

## Courts Make Doing Good Abroad Bad For Business At Home

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Many U.S.-based multinational corporations have implemented corporate social responsibility (CSR) programs in an effort to help address global social problems, including programs that try to help combat human rights and environmental abuses present in foreign countries supplying goods to the U.S. Unfortunately, these CSRs are increasingly likely to be used against those companies in multimillion dollar transnational supply chain lawsuits. More than 15 major U.S.-based multinationals faced such suits in 2015, and this number is likely to increase in 2016, in light of the Supreme Court's Jan. 11, 2016 denial of the petition for certiorari from the Ninth Circuit's decision in *Nestle USA Inc. v. Doe*.<sup>[1]</sup>

In *Nestle*, the Ninth Circuit held that a purported class of foreign plaintiffs should be able to pursue an Alien Tort Suit (ATS) action against U.S.-based entities that sourced cocoa from locally owned farms in the Ivory Coast, where some of the farms allegedly engaged in unlawful labor practices, including slave labor. In the Ninth's Circuit's view, it was not dispositive that the defendants had strict policies against slavery and were not alleged to have themselves enslaved the plaintiffs. The Ninth Circuit's decision was based largely on: (1) allegations that the defendants purchased cocoa that originated from the Ivory Coast, which is known to suffer from problems with forced labor; (2) evidence that the defendants publicly committed to helping to eradicate forced labor in the cocoa industry and offered numerous social benefit and support programs, which the plaintiffs' used as part of their proof that the companies "knew" of the human rights problems in the region and that they provided assistance and had "control" in the region and (3) allegations about the defendants' market share and their desire to obtain cheap cocoa.<sup>[2]</sup>

In reversing the district court's dismissal in *Nestle*, the Ninth Circuit has given plaintiffs' attorneys an opportunity to try to portray corporate efforts to help address global social issues in developing countries as evidence of "aiding and abetting" conduct that can be used to launch ATS suits. The Supreme Court's decision to deny certiorari means that it will likely be several years before U.S.-based

multinationals see relief from this socially destructive theory of transnational liability. In the meantime, supply chain transparency laws are being passed around the world (including in California and the United Kingdom) and consumer fraud class actions based on the Nestle aiding and abetting theories are increasing. Multinationals should prepare now to meet these new legal challenges, including by assessing their supply chain disclosures and other externally facing communications with these new risks in mind.

### **Corporate Social Responsibility Programs Aim to Provide Real Benefits to People in Developing Countries**

CSR programs — sometimes referred to as “sustainability” or “social welfare” programs — are business practices that aim to help the residents of developing countries that link to U.S. supply chains. These programs need not exist in conflict with a business’s traditional goals. Rather, many companies view CSR programs as a “win-win”: not only can they help society at large, but they can improve corporate reputations and increase efficiency, trade and global environmental sustainability.[3]

Many organizations sponsor and/or encourage CSR programs. For example, the United Nations Global Compact is a nongovernmental organization that, among other things, “supports companies to [d]o business responsibly by aligning their strategies and operations with [the Global Compact’s] Ten Principles on human rights, labor, environment and anti-corruption.”[4] Among these principles is the abolition of forced labor, and the compact encourages members to work toward this goal by helping to ameliorate the underlying social circumstances that result in forced labor. More than 500 U.S. companies have signed onto the UN Global Compact. By volunteering to join the compact, members are expected to “make the Global Compact and its principles an integral part of business strategy, day-to-day operations and organizational culture.”[5]

Individual companies and entire industries have embraced this challenge and implemented programs to improve the lives of residents in the countries in which they do business. For example, the World Cocoa Foundation — a member organization supported by more than 100 companies — “work[s] through public-private partnerships that bring together donors, industry members, producing country governments, research institutes and nongovernmental organizations to ... deliver the necessary social, agricultural and economic advances to promote a healthy, sustainable cocoa economy that benefits everyone from producer to consumer.”[6] Many of the cocoa industry’s efforts seek to help address the global social problem of forced labor. For example, the foundation “train[ed] teams of [adult] professionals to safely apply agrochemicals to cocoa farms in areas where children have previously been involved in this task.”[7] It also initiated “child labor awareness sessions” that were attended by tens of thousands of farmers and members of the local community.[8] And, to increase the educational opportunities for children, the foundation operates the ECHOES program, which has awarded more than 1,600 scholarships and has provided literacy training to more than 6,500 people.[9]

These efforts also extend far beyond the cocoa industry. For example:

- An oil company operating in West Africa has trained more than 3,000 individuals in enterprise development and management, has awarded more than 2,700 scholarships to secondary school students and supports 27 health care clinics that, in 2011 alone, serviced more than 275,000 people.[10]

- Numerous companies operating in Bangladesh have provided medical services to the local population, including hospitals, HIV/AIDS prevention programs and medical insurance.[11]
- Members of the cotton industry formed the Better Cotton Initiative which, among other things, aims to provide environmentally sustainable cotton using standards that can be met by “smallholder farms in Mali, Mozambique and Tajikistan” and “large, industrialized operations in Brazil, China and Australia.”[12]

### **Recent Transnational Supply Chain Cases Effectively Punish Companies for Foreign Trade and Corporate Social Responsibility Programs**

Proving that no good deed goes unpunished, plaintiffs’ lawyers have started using CSR programs as a cornerstone of transnational supply chain liability theories, seeking to hold multinationals liable for aiding and abetting human rights violations that allegedly occurred in their supply chains. Nestle, and another case relating to the chocolate industry (Hershey), illustrate this disturbing trend.

First, in Nestle, a purported class of alleged former child laborers from the Ivory Coast sued three corporations under the ATS for aiding and abetting unlawful labor practices, in violation of international law.[13] The plaintiffs did not claim that any of these three companies engaged in forced labor practices themselves. Rather, plaintiffs alleged that the companies should be liable for aiding and abetting alleged forced child labor committed by unaffiliated foreign actors. The plaintiffs’ theme was that the companies knew there were labor problems in the Ivory Coast (based on, inter alia, public reports, the companies’ on-the-ground benefit programs in the region and the companies’ public commitment to help address labor challenges in the region), and that the companies supposedly had sufficient control to fix the labor problems, but failed to do so because they wanted to purchase inexpensive cocoa.[14] In support of their case, the plaintiffs asserted that the companies “control such [forced labor] conditions by providing local farmers and/or farmer cooperatives with inter alia ongoing financial support, including advance payments and personal spending money ... ; farming supplies, including fertilizer, tools and equipment; training and capacity building in particular growing and fermentation techniques and general farm maintenance, including appropriate labor practices, to grow the quality and quantity of cocoa beans they desire.”[15] The complaint pointed to additional programs, including “technical assistance on income generation to new strategies to deal with crop infestation, to specific interventions designed to address child labour.”[16]

The district court dismissed these claims.[17] But, on appeal, the Ninth Circuit gave the complaint new life.[18] Relevant here was the court’s explanation of the mental state required to support allegations of aiding and abetting. The parties had disputed whether the relevant standard was acting with the “purpose” of furthering the forced labor at issue, or whether the standard was merely action with “knowledge” that conduct might facilitate forced labor.[19] The Ninth Circuit did not resolve this dispute. Claiming that it was applying the stricter “purpose” standard, the court found that the defendants were alleged to have acted “to support child slavery.”[20]

A second decision — this time from the Delaware Chancery Court — links ATS liability and CSR programs even more explicitly than did the Nestle decision. In Louisiana Municipal Police Employees’ Retirement

System v. Hershey Co., the plaintiff sought access to Hershey's books and records under Section 220 of Delaware's Corporate Code[21] to investigate alleged "wrongdoing or mismanagement" tied to Hershey's alleged support of child labor on cocoa farms.[22] The Chancery Court denied Hershey's motion to dismiss, citing the Ninth Circuit's decision to reverse the district court's decision in the Nestle case.[23] Opining on Hershey's alleged mens rea, the Chancery Court expressly tied Hershey's CSR programs to alleged knowledge of child labor: "I think you can draw the inference of knowledge from [petitioner's] cocoa sustainability efforts, which include its eight 'on-the-ground programs' through which [petitioner] has contact with farmers in West Africa and high-level visits, such as visits by [petitioner's] chairman." [24]

Transnational supply chain liability theories are also being used to launch consumer fraud suits. Consumer class actions challenging representations made on food labeling has been a rising trend over the past decade, such as whether food is "natural" or fails to disclose the presence of certain ingredients, such as foods grown from genetically modified seeds. Plaintiffs' lawyers have applied these theories in the human rights context, contending that food manufacturers are making misrepresentations to consumers by failing to inform them that food products are made or harvested under poor working conditions. For example, in *Sud v. Costco Wholesale Corp.*, a class of California consumers sued Costco and CP Foods alleging that Costco knowingly sold Thai prawns that had been caught by boats manned by slave labor.[25]

The risks posed by this new breed of litigation will only be compounded by developing supply chain disclosure laws. For example, in 2012, California's Transparency in Supply Chain Act took effect, which effectively requires midsize and large companies to disclose their efforts to eradicate human slavery and human trafficking from their supply chains.[26] The law requires companies to disclose, among other things, whether they verify if their supply chain implicates these human rights abuses, whether they audit their suppliers and whether they require certifications from suppliers that the products do not implicate human rights abuses.[27] The U.K. also has enacted a similar supply-chain-disclosure law.[28] These disclosures are likely to be one of the key weapons used by plaintiffs' attorneys as they launch their transnational supply chain lawsuits. Indeed, the plaintiffs in Hershey expressly referenced the California law as a basis for their Section 220 document request.[29]

### **Likely Affects on Corporate Social Responsibility Programs and Disclosures**

These recent developments undoubtedly will prompt renewed analyses of companies' CSR programs. Companies will have to assess how they run these programs, who they send to sourcing countries and how they comply with the developing disclosure laws. ATS litigation is a costly proposition. Much the same can be said of consumer class action litigation in general. In the transnational context, this litigation tends to last much longer than normal civil litigation, and the cross-border discovery required to test the plaintiffs' assertions typically involves hiring local counsel and litigating separate discovery proceedings in foreign jurisdictions.[30] Moreover, these countable costs do not incorporate the possible reputational costs that come from the negative publicity generated in attempts to link defendants to alleged human rights violations, such as child slavery. Exacerbating this cost calculus is that the defendants in these cases are often far removed from the alleged actions that harmed the plaintiffs — meaning that those companies often have a highly attenuated ability, if any, through their own conduct eliminate the possibility that they might purchase commodities or other inputs touching alleged human rights violations.

The perverse incentives these legal theories create are plain. If CSR programs and social engagement in global human rights challenges can be used as evidence of aiding and abetting alleged human rights

abuses carried out by unaffiliated foreign actors, they will increase litigation risk profiles and may no longer be seen as a “win-win” proposition that allows companies to make these investments in the first place. U.S. companies may rationally respond by scaling back, or eliminating CSR programs altogether.[31] This outcome does not help anyone. Likewise, if corporate disclosures about supply chain practices are used as roadmaps for lawsuits or as the basis of consumer fraud suits, companies could lose many of the incentives they would otherwise have to work directly with their suppliers on these issues.

It would be unfortunate to see efforts intended to foster social progress impeded by short-sighted litigation. Nonetheless, at a minimum, it is prudent for companies with transnational supply chains to potentially adjust their internal practices and disclosures in light of this developing body of law. And observation of corporate formalities becomes even more important to ensure that foreign conduct cannot be improperly attributed to U.S. entities subjected to ATS suits. In the end, every company is different, and each transnational supply chain presents its own litigation risks. But what is clear is that the recent court decisions have exacerbated the already challenging conditions in which many companies find they must operate.

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[1] No. 15-349 (U.S.).

[2] Doe v. Nestle USA, Inc., 766 F.3d 1013, 1023–26 (9th Cir. 2014).

[3] Archie B. Carroll & Kareem M. Shabana, The Conference Bd., The Business Case For Corporate Social Responsibility 1 (2011).

[4] United Nations Global Compact, Our Mission.

[5] Global Compact Network USA, How to Join.

[6] World Cocoa Foundation, History & Mission.

[7] World Cocoa Foundation, Reducing Child Labor Is a Shared Responsibility 2 (July 30, 2015).

[8] Ibid.

[9] World Cocoa Foundation, WCF ECHOES.

[10] Shell, Shell in Nigeria: Improving Lives in the Niger Delta (Apr. 2012).

[11] Wendy J. Werner, Corporate Social Responsibility Initiatives Addressing Social Exclusion in Bangladesh, 27 *Journal of Health, Population & Nutrition* 545 (2009).

[12] Better Cotton Initiative, 2014 Annual Report 6 (2014).

[13] 1st American Class Action Compl. for Injunctive Relief & Damages, *Doe v. Nestle SA*, No. 05-cv-5133(SVW) (C.D. Cal. July 10, 2009).

[14] *Id.* 32. Plaintiffs also claimed that the cocoa industry blocked legislation that would have addressed the problem, but in reality that proposed legislation would merely have provided the Food and Drug Administration with \$250,000 to fund development of an FDA label certifying chocolate as “slave free.” H. Amend. 142 H.R. 2330 (2001) (in 147 Cong. Rec. H3781 (daily ed. June 28, 2001)).

[15] *Id.* 34.

[16] *Id.* 38.

[17] *Doe v. Nestle SA* 748 F. Supp. 2d 1057, 1145 (C.D. Cal. 2010).

[18] *Doe*, 766 F.3d at 1016.

[19] *Id.* at 1023.

[20] *Id.* at 1024.

[21] 8 Del. C. § 220.

[22] See Master’s Report at 1, *La. Mun. Police Emps.’ Ret. Sys. v. Hershey Co.*, No. 7996-ML (Del. Ch. Nov. 8, 2013).

[23] Oral Ruling, Hr’g Tr. 76:24, *La. Mun. Police Emps.’ Ret. Sys. v. Hershey Co.*, No. 7996-ML (Del. Ch. March 18, 2014).

[24] *Id.* at 77:15-20.

[25] No. 15-cv-3783 (N.D. Cal.).

[26] Cal. Civ. Code § 1714.43.

[27] *Ibid.*

[28] U.K. Modern Slavery Act of 2015, Part 6. The U.K. law gives companies an choice, they can make a statement (1) of the steps the organization has taken with respect to the company’s business and with respect to all supply chains to ensure that slavery and human trafficking is not taking place or (2) a statement that the organization has taken no such steps.

[29] See Master’s Report at 7, 10, *La. Mun. Police Emps.’ Ret. Sys. v. Hershey Co.*, No. 7996-ML (Del. Ch. Nov. 8, 2013).

[30] See Br. of Product Liab. Advisory Counsel, Inc. as Amicus Curiae in Supp. of Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, 10-1491 (U.S. Feb. 3, 2012).

[31] See Staci Warden, Ctr. for Global Dev., *Joining the Fight Against Global Poverty: A Menu for Corporate Engagement 7* (2007)(if corporate philanthropy is seen not as a benefit, but rather as a risk, budgets for social benefit programs risk “downsizing” or complete elimination).

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