuses that are often highly endemic and particularized within specific industries and specific regions. In this way, lead firms would be held accountable for foreseeable harms (whether intentional or otherwise) that arise from such characteristic risks.<sup>223</sup>

At this point, skeptics will object that the above precedents pertain to defining the scope of employment for *qualifying* employees—i.e., servants within a master-servant relationship. Supply chain relationships are structured to avoid such a relationship. Transnational suppliers are deliberately kept at arms-length, making them independent contractors for which lead firms are normally categorically exempt from respondeat superior liability. Instead, liability is supposed to be borne by the supplier.

Yet, there are two reasons to question the application of the independent contractor rule in the supply chain context. First, the notion that, as independent businesses, supply chain contractors can be relied on to adequately manage the risks of production, internalize costs, and compensate unavoidable injuries is manifestly inapplicable.<sup>224</sup> As we have

---

<sup>220</sup> *Montague v. AMN Healthcare, Inc.*, 168 Cal. Rptr. 3d 123, 127 (Ct. App. 2014).

<sup>221</sup> *Id.*

<sup>222</sup> *Fahrendorff ex rel. Fahrendorff v. N. Homes, Inc.*, 597 N.W.2d 905, 915 (Minn. 1999) (Anderson, J., concurring in part and dissenting in part).

<sup>223</sup> In our proposal for enterprise liability below, we explicitly restrict lead firm liability to injuries arising from supplier-related risks that are significant, foreseeable, and characteristic of the relevant industry. See *infra* notes 232–243 and accompanying text.

<sup>224</sup> Cf. Calabresi, *supra* note 205, at 545–46.

seen, the competitive advantage that suppliers in developing countries offer inheres precisely in their ability to dodge such legal accountability and evade protective regulations with impunity.

Second, even accepting the independent contractor rule on its face, supply chain contracts arguably fall into recognized exceptions. Courts have recognized that certain tasks represent “non-delegable duties” for which legal responsibility cannot be outsourced to a contractor. Notably, the category of non-delegable duties includes both “inherently dangerous activities”<sup>225</sup> and contracting assignments that otherwise involve “peculiar risks.”<sup>226</sup> As we have seen, outsourcing work to distant supply chain contractors is often rife with both significant inherent dangers and peculiar risks that go well beyond the normal baseline risks of domestic production. Moreover, by assumption, such risks will be subject to clearly established global regulatory norms as a prerequisite of transnational unfair competition liability.<sup>227</sup>

Given these circumstances, the non-delegable duty exceptions arguably justify disregarding the arms-length nature of the independent contractor relationship and invoking respondeat superior to hold lead firms accountable for supplier misconduct. Doing so would force them to internalize the predictable elevated risks associated with their outsourcing decisions, ensuring that social costs are properly reflected in market pricing. At least where such characteristic risks are well-known, serious in nature, and subject to clear global norms, the principles articulated in the respondeat superior cases provide ample precedential support to hold lead firms accountable and prevent them from outsourcing legal responsibility.

---

<sup>225</sup> RESTATEMENT (SECOND) OF TORTS § 427 (AM. LAW INST. 1965).

<sup>226</sup> *Id.* § 416. Comment (a) to section 416 explains that while “abnormal” dangers and “peculiar risks” represent “different forms of statement of the same general rule,” section 427 “is more commonly applied where the danger involved in the work calls for a number of precautions, or involves a number of possible hazards, as in the case of blasting, or painting carried on upon a scaffold above the highway.” *Id.* § 416 cmt. a. By contrast, section 416 “is more commonly stated and applied where the employer should anticipate the need for some specific precaution, such as a railing around an excavation in the sidewalk.” *Id.*

<sup>227</sup> *See supra* Section III.A.



c. Ultrahazardous activities

The principle that unusual and significantly elevated risks justify imposing enterprise liability finds an even broader expression in the torts rules imposing strict liability for so-called “ultrahazard[s].”<sup>228</sup> Individuals engaging in ultrahazardous activities, such as raising dangerous wild animals or using dynamite for demolition, are held strictly liable for resulting injuries. Regardless of their knowledge of the risks or exercise of care to prevent them, their choice to impose elevated risks on society makes them full insurers of the activity’s characteristic harms.<sup>229</sup> In this way, the enterprise absorbs the full social costs of engaging in an abnormally dangerous activity.

Similarly, by outsourcing to a region and industry where producers have a known propensity to cause harm by engaging in a particular pattern of misconduct whose risks go significantly beyond baseline norms of domestic production, a multinational firm arguably engages in an ultrahazardous activity that creates an elevated risk of social harm. Multinational companies may work with such risky suppliers but must accept liability for resulting harms that are characteristic of the industry. Their business decision to outsource production despite the predictable dangers makes them responsible for internalizing the full costs of the harm they engender.<sup>230</sup>

2. The Unfair Competition Model Justifies a Systemic View of Supply Chain Accountability

Whether one analogizes supply chain cases to product liability or respondeat superior or adopts the ultrahazard approach that we have

---

<sup>228</sup> RESTATEMENT (SECOND) OF TORTS § 519 (AM. LAW INST. 1977).

<sup>229</sup> Liability only results from harms that are characteristic of the dangerous activity: a tiger mauling a neighbor, or a window shattered by dynamite’s explosive shock wave would qualify. However, if a pedestrian were injured by a veterinarian driving to administer treatment to the tiger, the animal’s owner would not be strictly liable. Likewise, using dynamite would not give rise to strict liability if a bystander suffered an allergic reaction. Neither of those injuries result from the characteristics that make these activities ultrahazardous. *Id.* § 519(2). The Restatement (Third) adds the further requirement that the dangerous activity be “not one of common usage.” RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 20 (AM. LAW INST. 2010).

<sup>230</sup> Note that this approach confers direct rather than secondary liability on the lead firm that outsourced the work. The larger point, however, is that enterprise liability collapses such technical distinctions in adopting a systemic view of the enterprise as a whole.

outlined above, these existing doctrinal models of enterprise liability dispel some of the concerns about the fairness of holding U.S. companies accountable for foreign suppliers' misdeeds. Those profiting from cost savings realized at the expense of upstream injuries arguably assume a quasi-restitutionary obligation to compensate the injured victims, and the principles established in tort law provide ample precedent to support such liability. Moreover, only enterprise liability will enable consumers to take into account the full social costs of their purchasing decisions.

An unfair competition framework adds a further justification: it forces courts otherwise inclined to externalize supply chain defects to foreign shores (and thereby locate them beyond U.S. concern) to confront the domestic consequences of such misconduct. Unfair competition law quantifies the cost savings from upstream misconduct and shows how such ill-gotten gains translate directly into competitive advantages realized in the U.S. end market.

Such undeserved advantages harm U.S. companies and lead to the loss of U.S. jobs. Holding downstream beneficiaries of supply chain misconduct accountable to compensate competitors for such harms would force disgorgement of ill-gotten profits and ensure a level playing field based on adherence to shared commercial standards. Moreover, unfair competition liability would apply to *all* companies selling in the U.S. market, thereby defusing the concern that only U.S.-based companies would bear the burden of regulatory accountability.<sup>231</sup>

Forcing lead firms to internalize the social costs of their outsourcing decisions via enterprise liability would have further benefits. Doing so would diminish the cost advantages realized through offshore production, potentially encouraging the reshoring of domestic manufacturing and saving U.S. jobs. Even the most nativist-minded, "America first" judge should approve.

---

<sup>231</sup> Cf. Sykes, *supra* note 170, at 2202.

### 3. The Foreign Corrupt Practices Act: A Model of Enterprise Liability for Remedying Systemic Supply Chain Abuses

A working model for imposing enterprise liability in global supply chains already exists in the Foreign Corrupt Practices Act (FCPA).<sup>232</sup> Prior to the FCPA's adoption in 1977, official corruption and bribery were viewed much as supply chain abuses are today: an intractable blight on global commerce to be endured and externalized as a foreign governance problem. U.S. policymakers, however, correctly identified bribery as a systemic concern that allowed corrupt competitors to steal business from honest rivals, undermining economic efficiency and the rule of law.

In asserting U.S. jurisdiction over foreign corruption, Congress opted for an enterprise liability model that explicitly held companies liable for misconduct by third parties and affiliates. The FCPA's constructive knowledge standard forced companies to engage in robust compliance activities. The FCPA has raised baseline standards of commercial conduct globally, and its model has been imitated elsewhere.<sup>233</sup> Moreover, dire predictions about the FCPA as a drag on American business have not materialized.<sup>234</sup> While experts debate the FCPA's ultimate efficacy as an anticorruption measure, it has increased global awareness of corruption, triggered widespread legal and corporate reforms, and offered a model compelling enough to inspire dozens of countries to adopt similar laws.<sup>235</sup>

The FCPA offers a highly relevant precedent, but it is not the only one. Other federal statutory schemes including the Lacey Act and the Forced Labor Statute, both discussed in more detail below, also impose quasi-strict enterprise liability on intermediaries for violations perpetrated overseas by upstream suppliers.<sup>236</sup>

---

<sup>232</sup> Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1 to -2 (2018)).

<sup>233</sup> See Maggie Gardner, *Channeling Unilateralism*, 56 HARV. INT'L L.J. 297, 325–32 (2015).

<sup>234</sup> See Adam W. Park, Comment, *Keep Your Eye on the Bribe: Focusing FCPA Enforcement*, 9 J.L. ECON. & POL'Y 305, 309 (2013) (noting arguments by business leaders against passage of FCPA).

<sup>235</sup> See William Magnuson, *International Corporate Bribery and Unilateral Enforcement*, 51 COLUM. J. TRANSNAT'L L. 360, 407–08 (2013) (finding that the FCPA has had a significant positive effect on corporate practices globally).

<sup>236</sup> See *infra* notes 245–249 and accompanying text.

D. *A Framework for Limiting Downstream Liability*

A host of subsidiary objections doubtless remain that animate judicial misgivings over intermediary liability. These include, broadly, a reluctance to engage in extraterritorial disputes; concerns about saddling companies with an impossible burden of policing global suppliers; the potential for unbounded liability that could swamp courts and companies alike; and the fear that U.S. companies would be placed at a competitive disadvantage with other global firms.

To alleviate such concerns, we propose four limiting principles. To impose liability on a supply chain entity downstream from the immediate wrongdoer, the following should be required in addition to proving the underlying violation: (1) the alleged third-party conduct clearly violated widely accepted global norms; (2) the misconduct resulted in competitive harms in the U.S. end market; (3) the harm results from risks that are characteristic of the enterprise; and (4) the downstream intermediary had actual or constructive knowledge of the underlying misconduct.

The first two principles are already “baked into” the unfair competition model introduced in Part III and apply broadly to ensure legal certainty and mitigate concerns over extraterritoriality. However, we reiterate these constraints here to emphasize how these limiting principles do double duty in cabining the liability exposure of intermediaries. In addition, the third and fourth principles apply specifically to the indirect liability context to frame a more restrictive liability standard for downstream intermediaries. Combined, these four principles ensure that multinational lead firms need not fear a court summons for minor infractions by far-flung suppliers. They will be liable only when they knowingly benefit from predictable, endemic wrongs that produce substantial negative spillover effects in the U.S. market and which have no defensible place in a civilized world.

By cabining liability, these limiting principles act as a “razor” for the compliance-minded corporate counsel seeking to identify downside risks in her company’s global supply chain. They each focus corporate attention on proactive policing against a defined set of risks. The following fleshes out each criterion in more detail.

1. *Global Norms*: As a first cut, our concerned corporate counsel need only worry about clear violations of a well-established global norm. As discussed in Part III, examples include human trafficking, child labor, illegal land seizures, and so on.<sup>237</sup> There is a limited set of norms that enjoy such widespread global acceptance, and the “clear violation” requirement further reduces the risk of companies being blindsided by unexpected sources of liability.

2. *Competitive Distortion in the U.S. Market*: As a second cut, our corporate counsel need only look for violations perpetrated on a large enough scale to produce *demonstrable competitive harms to the U.S. end market*. This comports with the rule in products liability that only “actuarially large” activities give rise to enterprise liability.<sup>238</sup> Harms resulting from isolated incidents or small-scale misconduct would not be actionable. Similarly, multinationals need not worry about minor suppliers whose price inputs do not materially affect their bottom line.

Tethering jurisdiction to U.S. end-market effects also mitigates concerns over inflicting competitive disadvantage on U.S. companies. Foreign firms operating in the U.S. market would be equally exposed to liability. Moreover, as noted, the broader thrust of such unfair competition actions would be to improve competitive conditions for U.S. manufacturers and workers.

3. *Characteristic Risk*: A third principle to cabin lead firm risk is the requirement that the underlying harm result from misconduct that is “characteristic” of the industry and locale in which the supplier operates. “Characteristic” risks are reasonably foreseeable, well-known harms that arise out of enterprise activity and generally occur industry-wide in a particular region.<sup>239</sup> In other words, our general counsel need not scour the enterprise supply chain for all potential violations. She need only act to avert violations that are widely known to be endemic to the supplier’s region and industry. The industries we canvassed in Part I, for example, are notorious for particular, widely documented harms: cocoa harvesting in Ivory Coast is plagued by child labor abuses; Thai fisheries are known

---

<sup>237</sup> See *supra* Section III.A.

<sup>238</sup> See Keating, *supra* note 203, at 73–74.

<sup>239</sup> The notion of characteristic risk has a basis in products liability law, where manufacturers are only liable for defects stemming from characteristic uses of the product, as opposed to unforeseeable misuse. See *id.* at 75–78. As noted, liability for ultrahazardous activities are similarly limited to characteristic risks. See *supra* note 229 and accompanying text.

to exploit forced labor; palm oil plantations wreak environmental destruction in Indonesia, and so on. A U.S.-based chocolate maker using a supplier from Ivory Coast should therefore be expected to exercise heightened diligence to ensure its supplier complies with child labor laws. By contrast, the U.S. company need not concern itself over illegal land seizures because this is not a characteristic violation that the Ivory Coast cocoa industry is known to engage in.

How would a lead firm determine whether a risk is characteristic of an industry? Government agencies and international organizations invariably track and document egregious abuses endemic to supply chain industries. Thus, in most cases, corporations could consult a limited set of authoritative sources to evaluate their risk exposure. We envision that federal agencies would act proactively to provide guidance to companies on risks associated with particular industries and regions, as already occurs in the context of the Lacey Act and Forced Labor Statute.<sup>240</sup> In cases where government reporting falls short, courts might also allow persistent reports of abuses catalogued by NGOs, when well-documented, credible, and prominently publicized, to be considered as triggering characteristic risk in appropriate circumstances.<sup>241</sup>

Evaluating characteristic risk is already familiar territory for corporate compliance officers. Statutory schemes abound at the state, federal, and transnational levels that require companies to perform supplier due diligence.<sup>242</sup> Some impose strict liability with potentially serious consequences. FCPA violations can result in multimillion-dollar fines and imprisonment for making corrupt payments to foreign

---

<sup>240</sup> See *infra* notes 245–249 and accompanying text.

<sup>241</sup> The governing standard would emphasize reports from reputable sources that could not help but attract the attention of any corporate counsel exercising the care of a prudent, socially responsible company. By contrast, obscure references or unsupported allegations would not create a duty if a reasonably diligent general counsel would not locate the information, or if it would be reasonable to discount that source in the absence of corroborating evidence.

<sup>242</sup> See, e.g., E. Christopher Johnson Jr., *Business Lawyers Are in a Unique Position to Help Their Clients Identify Supply-Chain Risks Involving Labor Trafficking and Child Labor*, 70 *BUS. LAW.* 1083, 1103–18 (2015) (canvassing U.S. state and federal laws as well as laws in France and the United Kingdom that impose supply chain monitoring requirements for human trafficking).

officials.<sup>243</sup> When it adopted the FCPA, Congress effectively made a legislative determination that bribery is a plague on global supply chains and mandated that companies act proactively to prevent it. Companies are required to have a deep knowledge of their overseas operations, including the business and legal ethics of their suppliers. Working with a supplier in a region where corruption is a characteristic risk can create a higher due diligence standard.<sup>244</sup>

Companies in hundreds of industries including textiles, produce, seafood, steel, and electronics are also already required to monitor their supply chains for forced labor.<sup>245</sup> The U.S. Department of Labor publishes an index of industries and countries in which forced labor is prevalent.<sup>246</sup> Compliance experts and U.S. officials both counsel that companies have a heightened duty of due diligence for suppliers in listed regions.<sup>247</sup>

The Lacey Act is even more closely analogous to the liability model proposed here. The underlying violations covered are thus extremely broad. If the harvesting or exporting involved a labor, environmental, or even tax violation, either civil or criminal, the product is “tainted,” and any downstream shipper or importer faces serious penalties including fines, imprisonment, and forfeiture of goods. Lacey Act due diligence requirements therefore extend beyond monitoring supplier conduct: they also require understanding the supplying country’s laws and constant measuring of supplier conduct against local legal standards.<sup>248</sup> Similar to

---

<sup>243</sup> See 15 U.S.C. §§ 78dd-3(d)–(e), 78ff (2018) (stating penalties); *SEC Enforcement Actions: FCPA Cases*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> [<https://perma.cc/G5MW-L5LP>] (listing FCPA enforcement actions and their resultant penalties, with fines as high as \$965 million).

<sup>244</sup> See Julie DiMauro, *Compliance Best Practices Across Your Supply Chain*, FCPA BLOG (Apr. 3, 2014, 10:08 AM), <http://www.fcpablog.com/blog/2014/4/3/compliance-best-practices-across-your-supply-chain.html> [<https://perma.cc/JL28-Q679>] (quoting FCPA compliance expert as saying, “If you’re going to work in a higher-risk region of the world, enforcement officials will say you went in knowing you needed to elevate your due diligence oversight efforts”).

<sup>245</sup> See BUREAU OF INT’L LABOR AFFAIRS, U.S. DEP’T OF LABOR, 2018 LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR (2018), <https://www.dol.gov/agencies/ilab/reports/child-labor/list-of-goods> [<https://perma.cc/556C-KXMZ>].

<sup>246</sup> *Id.*

<sup>247</sup> Rossella Brevetti, *Importers Should Keep Watchful Eye on Supply Chains*, BLOOMBERG L. (Aug. 8, 2016, 12:00 AM), <https://news.bloomberglaw.com/daily-labor-report/importers-should-keep-watchful-eye-on-supply-chains> [<https://perma.cc/R2UZ-AEQD>].

<sup>248</sup> See ADAM GRANT & SOFIE BECKHAM, WORLD RES. INST., *IKEA’S RESPONSE TO THE LACEY ACT: DUE CARE SYSTEMS FOR COMPOSITE MATERIALS IN CHINA* 21 (2013).

our proposal, both the Lacey Act and the Forced Labor Statute extend liability to intermediaries who import goods tainted by a violation at the source, but who did not participate in the violation.<sup>249</sup>

The upshot is that for many companies, the added burden of monitoring for “characteristic” risks in their supply chain to avoid unfair competition liability may be limited. The existence of regulations such as the Lacey Act, Forced Labor Statute, and FCPA demonstrate that compliance with corporate diligence regimes is possible and not overly burdensome.<sup>250</sup> Legions of corporate social responsibility (CSR) compliance professionals—from risk consultants to lawyers—are available to help companies affordably identify and manage supply chain risk. Technology can further reduce the compliance burden. Major advances in risk assessment technology, aided by big data analytics and artificial intelligence, have made in-house CSR risk monitoring affordable to businesses of any size and as easy as accessing an online dashboard.<sup>251</sup> Given today’s regulatory environment and the wealth of

---

<sup>249</sup> Indeed, the due diligence responsibilities extend beyond importers; even shipping companies may have their vessels seized for transporting materials that the company’s owner should have known violated the Act.

<sup>250</sup> Note also that Forced Labor and Lacey Act liability is not bounded by any domestic impact requirement. While unfair competition liability may potentially embrace a wider set of misconduct, the requirement that cost savings materially affect competitive conditions in the end market, in practice, restricts such liability to large-scale activities that generate significant cost savings, thereby easing the burden of detection.

<sup>251</sup> For example, IntegrityNext, one of many CSR consultants advising multinational corporations, offers for \$700 per month or less, “a cloud-based platform that covers all major aspects of CSR and sustainability requirements, allowing companies to monitor thousands of suppliers with minimal administration.” INTEGRITY NEXT, <https://www.integritynext.com/index.html> [<https://perma.cc/K8UD-Y7XZ>]; *Pricing*, INTEGRITY NEXT, <https://www.integritynext.com/pricing.html> [<https://perma.cc/56LZ-6TG3>]. Another consultant, Assent Compliance, provides a comprehensive software suite enabling companies to “manage every aspect of their responsible sourcing programs more efficiently.” *Corporate Social Responsibility Suite*, ASSENT, <https://www.assentcompliance.com/corporate-social-responsibility-suite> [<https://perma.cc/YQ9S-JQ2C>]. Non-profit Made in A Free World provides businesses with a software suite, FRDM, that uses predictive analytics to identify regions and suppliers that are high risk for labor violations. See Issie Lapowsky, *The Next Big Thing You Missed: Software That Helps Businesses Rid Their Supply Chains of Slave Labor*, WIRED (Feb. 3, 2015, 6:30 AM), <https://www.wired.com/2015/02/frdm> [<https://perma.cc/YG77-HSXX>] (“[B]usinesses can upload data on all the items they buy and where their suppliers are located, and FRDM will generate a



information and compliance assistance readily available, no company should be excused from understanding its supply chain fully and exercising reasonable care.<sup>252</sup>

4. *Knowledge*: Lastly, our general counsel would only have to worry about violations that her corporate officers knew or should have known about. Imposing a knowledge standard ensures that lead firms are not haled into court for surreptitious supplier offenses that evade reasonable diligence. As such, it mitigates some of the unfairness that strict liability could otherwise engender.

A knowledge standard comports with established practice in unfair competition cases, which generally concern dishonest conduct and culpable intent.<sup>253</sup> Knowledge of wrongdoing also creates a measure of responsibility, especially when the entity with knowledge reaps benefits from the underlying misconduct. Failing to exercise reasonable diligence to act upon culpable knowledge can be deemed tantamount to intentionally profiting through willful blindness.

There is substantial precedent in the law for imposing liability on defendants who knowingly benefit from harm inflicted by others. In tort law, for example, a principal that knowingly acquiesces in the benefits of its agent's wrongdoing will be liable for resultant injuries even outside the scope of agency.<sup>254</sup> Similarly, corporate officers face liability under the FCPA when they know of bribery committed by third parties on the company's behalf.<sup>255</sup> The Washington State IT theft statute, described in Part II, also provides a cause of action against third parties that knowingly sell goods produced using stolen information technology.<sup>256</sup>

These precedents also establish that the defendant need not have actual knowledge of wrongdoing. Rather, constructive or "red flag" knowledge can be sufficient. Under the FCPA, evidence of culpable

---

dashboard, explaining who the riskiest suppliers are."); Thor Olavsrud, *How Predictive Analytics Can Help End Slave Labor*, CIO (June 17, 2015, 5:00 AM), <https://www.cio.com/article/2936341/how-predictive-analytics-can-help-end-slave-labor.html> [<https://perma.cc/B67C-5FXC>].

<sup>252</sup> See GRANT & BECKHAM, *supra* note 248, at 23 ("[T]o complete the [Lacey Act] declaration form, a company needs to understand its supply chain fully. . . . It is no longer enough to just rely on trust: a company must now ask questions and back this up with on-the-ground audits.").

<sup>253</sup> 87 C.J.S. *Trademarks* § 24 (2018).

<sup>254</sup> See *supra* note 197 and accompanying text (discussing ratification theory of liability).

<sup>255</sup> 15 U.S.C. §§ 78dd-2(h)(3)(A)(i)–(ii).

<sup>256</sup> WASH. REV. CODE ANN. § 19.330.080 (West 2019).

knowledge include red flags such as knowing that the wrongdoer had a reputation for corruption, forming shell companies to evade liability, or making payments to consultants that far exceed the ostensible value of their services.<sup>257</sup> Under the Washington IT theft law, an intermediary has constructive knowledge when it receives notice from an IP owner that the defendant is selling goods produced using pirated technology.<sup>258</sup> The Copyright Act similarly provides that ISPs may be secondarily liable based on “aware[ness] of facts or circumstances [suggesting] infringing activity,” and courts have equated willful blindness to culpable knowledge.<sup>259</sup> The Lacey Act, too, imposes strict liability on importers and even shippers based on a constructive knowledge standard.<sup>260</sup>

Constructive knowledge can also arise from “blacklists” of known scofflaws or dodgy industries compiled by government agencies or other reputable sources. In addition to the Lacey Act and Forced Labor examples described above, California has recently passed a statute imposing joint liability on retailers for labor abuses committed by trucking companies who have been blacklisted for past misconduct.<sup>261</sup>

As these examples suggest, assessment of the knowledge criterion is logically related to characteristic risk. The more an industry is known to be rife with a particular form of abuse, the lower the knowledge threshold, and vice versa. When sourcing cocoa from Ivory Coast, where child labor is pervasive, a lead firm would be expected to exercise a high degree of vigilance policing against such practices. The mere hint of supplier abuse could trigger a duty to intervene. Where a contractor engages in a form of misconduct that is known, but relatively uncommon in that industry,

---

<sup>257</sup> See *United States v. Kozeny*, 667 F.3d 122, 127–33 (2d Cir. 2011); *In re Bio-Rad Labs., Inc.*, Securities Exchange Act of 1934 Release No. 73496, Accounting & Auditing Enforcement Release No. 3594, 2014 WL 5513834 (Nov. 3, 2014).

<sup>258</sup> WASH. REV. CODE ANN. § 19.330.080.

<sup>259</sup> 17 U.S.C. § 512(c)(1)(A) (2018); *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 34–35 (2d Cir. 2012).

<sup>260</sup> 16 U.S.C. § 3373(a)(1) (2018).

<sup>261</sup> Brett Murphy, *California Gov. Jerry Brown Signs Bill Holding Retailers Jointly Liable for Trucker Abuse*, USA TODAY (Sept. 22, 2018, 6:11 PM), <https://www.usatoday.com/story/news/2018/09/22/california-gov-signs-retail-liability-and-trucker-abuse-bill-into-law/1398408002> [<https://perma.cc/MK69-67U7>].

the diligence duties would be correspondingly diminished and might only trigger a need for action upon actual knowledge.<sup>262</sup> Finally, knowledge of isolated wrongdoing that is *not* a characteristic risk would not by itself engender enterprise liability, although other forms of intermediary liability could still attach, where applicable.<sup>263</sup> In this way, multinational firms can prioritize compliance efforts based on foreseeable risks.

In sum, the combined force of these limiting principles would shield multinational companies from the threat of unexpected liability and mitigate the burden of monitoring myriad, far-flung suppliers for all manner of misconduct. Instead, corporate counsels could allocate compliance resources according to efficient and predictable criteria.

#### E. *Bringing Enterprise Liability into Unfair Competition Law*

Having set forth a theoretical rationale and framework for applying enterprise liability to supply chain misconduct, the question remains: How could such an approach actually be implemented in unfair competition law? This Section explores three options: (1) legislative reform, (2) executive agency adoption, and (3) common-law adjudication.

##### 1. Legislative Reform

Legislation offers the most direct means to implement enterprise liability. As noted, Congress already imposes quasi-strict liability on

---

<sup>262</sup> Technological advances could further alter the constructive knowledge calculus as AI-driven software solutions exponentially reduce the cost and increase the accessibility and effectiveness of supply chain risk monitoring. *See, e.g.*, PEDRO MOURA COSTA ET AL., BVRIO INST., USING BIG DATA TO DETECT ILLEGALITY IN THE TROPICAL TIMBER SECTOR (2016); *see also supra* note 251 and accompanying text; Eugene Volokh, *Tort Law vs. Privacy*, 114 COLUM. L. REV. 879, 883 (2014) (arguing that as technology develops and makes precautions cheaper and more accessible, failing to take measures that once seemed unduly burdensome might now be negligent).

<sup>263</sup> Background principles of tort liability such as negligence, agency liability, aiding and abetting, etc., would remain germane. Thus, a company that has credible evidence of misconduct by a specific supplier could still be liable for negligent entrustment, for example, if it continued to source production from it.

imported goods made with forced labor and on imports of illegally taken wildlife, fish, and plants.<sup>264</sup> The idea would be to generalize such liability to govern a broader range of goods and actionable misconduct. The threat of such expanded liability would doubtless unleash frenzied lobbying in opposition, and given the impediments to legislative action, the chances of broad reforms materializing in the immediate future seem small. However, one can imagine this calculus changing should public opinion become galvanized by media reporting on supply chain atrocities in the future. It is also conceivable that “America First” populists could latch onto some version of this proposal as a means to punish foreign unfair trade practices.

State legislation offers an alternative pathway to reform. As noted, California has already passed legislation requiring retailers and manufacturers to disclose information regarding their efforts to eradicate slavery and human trafficking from their supply chains.<sup>265</sup> Such disclosure requirements have proven ineffective in triggering actual reforms, as subsequent case law has revealed.<sup>266</sup> A logical next step would be to mandate that companies exercise actual diligence in preventing supply chain abuses. Several European countries have already enacted legislation imposing duties of “vigilance” on multinational firms to counter human rights abuses in their supply chain.<sup>267</sup> As noted, California has itself made retailers responsible for combatting abuses in the domestic trucking sector.<sup>268</sup> And Washington State holds retailers accountable for IP theft by suppliers.<sup>269</sup> Creating enterprise-wide unfair competition liability would complement such piecemeal legislation and

---

<sup>264</sup> See 16 U.S.C. §§ 3371–3378; 19 U.S.C. § 1307 (2018); *supra* notes 68–70 and accompanying text.

<sup>265</sup> See *supra* note 66.

<sup>266</sup> See, e.g., *Dana v. Hershey Co.*, 180 F. Supp. 3d 652, 665 (N.D. Cal. 2016) (noting the chocolate industry has acknowledged its continued failure for more than a decade to eradicate child and slave labor from its Ivorian supply chain and “admitted its failure to even develop a comprehensive certification system” to prevent such abuses).

<sup>267</sup> See Roel Nieuwenkamp, *Impatient Governments Push Corporate Supply Chain Due Diligence*, KINGDOM OF NETH. (Dec. 5, 2017, 12:00 AM), <https://www.permanentrepresentations.nl/latest/news/2017/12/5/blog--impatient-governments-push-corporate-supply-chain-due-diligence> [<https://perma.cc/88CB-WGAR>].

<sup>268</sup> See *supra* note 261.

<sup>269</sup> See *supra* note 103.

supply a powerful motivator to take supply chain diligence duties seriously.

## 2. Executive Agency Adoption

An alternative pathway to implement enterprise liability would be for an executive agency to adopt the paradigm either through formal administrative rulemaking or by applying the principle in agency adjudication of unfair trade disputes. The two most likely candidates for agency adoption are the ITC and FTC, both of which, as noted, have broad statutory authority to regulate unfair methods of competition.

### a. ITC Section 337

As the federal agency charged most directly with regulating unfair competition related to importation, the ITC may be the most likely candidate to adopt a quasi-strict approach to intermediary liability. Indeed, an argument exists that the ITC's in rem jurisdiction under section 337 over "the importation of articles"<sup>270</sup> makes questions of secondary liability irrelevant. At least one commentator has asserted that "as a statute exerting in rem jurisdiction, [section] 337 does not require that [importers] intend or cause the unfairness, only that . . . there is a nexus between the unfairness and importation of articles."<sup>271</sup> Cost savings from unfair practices that give imported goods an undeserved advantage establish such a nexus. On this reading, so long as an intermediary benefits from such ill-begotten savings, the ITC should bar entry of the goods regardless of the importer's complicity in the underlying misconduct.

Such an expansive reading of section 337 is arguably consistent with section 337's origins as a trade protectionist statute.<sup>272</sup> Congress intended section 337 to provide broad protection, insulating U.S. industries from the effects of unfair competition overseas.<sup>273</sup> Competition from foreign producers that violate global norms unfairly deprives U.S. industries of

---

<sup>270</sup> 19 U.S.C. § 1337(a)(1)(A) (2018).

<sup>271</sup> Buckler & Jackson, *supra* note 17, at 528–29. While Buckler and Jackson do not provide authority for their claim, this Article provides a supporting rationale.

<sup>272</sup> See *In re Orion Co.*, 71 F.2d 458, 465 (C.C.P.A. 1934).

<sup>273</sup> *Suprema, Inc. v. Int'l Trade Comm'n*, 796 F.3d 1338, 1350–51 (Fed. Cir. 2015).

the level playing field that such standards are supposed to ensure. Providing relief under section 337 in such circumstances arguably falls squarely within Congress's protectionist aim.<sup>274</sup> Moreover, the logic of this conclusion retains its force regardless of whether the actual wrongdoer conducts the importation or works through an intermediary.<sup>275</sup> So long as cost savings from unfair practices have passed down to the imported goods, giving the importer an undeserved advantage in the end market, the need for protection remains.

This purposive reading of section 337 is reinforced structurally by the *in rem* nature of its operative language. The statute focuses on unfairness inherent "in the importation of articles" rather than on the need to punish bad acts by anyone in particular.<sup>276</sup> To empower the ITC to block the goods' entry, the statutory text requires only that the unfair importation have the "threat or effect" of injuring a domestic industry.<sup>277</sup> Arguably, the cost savings engendered by the goods' illicit manufacture supplies such threat, making the importing parties' individual culpability irrelevant.

Such an interpretation, while novel in the section 337 context, would be consistent with the existing understanding of section 307, the Forced Labor Statute. Section 307 similarly provides *in rem* jurisdiction over imported articles based on the circumstances in which they were manufactured, and it has been applied to bar importation irrespective of importer culpability. Sections 307 and 337 both appear in title 19. Moreover, section 307 was introduced by the same 1930 Tariff Act that enshrined the ITC's unfair competition authority as section 337.<sup>278</sup> Thus, it makes sense to read them *in pari materia*.

---

<sup>274</sup> See *Frischer & Co. v. Bakelite Corp.*, 39 F.2d 247, 259 (C.C.P.A. 1930) ("[T]he purpose of [section 337 was] to give to industries of the United States, not only the benefit of the favorable laws and conditions to be found in this country, but also to protect such industries from being unfairly deprived of the advantage of the same . . .").

<sup>275</sup> *Cf. Suprema*, 796 F.3d at 1352 (noting that interpreting section 337 to preclude intermediary liability "would be an open invitation to foreign entities . . . to circumvent Section 337").

<sup>276</sup> 19 U.S.C. § 1337(a)(1)(A), (d)(1) (2018).

<sup>277</sup> *Id.*

<sup>278</sup> Tariff Act of 1930, ch. 497, title III, §§ 307, 337, 46 Stat. 689, 703 (June 17, 1930).

Construing section 337's in rem authority as focused on preventing competitive harms regardless of importer culpability is also consistent with long-established traditions of civil forfeiture in custom law.<sup>279</sup> Indeed, it is notable that the "innocent-owner" defense that otherwise governs federal civil forfeiture statutes is explicitly excluded from Title 19 customs law.<sup>280</sup> Accordingly, congressional intent to apply strict liability in this domain can be inferred.

The ITC has not tested the limits of its authority in this regard. Yet, while case law addressing intermediary liability under section 337 is sparse, federal courts have accepted that the ITC's in rem jurisdiction gives it the flexibility to take into account conduct by parties other than the immediate importer.<sup>281</sup> Moreover, "court[s have] consistently deferred to the [ITC], recognizing the Commission's technical expertise in deciding issues arising under Section 337, a statute Congress has entrusted the agency to administer."<sup>282</sup> The ITC's power to police unfair competition is designed to advance fundamental goals of U.S. trade policy.<sup>283</sup> Should the ITC determine that such policy goals are advanced by imposing strict liability on importers for unfair practices that benefit them, courts can be expected to grant its determination deferential consideration.

#### b. FTC Section 5

The FTC's authority over unfair competition is more general, but it does extend to foreign practices that affect domestic commerce.<sup>284</sup> While the FTC lacks in rem jurisdiction and does not allow private actions, it offers other advantages: it has a bigger administrative staff than the ITC, and is thus better equipped to frame substantive policy, conduct formal

---

<sup>279</sup> See *Austin v. United States*, 509 U.S. 602, 611–13 (1993).

<sup>280</sup> See 18 U.S.C. § 983(i)(2) (2018); *United States v. Davis*, 648 F.3d 84, 94–95 (2d Cir. 2011).

<sup>281</sup> *Suprema, Inc. v. Int'l Trade Comm'n*, 796 F.3d 1338, 1346–49. *Suprema* was a patent case involving inducement liability for infringement that took place after importation. The supply chain cases present the inverse scenario: liability for third-party violations that precede importation. However, *Suprema's* flexible and deferential reading of ITC authority offers at least generalized support for the position advanced here.

<sup>282</sup> *Id.* at 1352 (granting *Chevron* deference to ITC interpretations of Section 337).

<sup>283</sup> *In re Orion*, 71 F.2d 458, 465 (C.C.P.A. 1934).

<sup>284</sup> 15 U.S.C. § 45(a)(3)(A)(i) (2018).

investigations, and issue industry guidance.<sup>285</sup> The FTC can also regulate unfair or deceptive practices that occur on an industry-wide basis through administrative rulemaking.<sup>286</sup> Accordingly, it could identify and prioritize particular forms of supply chain misconduct for redress and potentially also mandate specific action to prevent unfair practices.<sup>287</sup>

Overall, FTC and ITC authority complement one another. The FTC can redress supply chain misconduct on a more comprehensive basis than the ITC's piecemeal adjudication. It could compile evidence regarding patterns of misconduct in particular industries and regions overseas and thereby provide guidance to lead firms as to characteristic risks that should inform their compliance efforts. However, the ITC has broader jurisdiction over imports, bears an explicitly protectionist mandate, and allows for private actions. Ideally, the two agencies would work together: the FTC would engage in fact-finding to provide the substantive basis to mandate aggressive enforcement of unfair competition in supply chains, and the ITC would harness private actions and deploy its in rem jurisdiction to enforce FTC mandates.<sup>288</sup>

### c. Common-Law Adjudication

The final implementation pathway would be for courts to take a hand in moving toward enterprise liability through common law adjudication. The common law affords courts the flexibility to adapt existing doctrines to new contexts over time. The history of products liability law provides a roadmap. As with supply chain liability, courts initially approached products liability with deep skepticism due to concerns about fairness and unbounded liability overwhelming courts and debilitating companies.<sup>289</sup> However, products liability law underwent

---

<sup>285</sup> See 15 U.S.C. §§ 43, 46, 49, 57b-1 (2018); *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N (Oct. 2009), <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> [https://perma.cc/FE5W-CBGC].

<sup>286</sup> See 15 U.S.C. §§ 46(g), 57a.

<sup>287</sup> See NCLC TREATISE, *supra* note 100, § 3.2.6.

<sup>288</sup> FTC rulemaking could also potentially be enforced under state unfair competition law "because violation of an FTC rule is a per se violation of [state law]." *Id.*

<sup>289</sup> See Keating, *supra* note 203, at 44-46.



a gradual common law transformation from fault-based liability to strict enterprise liability.<sup>290</sup> Over time, the parameters of products liability became bounded not by determining fault but by determining whether a particular risk is “characteristic” of a given enterprise.<sup>291</sup> This shift reflected a policy choice by courts to bar defendants along the supply chain from evading responsibility for predictable harms that arise from product defects.<sup>292</sup> The liability baseline thus set, supply chain actors ideally will reallocate the costs of harm among themselves through contractual indemnity and insurance, optimally incentivizing the least-cost avoider to minimize risk.<sup>293</sup>

Unfair competition law provides a promising vehicle to advance beyond existing standards for intermediary liability as state “UDAP statutes were passed to overcome the limitations of contract and tort law.”<sup>294</sup> Courts have recognized legislative intent that state unfair competition law be applied broadly to meet its remedial goal.<sup>295</sup> In numerous cases, they have proved willing to push the limits of agency doctrine and contributory liability and disregard corporate formalities in order to hold accountable secondary actors who benefit from unfair practices.<sup>296</sup> Such doctrinal innovation is consistent with the longstanding tradition of progressive, common-law development of unfair competition standards.<sup>297</sup>

Speculating on the most promising doctrinal vehicles for further judicial expansion is beyond the scope of this Article. That said, the liability framework we propose above suggests some possibilities. Since culpable knowledge is a central tenet of the framework, tort doctrines that incorporate a knowledge standard provide potentially fertile ground for expansion. Aiding and abetting and ratification may be especially promising candidates since courts have already experimented with more

---

<sup>290</sup> *Id.*

<sup>291</sup> *Id.* at 46–47.

<sup>292</sup> See Dawson, *supra* note 212, at 767–68.

<sup>293</sup> See Keating, *supra* note 203, at 47.

<sup>294</sup> NCLC TREATISE, *supra* note 100, § 10.1.2.

<sup>295</sup> *Id.* §§ 10.1.2, 10.2.3.2.

<sup>296</sup> *Id.* §§ 10.1.2 n.6, 10.2.3.2–5, 10.4.

<sup>297</sup> See *supra* Section II.D.

expansive interpretations in the supply chain context.<sup>298</sup> Other doctrines may be less suitable. Expanding negligent undertaking liability, for example, could have the counterproductive effect of punishing companies for making good-faith corporate social responsibility efforts.<sup>299</sup>

#### F. *Enforcement Strategy and Internalization of Compliance Norms*

To maximize the impact of transnational unfair competition actions requires attention to implementation strategy. As we argue above, supply chain abuse is a systemic problem. A true systemic solution, however, cannot be achieved through piecemeal litigation. The ultimate aim of the unfair competition approach should not be to punish isolated “bad apples,” but rather to trigger lasting behavioral changes. Legal enforcement functions best when it effectively promotes and shapes behavioral norms.<sup>300</sup> Ideally, strategic litigation will motivate multinational companies and their suppliers to internalize rigorous supply chain standards into their own value sets so that they police themselves and, ideally, their competitors.<sup>301</sup> Enforcement actions should therefore be designed both to deter misconduct and engender lasting changes in behavioral norms. The following paragraphs briefly sketch some key elements to achieve these goals.

First, the scope of enforcement actions should begin modestly, targeting the most egregious offenders and only gradually ratcheting upward over time. This incremental enforcement strategy mitigates concerns about fairness to defendants and avoids the backlash that

---

<sup>298</sup> See, e.g., *Adhikari v. KBR Inc.*, No. 4:16-CV-2478, 2017 WL 4237923, at \*7 (S.D. Tex. Sept. 25, 2017) (holding that defendant’s mere knowledge it used labor brokers involved in human trafficking is sufficient to satisfy the knowledge prong of aiding and abetting liability).

<sup>299</sup> See, e.g., *Doe v. Wal-Mart Stores, Inc.*, No. CV 05-7307 AG (MANx), 2007 U.S. Dist. LEXIS 98102, at \*15 (C.D. Cal. Mar. 30, 2007) (expressing such misgivings).

<sup>300</sup> See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 349 (1997); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2603–04 (1997); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 23 (2006).

<sup>301</sup> Cf. Koh, *supra* note 300, at 2646; Priest, *supra* note 85, at 217–18, 228–31.

aggressive imposition of liability could engender. Targeting high-profile violators also generates publicity and increases the perceived risk of liability to others.<sup>302</sup> This can amplify the effect of individual lawsuits beyond the immediate parties, casting a “transnational shadow” that influences conduct across borders and industries.<sup>303</sup>

Second, enforcers should emphasize forward-looking settlements that prioritize corporate reforms over punishment. Trading reduced penalties for proactive compliance commitments further mitigates fairness concerns.<sup>304</sup> It also reduces the potential for resentment, “anti-imperialist” sentiment, and backlash. Accordingly, soft-touch enforcement strategies are better suited to co-opting defendants into becoming change agents.

Enforcement, critical as it is, represents only one half of an effective, integrated approach that combines both carrot and stick. Unfair competition can supply the enforcement “stick” that motivates compliance. It punishes transgressors and simultaneously reassures competitors that they will not face a competitive disadvantage through their own compliance. Yet, achieving lasting behavioral change requires

---

<sup>302</sup> High-profile lawsuits are bound to land on the radar of compliance professionals of the sort discussed in note 251, *supra*, and become routinized into the compliance standards recommended to multinational company lawyers and compliance officers.

<sup>303</sup> See Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TUL. L. REV. 67, 118 (2009). Similarly, Chimène Keitner emphasizes that liability rulings in transnational cases tend to exert a “compliance pull” that promotes internalization of corporate social responsibility norms “beyond the framework of formal adjudication.” Chimène I. Keitner, *Optimizing Liability for Extraterritoriality Torts: A Response to Professor Sykes*, 100 GEO. L.J. 2211, 2214 (2012). It might be necessary to target multiple high-profile offenders in one industry. Otherwise, the process of norm internalization throughout the supply chain may founder as unscrupulous competitors continue to take advantage of cost-saving violations. Cf. Sethi et al., *supra* note 43, at 515 (discussing multinational firm that was driven to disband supplier corporate social responsibility program because competitors who did not employ such programs enjoyed a material cost advantage).

<sup>304</sup> Many of the state unfair competition actions discussed in Part II notably culminated in settlements with detailed compliance obligations. See *supra* Section II.C.2. Federal prosecutors have similarly employed deferred prosecution agreements in the FCPA and Lacey Act contexts. See Jon Jordan, *The Need for a Comprehensive International Foreign Bribery Compliance Program, Covering A to Z, in an Expanding Global Anti-Bribery Environment*, 117 PENN ST. L. REV. 89, 114–15 (2012); Kaldjian & Barber, *supra* note 70.

continued reinforcement.<sup>305</sup> Such reinforcement is best supplied through the “carrot” of private ordering.

As detailed in Part I, a broad array of private ordering initiatives promote corporate social responsibility, fair trade, and sustainability. Such initiatives allow companies to trumpet their ethical virtues through conduct codes backed by compliance monitoring organizations. Unfair competition suits should aim to provide the incentives and accountability necessary for corporations to take such commitments seriously. As unfair competition suits generate settlements that include monitoring and compliance commitments, such provisions will naturally dovetail with existing private ordering. Combining legal accountability through unfair competition law with continued reinforcement via private ordering will yield more effective outcomes than either measure could achieve alone.

Finally, unfair competition enforcement should exploit the gatekeeper role that end-market multinational companies play as the central actors within global supply chains. Multinationals are ideally situated to propagate reforms across their vast network of supplier contracts. As supply chain enterprises weave into their organizational tissue, internal structures that standardize, routinize, and reinforce compliance across all levels of the enterprise, regulatory norms will become internalized over time.<sup>306</sup> Achieving such a culture of regulatory compliance represents the ultimate goal of supply chain reform.

---

<sup>305</sup> Koh argues that norm internalization underpins compliance in the international law context and occurs through repeated, structured interactions between transnational actors. *See* Koh, *supra* note 300, at 2646.

<sup>306</sup> Routinizing compliance across the supply chain may require a critical mass of players in an industry to play by the same rules. The Mattel Inc. case study is instructive. *See* Sethi, *supra* note 43. Mattel, responding to public shaming over supply chain labor transgressions, implemented a sophisticated global supplier monitoring program. *Id.* at 483–84. The cost of running the program was not expensive to operate “when measured as a proportion of total production costs or sales prices.” *Id.* at 515. It was prohibitively expensive, however, when factoring in the significantly increased procurement costs for inputs from Mattel’s suppliers *as compared to the procurement costs of Mattel’s competitors* who did not impose comparable CSR obligations on their own suppliers. *Id.*

## CONCLUSION

This Article has explored extraterritorial use of unfair competition law to hold foreign producers who export to the United States accountable for violations of global regulatory norms. While thus far applied primarily to intellectual property infringement, the same underlying theory of unfair competition could be used to target violations in many other domains including human rights, labor law, and environmental protection. Unfair competition law could therefore address persistent enforcement failures in global supply chains and bring a measure of justice to those powerless to enforce rights in their home countries.

Existing efforts to reform global supply chain governance suffer from a fatal flaw: lack of a reliable enforcement mechanism. Powerful multinational corporations easily evade accountability for their suppliers' misdeeds. U.S. courts are reluctant to exercise jurisdiction over conduct abroad, and consumers remain largely indifferent to the human suffering that their purchases underwrite.

Unfair competition law could thus prove a game changer. It supplies a powerful new tool to vindicate global regulatory norms that offers numerous advantages: It confers jurisdiction in U.S. courts; it harnesses a set of motivated, well-resourced plaintiffs—namely, disadvantaged competitors; and it provides enforcement with real teeth as perpetrators risk being frozen out of lucrative U.S. markets. Importantly, this strategy requires no new laws to be passed and already has a proven track record.

Extraterritorial application of unfair competition law should, however, be tempered by jurisprudential restraint. Allowed to operate in unfettered fashion, such actions could easily lend themselves to protectionist abuses. This Article has proposed a set of principles to cabin such dangers and minimize adverse repercussions. Restricting extraterritorial unfair competition action to clear violations of concretely defined norms backed by international obligations would ensure that such actions are cloaked in the mantle of international legitimacy and promote commercial certainty by providing transnational firms focal points around which to focus their compliance efforts. Requiring proof of competitive injuries in the downstream forum state market offers further safeguards against abuse as well as a further mechanism to prioritize compliance.

Finally, this Article supplies a novel theory of enterprise liability that would hold downstream intermediaries accountable where they knowingly benefit from their suppliers' misdeeds. Making multinational corporations liable for violations in their supply chain could prove a particularly effective strategy to promote norm change through private ordering: the web of supplier contracts that multinationals typically enforce across their supply chains provide an ideal vehicle to propagate compliance norms. The hope is that the motivating pressure of litigation combined with continuous reinforcement through private ordering will, over time, lead regulatory compliance to become internalized.

Purging global supply chains of persistent patterns of abuse would redeem globalization from its most egregious failure. Holding global scofflaws accountable would also serve to defuse the anti-globalist backlash against "unfair trade." By restoring confidence in the global rule of law and placing world trade on a more equitable foundation, unfair competition law could thus make a lasting contribution to global governance.