

In the
Supreme Court of the United States

NESTLÉ USA, INC.,

Petitioner,

v.

JOHN DOE I, ET AL.,

Respondents.

—————
CARGILL, INC.,

Petitioner,

v.

JOHN DOE I, ET AL.,

Respondents.

—————
On Writs of Certiorari to the
United States Court of Appeals for the Ninth Circuit

**BRIEF OF TONY'S CHOCOLONELY
AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENTS**

CHARITY RYERSON

COUNSEL OF RECORD

ALICIA BRUDNEY

CORPORATE ACCOUNTABILITY LAB

6214 N. GLENWOOD AVENUE

CHICAGO, IL 60660

(773) 346-5545

CHARITY@CORPACCOUNTABILITYLAB.ORG

COUNSEL FOR AMICUS CURIAE

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. COMPANIES THAT SOURCE FROM CÔTE D’IVOIRE AND COMPLY WITH INTERNATIONAL AND DOMESTIC LAW HAVE NO REASON TO FEAR LIABILITY UNDER THE ALIEN TORT STATUTE	3
A. Effective Due Diligence and Farmer Interventions Reduce Liability Exposure ...	3
B. Respondents’ Aiding and Abetting Allegations Are Clearly Distinct from an Effective Due Diligence Program or Interventions to Reduce Child Labor.....	5
C. Tony’s Has Developed an Effective Sourcing Model That Is Replicable and Resists a Cocoa System Built on Modern Slavery and Illegal Child Labor	6
II. THE ALIEN TORT STATUTE FILLS A GAP IN U.S. LAW AND LEVELS THE PLAYING FIELD FOR TRANSNATIONAL COMPANIES, INCLUDING THOSE WITH U.S. SUBSIDIARIES	9
A. There Is an Emerging Global Consensus in Favor of Binding Law for Corporate Liability on Both the National and Transnational Levels.....	9

TABLE OF CONTENTS – Continued

	Page
B. The Alien Tort Statute Fills a Gap in U.S. Law, Without Which the United States Would Become a Safe Harbor for Human Rights Abusers	12
C. As Cocoa Companies Will Remain in the West African Market Regardless of the Outcome of this Case, Companies Operating in the Region Should Be Held to the Same Standards	14
CONCLUSION.....	15

TABLE OF AUTHORITIES

Page

CASES

<i>Chandler v. Cape PLC</i> , [2012] EWCA Civ 525	11
<i>Kiobel v. Royal Dutch Petroleum Co.</i> , 569 U.S. 108 (2013).....	3, 13
<i>Nevsun Resources Ltd. v. Araya</i> , [2020] SCC 5	11
<i>Vedanta Res. PLC and another (Appellants) v. Lungowe and Others (Respondents)</i> , [2019] UKSC 20	11

INTERNATIONAL LAW

French Duty of Vigilance Law and the UK Modern Slavery Act of 2015.....	10
French Law on the Duty of Vigilance of Parent and Instructing Companies, Law No. 2017-399 (Mar. 27, 2017)	10
Modern Slavery Act 2015, c. 30 (UK).....	10
Modern Slavery Act 2018 (Cth) (Austl.)	10
Rechtbank Den Haag 1 mei 2019, ECLI:NL:RBDHA:2019:4233.....	11
Rechtbank Den Haag 30 januari 2013, ECLI:NL:RBDHA:2013:BY9854.....	11

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

<p>ABN AMRO et al., <i>Support for EU Framework on Mandatory Human Rights and Environmental Due Diligence</i> (Sept. 2, 2020), available at https://media.business-humanrights.org/media/documents/EU_Business_Statement_Mandatory_Due_Diligence_02092020.pdf.....</p>	12
<p>Antonie Fountain & Friedel Huetz-Adams, <i>Cocoa Barometer 2018</i> (2018), available at https://www.voicenetwork.eu/wp-content/uploads/2019/08/Cocoaborometer2018_web4.pdf.....</p>	7
<p>Bureau of Int’l Lab. Affairs, <i>Child Labor in the Production of Cocoa</i>, https://www.dol.gov/agencies/ilab/our-work/child-forced-labor-trafficking/child-labor-cocoa.....</p>	14
<p>Elke de Buhr & Elise Gordon, Tulane Univ. & Walk Free Found., <i>Bitter Sweets: Prevalence of Forced Labour & Child Labour in the Cocoa Sectors of Cote d’Ivoire & Ghana</i> (2018), available at https://cocoainitiative.org/wp-content/uploads/2018/10/Cocoa-Report_181004_V15-FNL_digital.pdf.....</p>	13
<p>EU. Comm. on Legal Affairs, <i>Draft Report with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability</i>, 2020/2129 (INL) (Sept. 11, 2020),</p>	

TABLE OF AUTHORITIES – Continued

	Page
https://www.europarl.europa.eu/doceo/ document/JURI-PR-657191_EN.pdf	10
Federal Ministry for Economic Cooperation and Development & Federal Ministry of Labour and Social Affairs Joint Press Release, Federal Ministers Heil and Müller: <i>Now the Coalition Agreement Will Come into Play for a Supply Chain Law. The Aim is Finalisation Before the End of this Legislative Term</i> (July 14, 2020), https://tinyurl.com/y6pq4slq	10
Gov't. of the Netherlands, <i>Evaluation and Revision of Policy on Responsible Business Conduct (RBC)</i> , https: //www.government.nl/topics/responsible- business-conduct-rbc/evaluation-and- renewal-of-rbc-policy	11
Int'l Labour Org. et al., <i>Ending Child Labour, Forced Labour and Human Trafficking in Global Supply Chains</i> (2019), available at http://mneguidelines.oecd.org/Ending- child-labour-forced-labour-and-human- trafficking-in-global-supply-chains.pdf	4
John Ruggie, <i>Protect, Respect and Remedy: A Framework for Business and Human Rights</i> , U.N. Doc. A/HRC/8/5 (April 7, 2008), available at www.reports-and- materials.org/Ruggie-report-7-Apr-2008. pdf	4

TABLE OF AUTHORITIES – Continued

	Page
National Opinion Research Center (NORC), <i>NORC Final Report: Assessing Progress in Reducing Child Labor in Cocoa Production in Cocoa Growing Areas of Côte d'Ivoire and Ghana</i> (Oct. 2020), Available at https://www.norc.org/PDFs/Cocoa%20Report/NORC%202020%20Cocoa%20Report_English.pdf	12
Nestlé, <i>Cocoa Plan, Tackling Child Labour: 2017 Report</i> (2017), available at https://www.nestlecocoaplanreport.com/sites/default/files/2017-10/NestleCocoaPlanReport2017_EN_0.pdf	8
Nicolas Bueno & Claire Bright, <i>Implementing Human Rights Due Diligence Through Corporate Civil Liability</i> , 69 INT'L COMP. L.Q. 789 (2020)	10
OECD, <i>OECD Guidelines for Multinational Enterprises</i> (2011 ed.), available at http://www.oecd.org/daf/inv/mne/48004323.pdf ..	4
Tony's Chocolonely et al., <i>Een wet zorgplicht kinderarbeid, pakt kinderarbeid serieus aan</i> , available at https://tinyurl.com/y5mlp96g	12
Tony's Chocolonely, <i>Tony's Open Chain</i> , https://www.tonysopenchain.com	9

TABLE OF AUTHORITIES – Continued

	Page
Tony’s Chocolonely, Corporate Statement on CLMRS, https://tonyschocolonely.com/us/en/clmrs	7
Tony’s Chocolonely, <i>Tony’s Impact</i> , https://tonyschocolonely.com/us/en/our-mission/tonys-impact	2, 6
U.N. Office of the High Comm’r for Human Rights, <i>Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework</i> , U.N. Doc. HR/PUB/11/04 (2011)	4



INTEREST OF THE AMICUS CURIAE¹

Tony's Factory BV (Tony's), which sells chocolate bars under the name Tony's Chocolonely, is a Dutch chocolate company that sells chocolate products in twenty-two countries, including in the United States. Tony's has a wholly owned U.S. subsidiary, Tony's Chocolonely Inc., incorporated in New York. Like Petitioners, Tony's sources cocoa, the key ingredient in chocolate, from Côte d'Ivoire and Ghana. Tony's supply chain is comparable to Petitioners' in evaluating, purchasing, transporting, storing, and manufacturing, and Tony's competes with Petitioners head-to-head in the mass chocolate market.

Tony's believes that companies that knowingly aid and abet forced child labor should be liable for their complicity. To avoid participating in a broken system, Tony's has created an effective program to address and overcome farmer poverty and exploitation. Tony's uses distinct methods, tools, and results to inspire others to act. Tony's is both a producer of high-quality chocolate and a leader in raising global awareness about the inequities caused by current practices in the cocoa industry.

¹ This brief is filed with the consent of all parties. Respondents filed with the Court letters providing blanket consent. Petitioner Nestlé USA, Inc. also filed with the Court letters providing blanket consent. Cargill, Inc. provided written consent. No counsel for any party authored this brief in whole or in part, nor did any party or person make a monetary contribution to the brief.



SUMMARY OF ARGUMENT

Companies that comply with international and domestic law have nothing to fear from corporate and aiding and abetting liability under the Alien Tort Statute (ATS), even if they source from countries with poor human rights records. One effective way for a company to limit its liability exposure is to conduct meaningful due diligence and farmer interventions, like those that Tony's carries out in Côte d'Ivoire and Ghana. Programs that reduce forced child labor bear little resemblance to Plaintiffs' aiding and abetting allegations.

As Tony's has demonstrated, it is possible to source cocoa from West Africa and not fear liability under the ATS. Tony's has created a system that combines, among other strategies, transparency, higher prices for cocoa beans, strong farmers, long-term commitments, and interventions to support quality and productivity—all elements of a legitimate due diligence system that allows it to source cocoa responsibly. *See* Tony's Chocolonely, *Tony's Impact*, <https://tonyschocolonely.com/us/en/our-mission/tonys-impact> (last visited Oct. 17, 2020). Tony's has established a robust and replicable system for sourcing cocoa that does not rely on farmer poverty and forced child labor.

There is a growing global consensus in favor of binding law around corporate liability for human rights violations. More and more countries are passing mandatory human rights due diligence legislation and an increasing number of courts are allowing plaintiffs alleging extraterritorial supply chain harms to proceed.

Rather than putting U.S. companies at a comparative disadvantage, the Alien Tort Statute fills a gap in the law that would otherwise make the United States a safe harbor for human rights abusers. *See Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 127 (2013) (Breyer, J., concurring).

Without corporate and aiding and abetting liability under the ATS, companies that comply with international human rights norms will be forced to compete on an uneven playing field. Because West Africa is a major producer of cocoa, companies like Tony's and Petitioners will continue to source from the region regardless of this case's outcome, leaving those companies that wish to follow the law at a disadvantage to those that do not.



ARGUMENT

I. COMPANIES THAT SOURCE FROM CÔTE D'IVOIRE AND COMPLY WITH INTERNATIONAL AND DOMESTIC LAW HAVE NO REASON TO FEAR LIABILITY UNDER THE ALIEN TORT STATUTE.

A. Effective Due Diligence and Farmer Interventions Reduce Liability Exposure.

Petitioners and supporting amici argue that corporate and aiding and abetting liability under the ATS will deter investment, prevent positive interventions in cocoa growing communities, and unfairly disadvantage American businesses. Nestlé Br. 33; Coca Cola Amicus Br. 5; WCF et al. Amicus Br. 17-22. But companies

that comply with international and domestic law have nothing to fear from liability under the ATS.

Due diligence refers to “the steps a company must take to become aware of, prevent and address adverse human rights impacts.” John Ruggie (Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises), *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶ 56, U.N. Doc. A/HRC/8/5 (April 7, 2008), available at www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf. Meaningful due diligence is preventive; it aims “to avoid causing, contributing to, or being linked to, through business relations, child labour, forced labour and human trafficking, and to seek to prevent these risks from materializing.” Int’l Labour Org. et al., *Ending Child Labour, Forced Labour and Human Trafficking in Global Supply Chains* 59 (2019), available at <http://mneguidelines.oecd.org/Ending-child-labour-forced-labour-and-human-trafficking-in-global-supply-chains.pdf>.

Tony’s has created an effective due diligence system, *see infra* Section I.B, which complies with the Organization for Economic Cooperation and Development’s (OECD) Guidelines for Multinational Enterprises and other international standards, including the United Nations Guiding Principles on Business and Human Rights (UNGPs). OECD, *OECD Guidelines for Multinational Enterprises* (2011 ed.), available at <http://www.oecd.org/daf/inv/mne/48004323.pdf>; U.N. Office of the High Comm’r for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. HR/PUB/11/04 (2011). Tony’s

has adopted these standards into its business model and incorporated them into the company's due diligence system. The steps Tony's has taken to ensure compliance have resulted in verifiable improvements in poverty and child labor in the cocoa farming communities from which Tony's sources. *See infra* Section I.B.

B. Respondents' Aiding and Abetting Allegations Are Clearly Distinct from an Effective Due Diligence Program or Interventions to Reduce Child Labor.

Petitioner Nestlé USA argues that Respondents' position would mean that "any company doing business from the United States with Ivorian cocoa farmers is subject to an ATS suit because every such company will make financial decisions regarding and engage in some supervision of their Ivorian counterparties." Nestlé Br. 33. This assumes that either all companies doing business in Côte d'Ivoire violate international and domestic law or that there is no difference between aiding and abetting forced child labor and legitimate due diligence programs. Both assumptions are false.

According to Respondents, "Petitioner maintains its influence on this slavery-based system in part by providing plantation owners with (1) financial support, including advance payments and personal spending money to maintain the plantations' loyalty as exclusive suppliers; (2) farming supplies, including fertilizers, tools and equipment; and (3) training and capacity building." Resp'ts' Br. 5 (citing JA 315-16, 318-20).

A robust and effective due diligence program may include certain of these activities for the purpose of preventing and remediating harm. But activities that

are conducted to maintain control over farming communities and obfuscate or prolong the forced labor system are not due diligence and therefore should not protect companies from liability. Petitioners blur this distinction and imply that any intervention could lead to liability.

C. Tony's Has Developed an Effective Sourcing Model That Is Replicable and Resists a Cocoa System Built on Modern Slavery and Illegal Child Labor.

Tony's has shown that with a modest investment in time, technology, and direct payments to farmers, it is possible to establish a robust system for sourcing cocoa without exploiting communities.

Tony's uses five interrelated Sourcing Principles, which, applied together, lead to sustainable change in cocoa supply chains. These five principles are: traceable cocoa beans, higher prices, strong farmers, long-term commitments, and quality and productivity. *See Tony's Impact, supra*. Tony's believes that each of these must be implemented and carried out consistently across the supply chain to eliminate the use of forced labor.

Traceable beans: While most chocolate companies sourcing from West Africa can, at best, trace only part of their supply chains, Tony's knows and discloses the source of every bean. Tony's Beantracker ensures that the company knows when its beans are being transported and from which cooperative. By trading directly—and on equal footing—with cocoa farmers and cooperatives, Tony's also knows what the social and environmental conditions are on the farms from which its beans are sourced. Additionally, each year, Price-waterhouseCoopers (PwC) does an independent audit

that examines the traceability of Tony's beans and the social conditions within coops, including identified abuse and remediated efforts.

This system is backed by technology and constant monitoring. Tony's uses GPS technology to map farms and has rolled out an effective Child Labour Monitoring and Remediation System (CLMRS) that covers all cooperatives that supply its beans. The CLMRS helps coops to identify instances of illegal child labor, find alternative solutions, prevent future instances of illegal child labor, and raise awareness around the topic. *CLMRS*, Tony's Chocolonely, <https://tonyschocolonely.com/us/en/clmrs> (last visited Oct. 18, 2020). The system has a proven record of identifying abuses and, when found, taking remedial action. Antonie Fountain & Friedel Huetz-Adams, *Cocoa Barometer 2018*, at 15 (2018), available at https://www.voicenetwerk.eu/wp-content/uploads/2019/08/Cocoaborometer2018_web4.pdf. While Petitioner Nestlé also uses this system, it covers only a small percentage of its supplier farms. This is part of the problem. Although companies like Petitioners engage in some interventions, they fail to implement them at scale, with sufficient transparency, and in combination with the other necessary principles.²

² Amici WCF et. al. state that "labor monitoring and remediation systems implemented by petitioner Nestlé have reduced hazardous child labor by about 50 percent among identified child laborers." WCF et al. Amicus Br. 27. While this could be read to indicate a 50 percent reduction in child laborers on farms producing for Nestlé overall, this only pertains to the percentage of Nestlé farms that have implemented the CLMRS system. As of 2017, this applied to "around a third of Nestlé's total global cocoa supply." Nestlé Cocoa Plan, *Tackling Child Labour: 2017 Report* 10 (2017),

Higher prices: For the most recent cocoa season (2019/2020), Tony's paid 60% (\$825/ton) above the farmgate price in Côte d'Ivoire. This amount, known as the Living Income Reference Price, is also higher than Fair Trade premiums. This higher price enables cocoa farmers to earn a living income and operate their farms without unpaid forced labor.

Strong farmers: For its entire cocoa supply chain, Tony's works with cocoa cooperatives that share its vision. It supports them in professionalizing, creating leadership and initiative from within, and becoming strong, independent actors in the cocoa system. Collectively, farmers have a platform, stand strong, and are able to represent themselves in the context of coops, communities, politics, and international markets. Farmers are empowered to change the structural inequality in the value chain.

The long-term: Tony's ensures that farmers and cooperatives have long-term contracts that last at least five years. This commitment is one-sided, which means that the coops can decide to terminate the contract earlier. By committing to long-term contracts with all supplying cooperatives, Tony's gives the farmers and cooperatives income security. The multi-year horizon enables them to make better choices for investments and recouping costs. This allows farmers to focus on planning beyond a single cocoa season. Both infrastructure changes and transformations in communities require long-term and reliable partnerships to be successful.

Quality and productivity: Tony's provides every farmer in its supply chain with agricultural knowledge and skills related to growing cocoa and other crops. Professional farming techniques, including replanting and rehabilitating cocoa and shade trees, leads to better quality and more cocoa and food crops from the existing plot of land. This agricultural knowledge empowers farmers to drive their own development and future, while simultaneously safe-guarding the cocoa farms.

The steps described above constitute an effective system for sourcing cocoa, one that other chocolate companies could adopt. *See Tony's Open Chain*, <https://www.tonysopenchain.com>. Tony's believes that this system is scalable to meet all sourcing needs from a portion of a producing area, country-wide production zone, or the entire cocoa producing region. By putting in the time and effort to create a sustainable business model, Tony's has demonstrated that it is possible to source cocoa from West Africa in a way that is rights-promoting and complies with international human rights norms.

II. THE ALIEN TORT STATUTE FILLS A GAP IN U.S. LAW AND LEVELS THE PLAYING FIELD FOR TRANSNATIONAL COMPANIES, INCLUDING THOSE WITH U.S. SUBSIDIARIES.

A. There Is an Emerging Global Consensus in Favor of Binding Law for Corporate Liability on Both the National and Transnational Levels.

Globally, foreign courts and governments increasingly favor legal accountability for corporations that commit and are complicit in extraterritorial human rights abuses. On the transnational level, the European

Union is currently drafting EU-wide mandatory human rights due diligence legislation that would apply to all companies incorporated in the EU and all companies that sell goods or services within the EU. Comm. on Legal Affairs, *Draft Report with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability*, 2020/2129 (INL) (Sept. 11, 2020), https://www.europarl.europa.eu/doceo/document/JURI-PR-657191_EN.pdf.

EU-level legislation would complement existing state-level legislation, including the French Duty of Vigilance Law and the UK Modern Slavery Act of 2015.³ French Law on the Duty of Vigilance of Parent and Instructing Companies, Law No. 2017-399 (Mar. 27, 2017); Modern Slavery Act 2015, c. 30 (UK). Other countries, including Germany and Switzerland, are discussing legislation to address corporate liability for supply chain abuses. Federal Ministry for Economic Cooperation and Development & Federal Ministry of Labour and Social Affairs Joint Press Release, Federal Ministers Heil and Müller: *Now the Coalition Agreement Will Come into Play for a Supply Chain Law. The Aim is Finalisation Before the End of this Legislative Term* (July 14, 2020), <https://tinyurl.com/y6ppq4slq>; Nicolas Bueno & Claire Bright, *Implementing Human Rights Due Diligence Through Corporate Civil Liability*, 69 INT'L COMP. L.Q. 789, 804 (2020).

In the Netherlands, where Tony's is headquartered, there is already civil liability for extraterritorial corporate abuse by Dutch companies. *See, e.g.*, Recht-bank Den Haag 1 mei 2019, ECLI:NL:RBDHA:2019:

³ Outside of Europe, other countries have also passed similar acts. *See, e.g.*, *Modern Slavery Act 2018* (Cth) (Austl.).

4233; Rechtbank Den Haag 30 januari 2013, ECLI:NL:RBDHA:2013:BY9854. Additionally, the Netherlands has passed a Child Labor Due Diligence Law, although it has not yet entered into effect. Gov't. of the Netherlands, *Evaluation and Revision of Policy on Responsible Business Conduct (RBC)*, <https://www.government.nl/topics/responsible-business-conduct-rbc/evaluation-and-renewal-of-rbc-policy> (last visited Oct. 17, 2020). Failure to comply with this law can lead to substantial administrative fines and repeated non-compliance can lead to criminal sanctions. Bueno & Bright, *supra*, at 800-01.

In other jurisdictions, courts are allowing plaintiffs alleging extraterritorial supply chain harms to proceed under ordinary tort theories and international law. For example, the Canadian Supreme Court recently held that international norms can be applied under Canadian law, allowing a case to move forward on behalf of three Eritreans against Nevsun Resources, a mining company, for human rights abuses that occurred in Eritrea. *Nevsun Resources Ltd. v. Araya* [2020] SCC 5. Similarly, the U.K. Supreme Court recently established frameworks for parent company liability for human rights violations abroad. *See Vedanta Res. PLC and another (Appellants) v. Lungowe and Others (Respondents)* [2019] UKSC 20; *Chandler v. Cape PLC* [2012] EWCA Civ 525.

This recent shift towards mandatory due diligence laws, parent company liability, and extraterritorial application of tort law is emblematic of a desire by states—and the many companies that support due

diligence laws⁴—to regulate transnational business conduct as it relates to human rights.

B. The Alien Tort Statute Fills a Gap in U.S. Law, Without Which the United States Would Become a Safe Harbor for Human Rights Abusers.

Petitioner Cargill argues that ATS liability would “discourage investment in the United States. Foreign companies might seek to restructure or to move operations out of this country in order to avoid the burden and risk of ATS litigation.” Cargill Br. 48; *see also* Nestlé Br. 33. To the contrary, the ATS fills a hole in U.S. law that would otherwise allow the United States to become a safe harbor for human rights abusers.

As has been repeatedly shown, voluntary initiatives like the Harkin-Engel Protocol are insufficient to stop business-related human rights abuse. *See generally* NORC, *NORC Final Report: Assessing Progress in Reducing Child Labor in Cocoa Production in Cocoa Growing Areas of Côte d’Ivoire and Ghana* (Oct. 2020). For twenty years, chocolate companies like Petitioners have promised to change their behavior, yet forced child labor remains an endemic problem in the industry. *See generally* Elke de Buhr & Elise

⁴ Nestlé has supported an EU-wide mandatory human rights due diligence law. ABN AMRO et al., *Support for EU Framework on Mandatory Human Rights and Environmental Due Diligence* (Sept. 2, 2020), available at https://media.business-humanrights.org/media/documents/EU_Business_Statement_Mandatory_Due_Diligence_02092020.pdf. Cargill has also been publicly supportive of the Dutch Child Labor Due Diligence Act. Tony’s Chocolonely et al., *Een wet zorgplicht kinderarbeid, pakt kinderarbeid serieus aan*, available at <https://tinyurl.com/y5mlp96g>.

Gordon, Tulane Univ. & Walk Free Found., *Bitter Sweets: Prevalence of Forced Labour & Child Labour in the Cocoa Sectors of Cote d'Ivoire & Ghana* 10 (2018), available at https://cocoainitiative.org/wp-content/uploads/2018/10/Cocoa-Report_181004_V15-FNL_digital.pdf. Legal deterrents like the ATS are necessary to stop companies from exploiting communities and profiting from a system of forced child labor.

Moreover, as legislatures and courts establish more expansive liability outside the United States, overturning the Ninth Circuit's decision would make the United States not just an outlier, but a refuge for unethical companies. *See Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 127 (2013) (Breyer, J., concurring). Yet, there is "a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind." *Id.* Instead of being competitively disadvantaged, *see Nestlé Br. 33*, if the Ninth Circuit's decision is overturned, companies would flock to the United States for exactly the wrong reasons—because they could avoid liability for actions undertaken anywhere else in the world.

This could create perverse incentives for corporate conduct. Because both Tony's and Petitioner Nestlé have European parent companies and a U.S. subsidiary, both already face the prospect of liability for extraterritorial conduct in their parent company jurisdictions. Tony's parent company could face civil liability in the Netherlands if it aided and abetted extraterritorial forced child labor in West Africa. *See supra* Section II.A. Yet without liability under the ATS, its U.S. subsidiary may not. If Petitioners' succeed, a European company with a U.S. subsidiary would have an incentive to route

all illegal conduct supporting child slavery and other egregious human rights violations through their U.S. subsidiaries to avoid legal consequences.

C. As Cocoa Companies Will Remain in the West African Market Regardless of the Outcome of this Case, Companies Operating in the Region Should Be Held to the Same Standards.

Like Petitioners, Tony's is reliant on the Ivorian farms that provide the key ingredient in its products. Together, Côte d'Ivoire and Ghana account for two-thirds of the world's cocoa production. Bureau of Int'l Lab. Affairs, *Child Labor in the Production of Cocoa*, <https://www.dol.gov/agencies/ilab/our-work/child-forced-labor-trafficking/child-labor-cocoa> (last visited Oct. 17, 2020). Given that no other region could meet the global demand for cocoa, companies will continue to invest in the region regardless of the outcome of this case. The question, though, is how such investment will occur, and whether it will undermine or promote respect for human rights.

Without corporate liability in the United States for aiding and abetting violations of customary international law, companies will have little incentive to invest in a way that promotes human rights. This will disadvantage companies like Tony's that comply with both domestic and international law. Liability helps to avoid a corporate race to the bottom, in which U.S.-based companies comply with fewer and fewer human rights norms, leaving companies that follow the law at a disadvantage. By filling an important gap, the ATS deters unscrupulous businesses from profiting from illegal labor and benefits companies that protect

the rights of the workers and farmers in their supply chains.



CONCLUSION

For these reasons, we respectfully request that the Court affirm the Ninth Circuit's decision and remand the case for further proceedings.

Respectfully submitted,

CHARITY RYERSON

COUNSEL OF RECORD

ALICIA BRUDNEY

CORPORATE ACCOUNTABILITY LAB

6214 N. GLENWOOD AVE.

CHICAGO, IL 60660

COUNSEL FOR AMICUS CURIAE

OCTOBER 21, 2020