

# CHILDREN, CHOCOLATE, AND PROFITS: A POLICY-ORIENTED ANALYSIS OF CHILD LABOR AND THE CHOCOLATE INDUSTRY GIANTS

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## *Introduction*

Child Labor. It is often defined as “work that deprives children of their childhood, their potential and their dignity, and that is harmful to physical and mental development.”<sup>1</sup> The visual picture the term brings to mind – children working long hours in hazardous and strenuous conditions - assaults the conscience of individuals across cultures and civilizations. The existence of child labor within the cocoa industry continues despite promises and efforts to bring about its end. The leading chocolate producers<sup>2</sup> claim progress, yet this paper will show that none of these companies are able to verify that their cocoa supply chains are child labor-free. The average consumer would be appalled if they thought their purchase of chocolate contributed to the plight of child laborers, but they have no guarantee that this is not the case. While some chocolate companies meet minimal fair-trade standards, none of the chocolate industry giants are able to label their chocolates as fair-trade. Major grocery chains often do not even carry fair-trade chocolate.<sup>3</sup> The consumer would need to give up purchasing some of

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<sup>1</sup> *What is Child Labor*, INT'L LAB. ORG. [ILO], <https://www.ilo.org/ipecc/facts/lang--en/index.htm> (last visited Feb. 23, 2020).

<sup>2</sup> Press Release, Cocoa and Chocolate Market 2019 Global Analysis, Opportunities and Forecast to 2024, MARKET WATCH (Feb. 25, 2019), <https://www.marketwatch.com/press-release/cocoa-chocolate-market-2019-global-analysis-opportunities-and-forecast-to-2024-2019-02-25>. Leading chocolate producers are Nestle SA, Mars and Hershey. Elliot J. Schrage & Anthony P. Ewing, *The Cocoa Industry and Child Labour*, 18 J. CORP. CITIZENSHIP 99, 101 (Summer 2005).

<sup>3</sup> IBISWORLD, SUPERMARKETS AND GROCERY STORES IN FLORIDA-MARKET RESEARCH REPORT, (Jan. 2020), <https://www.ibisworld.com/united-states/market-research-reports/supermarkets-grocery-stores-industry/>. A recent visit to a local

the most popular chocolates, such as: Snickers, M&M's, Twix, Dove, 3 Musketeers, Milky Way (Mars), Butterfinger, Nestle Crunch, Toll House chocolate chips (Nestle), Reese's, Kit Kat, Almond Joy, Mounds, Rolo, Heath, Brookside, Whoppers, Hershey's Kisses, syrup, cocoa and chocolate bars, Cadbury (Hersheys and Cadbury in the U.S.).

West Africa produces 70% of the world's cocoa each year, with 60% of this cocoa produced in Ghana and Côte d'Ivoire annually.<sup>4</sup> Twenty years ago, media reports and documentaries exposed the existence of child labor in the cocoa industry.<sup>5</sup> Reports of children between 9 and 12 years of age engaged in forced labor emerged with descriptions of abysmal conditions: strenuous work beginning at sunrise and ending at nightfall, inadequate food and medical care, beatings, and non-existent educational opportunities.<sup>6</sup> Subsequent reports stated that "children as young as six . . . were forced to work 80-100 hour weeks without pay, suffered from malnutrition, and were subject to beatings and other abuse."<sup>7</sup>

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Publix Markets found no fair-trade chocolate in the candy aisle. Publix is one of the largest grocery chains in the United States.

<sup>4</sup> E. de Burh & E. Gordon, *Bitter Sweets: Prevalence of Forced Labour and Child Labour in the Cocoa Sectors of Côte d'Ivoire and Ghana*, TULANE U. & WALK FREE FOUNDATION 11 (2018) [https://cocoainitiative.org/wp-content/uploads/2018/10/Cocoa-Report\\_181004\\_V15-FNL\\_digital.pdf](https://cocoainitiative.org/wp-content/uploads/2018/10/Cocoa-Report_181004_V15-FNL_digital.pdf) [hereinafter Tulane Report 2018].

<sup>5</sup> Sudarsan Raghavan & Sumana Chatterjee, *A Taste of Slavery*, KNIGHT RIDDER NEWSPAPERS (June 24, 2001), <http://vision.ucsd.edu/~kbranson/stopchocolateslavery/newsandinformation.html>.

<sup>6</sup> *Id.*

<sup>7</sup> Schrage, *supra* note 2, at 100. "A child's workday typically begins at six in the morning and ends in the evening. Some of the children use chainsaws to clear the forests. Other children climb the cocoa trees to cut bean pods using a machete. These large, heavy, dangerous knives are the standard tools for children on the cocoa farms, which violates international labor laws and a UN convention on eliminating the worst forms of child labor. Once they cut the bean pods from the trees, the children pack the pods into sacks that weigh more than 100 pounds when full and drag them through the forest. Aly Diabate, a former cocoa slave, said, "Some of the bags were taller than me. It took two people to put the bag on my head. And when you didn't hurry, you were beaten...Holding a single large pod in one hand, each child has to strike the pod with a machete and pry it open with the tip of the blade to expose the cocoa beans. Every strike of the machete has the potential to slice a child's flesh. The majority of children have scars on their hands, arms, legs or shoulders from the machetes. In addition to the hazards of using machetes, children are

Chocolate producing companies at first claimed to be unaware, but the media attention and the subsequent public awareness forced these companies to acknowledge the problem.<sup>8</sup> In 2001, the chocolate industry adopted the Harkin-Engel Protocol, also referred to as the Chocolate Industry Protocol, in which it “publicly acknowledged the problem of forced child labor” with a promise to “commit significant resources to address it” and ensure that “cocoa beans and their derivative products have been grown and/or processed without any of the worst forms of child labor.”<sup>9</sup> The noble goals set forth in this voluntary, self-regulating agreement were to be attained by 2005. Twenty years have passed since the signing of the Chocolate Industry Protocol (CIP). The purpose of this paper is to determine the effectiveness of the CIP and the status of child labor in the cocoa supply chain in the years since.

### *Delimitation of the Problem*

Extreme poverty is a root cause of child labor.<sup>10</sup> Extreme poverty existed in West Africa at the time of the initial child labor reports and continues to this day.<sup>11</sup> The vast majority of cocoa produced in

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also exposed to agricultural chemicals on cocoa farms in Western Africa. Tropical regions such as Ghana and the Ivory Coast consistently deal with prolific insect populations and choose to spray the pods with large amounts of industrial chemicals. In Ghana, children as young as 10 spray the pods with these toxins without wearing protective clothing.” *Child Labor and Slavery in the Chocolate Industry*, FOOD EMPOWERMENT PROJECT, <https://foodispower.org/human-labor-slavery/slavery-chocolate/> (last visited on Feb. 17, 2020) [hereinafter *Child Labor and Slavery*].

<sup>8</sup> *Child Labor in Cocoa: What You Need to Know*, GREEN AM. MAG. <https://www.greenamerica.org/end-child-labor-cocoa-choose-fair-labor/taking-bite-out-child-labor>. See, e.g. Raghavan, *supra* note 5.

<sup>9</sup> CHOCOLATE MANUFACTURERS ASS’N AM., PROTOCOL FOR THE GROWING AND PROCESSING OF COCOA BEANS AND THEIR DERIVATIVE PRODUCTS IN A MANNER THAT COMPLIES WITH ILO CONVENTION 182 CONCERNING THE PROHIBITION AND IMMEDIATE ACTION FOR THE ELIMINATION OF THE WORST FORMS OF CHILD LABOUR, (2001) [hereinafter *Cocoa Industry Protocol*].

<sup>10</sup> Zahid Naeem, Faiza Shaukat & Zubair Ahmed, *Child Labor in Relation to Poverty*, 5 (2 Supp. 1) INT’L J. HEALTH SCI. (QASSIM) 48-49 (2011).

<sup>11</sup> Kathleen Beegle et al., *Poverty in Rising Africa*, Africa Poverty Report, WORLD BANK GROUP (2016).

West Africa comes from “small farms, where farmers and their children live on less than \$1 per day”-- well below the World Bank Poverty Level.<sup>12</sup> These economic conditions and poverty cause many children to work on family farms.<sup>13</sup> Most cocoa industry child labor occurs on these small family farms; others less fortunate are victims of child trafficking and work in the most dire conditions.<sup>14</sup>

Grants from the U.S. Department of Labor provided funding to Tulane University to research child labor in West African cocoa growing areas. This research [“Tulane Reports”] was conducted over an eleven-year period (2006-2017), and the results were published in two reports. The 2015 report found 2.12 million child laborers worked in cocoa production.<sup>15</sup> The 2018 report found 1,599,900 children between the ages of ten and seventeen in Côte d’Ivoire and Ghana working in cocoa production.<sup>16</sup> A summary of the 2018 report states:

- “More than 90 percent of working children are exposed to child labour.”<sup>17</sup>
- “More than 85 percent of working children are exposed to hazardous work.”<sup>18</sup>
- “26 percent of children in Côte d’Ivoire and 46 percent of children in Ghana working in cocoa agriculture” are under-age and working excessive hours.<sup>19</sup>

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<sup>12</sup> *Child Labor in Your Chocolate? Check Out Our Chocolate Scorecard*, GREEN AMERICA MAG. (Oct. 16, 2019), <https://www.greenamerica.org/end-child-labor-cocoa/chocolate-scorecard> [hereinafter *Chocolate Scorecard*].

<sup>13</sup> *Child Labor and Slavery*, *supra* note 7.

<sup>14</sup> Peter Whoriskey & Rachel Siegel, *Cocoa’s Child Laborers*, WASH. POST (June 5, 2019), <https://www.washingtonpost.com/graphics/2019/business/hershey-nestle-mars-chocolate-child-labor-west-africa/>.

<sup>15</sup> *Survey Research on Child Labor in West African Cocoa Growing Areas*, PAYSON CTR. INT’L DEV., TULANE U. SCH. PUB. HEALTH (July 30, 2015).

<sup>16</sup> Tulane Report 2018, *supra* note 4, at 5.

<sup>17</sup> *Id.* “Child labour” is defined as persons between five and seventeen years of age, working in the worst forms of child labour, employed below minimum age, or working in hazardous unpaid household services. *Id.* at 10.

<sup>18</sup> *Id.* at 5.

<sup>19</sup> *Id.*

The “hazardous work” includes spraying insecticides, lifting heavy loads, burning fields, using sharp tools, working long hours, and night work.<sup>20</sup> More than half of these children report injuries.<sup>21</sup> International standards call for children to perform only “light work” that does not interfere with compulsory schooling; however, primary education in these areas is unenforced and usually ends by age 13.<sup>22</sup> Another significant obstacle to education is the reality that families living on less than \$1 per day cannot afford the fees for uniforms, books, and supplies.<sup>23</sup>

The report also reiterates that “poverty is a root cause of child labour and forced labour” and that the “clear majority of workers do not earn . . . a living wage.”<sup>24</sup> Also contributing are the “unsustainable commodity prices and market concentration of distributors.”<sup>25</sup> “[A] generally low international market price for cocoa and seasonal price fluctuations as a result of changes in both the supply and demand of cocoa, put financial strain on cocoa workers already struggling with poverty.”<sup>26</sup> As cocoa workers are unable to earn a livable wage, their children become laborers on the farm.<sup>27</sup> The system of cocoa production in West Africa is complex and includes many intermediaries, typically involving small farmers, local middlemen, local exporters, international traders, and major international cocoa brands.<sup>28</sup> “Under the present system, once sold to market, it is impossible to trace exactly where the beans came from – and whether or not young children are being forced to work to produce them.”<sup>29</sup>

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<sup>20</sup> Tulane Report 2018, *supra* note 4, at 6.

<sup>21</sup> Survey, *supra* note 15, at 68.

<sup>22</sup> Schrage, *supra* note 2, at 102.

<sup>23</sup> Whoriskey, *supra* note 14.

<sup>24</sup> Tulane Report 2018, *supra* note 4, at 3.

<sup>25</sup> *The Cocoa Protocol: Success or Failure?*, INT’L LAB. RIGHTS F. (June 30, 2008) <https://laborrights.org/publications/cocoa-protocol-success-or-failure> [hereinafter *Cocoa Protocol*].

<sup>26</sup> Tulane Report 2018, *supra* note 4, at 9.

<sup>27</sup> *Id.*

<sup>28</sup> Schrage, *supra* note 2, at 101.

<sup>29</sup> Humphrey Hawksley, *Ivory Coast Cocoa Farms Child Labour: Little Change*, BBC NEWS, IVORY COAST (Nov. 10, 2011), <https://www.bbc.com/news/world-africa-15681986>.

*Conflicting Claims*

The international cocoa industry, the International Labour Organization, the governments of Côte d'Ivoire and Ghana, and the United States Department of Labor have collaborated on programs and projects to address child labor in the cocoa supply chain. The participation of Côte d'Ivoire and Ghana does not include direct funding, hindering government efforts due to the lack of resources.<sup>30</sup>

*Governments*

The Tulane Reports document significant factors within Côte d'Ivoire and Ghana at the time of research. Severe political instability existed in Côte d'Ivoire, and both countries experienced increases in population and in cocoa production.<sup>31</sup> Poverty is significant in both countries: in Ghana, over 23% of the population lives at or below the national poverty line<sup>32</sup> and Côte d'Ivoire has over 46%.<sup>33</sup>

The United States Department of Labor cited a “significant advancement in efforts to eliminate the worst forms of child labor” in Côte d'Ivoire and a “moderate advancement” in Ghana in 2018.<sup>34</sup> Both countries developed national plans in this effort.<sup>35</sup> Significant improvements in access to education were also reported for both countries, although opportunities were still limited and children vulnerable

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<sup>30</sup> Tulane Report 2018, *supra* note 4, at 10.

<sup>31</sup> *Id.*

<sup>32</sup> *Poverty and Equity Brief, Sub-Saharan Africa, Ghana*. WORLD BANK (Apr. 2020). The national poverty line is defined by the World Bank as when “people don’t have enough to meet their basic needs.” *What are Poverty Lines*, WORLD BANK (Apr. 14, 2017), <https://www.worldbank.org/en/news/video/2017/04/14/what-are-poverty-lines>.

<sup>33</sup> *Poverty and Equity Brief, Sub-Saharan Africa, Côte d'Ivoire*, WORLD BANK (Apr. 2020).

<sup>34</sup> BUREAU INT’L LAB. AFF., *Child Labor and Forced Labor Reports: Côte d'Ivoire*, DEP’T LAB. (2019); BUREAU INT’L LAB. AFF., *Child Labor and Forced Labor Reports: Ghana*, DEP’T LAB. (2019) [hereinafter *Child Labor Reports*].

<sup>35</sup> *Id.* (noting the plan of Côte d'Ivoire is the “National Action Plan of the Fight Against Trafficking, Exploitation and Child Labor” and a “National Inspection Strategy” whereas Ghana’s plan is the “National Plan of Action Phase II.”)

to recruitment into child labor.<sup>36</sup> That same year, Côte d'Ivoire identified only 7 infractions of child labor; Ghana identified 14.<sup>37</sup>

After suffering through years of civil war, a new government was established in Côte d'Ivoire in 2011.<sup>38</sup> Stating that ending child labor and poverty is a priority, the new government acknowledged the need for the involvement and assistance of the cocoa industry.<sup>39</sup> Gilbert Kone Kafana, Minister for Labour and Social Affairs said:

There is a moral obligation. The chocolate companies have a duty to engage with us. We need to build roads, schools, hospitals and social centres; anything that would allow Ivory Coast to progress. This development is necessary for farmers to have a good life, and it is in the interest of the industry to work with us.<sup>40</sup>

Between 2006 and 2019, The U.S. Department of Labor provided over \$55 million in grants as “technical assistance to address labor exploitation in cocoa-producing areas.”<sup>41</sup> These funds were distributed as follows:

- \$35.9 million to International Labor Organization on the Elimination of Child Labor,
- \$7.4 million to Tulane University for “Survey Research on Child Labor in West African Cocoa Growing Areas,”
- \$4.5 million to Winrock for “Mobilizing Community Action and Promoting Opportunities for Youth in Ghana’s Cocoa-Growing Communities,”
- \$4.5 million to International Cocoa Initiative for “Eliminating Child Labor in Cocoa,” and

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Ivory Coast Profile – Timeline*, BBC (Jan 15, 2019). <https://www.bbc.com/news/world-africa-13287585>.

<sup>39</sup> Hawksley, *supra* note 29.

<sup>40</sup> *Id.*

<sup>41</sup> *Child Labor*, *supra* note 20.

- \$2.9 million to National Opinion Research Center at the University of Chicago for “Assessing Progress in Reducing Child Labor in Cocoa-Growing Areas of Cote d’Ivoire and Ghana.”<sup>42</sup>

In spite of these efforts – both monetarily and systematically – the key factors in the poverty cycle and child labor have not been alleviated. Government programs are directed toward farming concerns such as depleted soil nutrients and incidence of pests and diseases which affect crops.<sup>43</sup> The overriding issue of “a generally low international market price for cocoa and seasonal price fluctuations as a result of changes in both the supply and demand of cocoa, put financial strain on cocoa workers already struggling with poverty.”<sup>44</sup> Simply stated: “Governments have not helped farmers to bargain in the face of the concentrated power of multinational corporations.”<sup>45</sup>

### *Chocolate Industry Giants*

The World Cocoa Foundation (WCF) has over 100 members, consisting of “farm-level input providers, financial institutions, cocoa processors, chocolate makers and manufacturers, farmer cooperatives, cocoa trading companies, ports, warehousing companies, and retailers.”<sup>46</sup> A vice president of WCF, Timothy S. McCoy, explained that the cocoa industry lacked understanding of the real magnitude of child labor and how it should be addressed with the Protocol was signed in 2001.<sup>47</sup> He now states that West African governments and labor organizations also have responsibility, but major strides have been made by companies through “building schools, supporting agricultural cooperatives and advising farmers on better production methods.”<sup>48</sup>

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<sup>42</sup> *Id.*

<sup>43</sup> Tulane Report 2018, *supra* note 4, at 11.

<sup>44</sup> *Id.*

<sup>45</sup> Cocoa Industry Protocol, *supra* note 9, at 14.

<sup>46</sup> *Our Members*, WORLD COCOA FOUNDATION, <https://www.world-cocoafoundation.org/about-wcf/members/> (last visited Feb. 23, 2020).

<sup>47</sup> Whoriskey, *supra* note 14.

<sup>48</sup> *Id.*

CocoaAction was established in 2014 by the WCF as a “voluntary industry-wide strategy that aligns the world's leading cocoa and chocolate companies, origin Governments, and key stakeholders on regional priority issues in cocoa sustainability.”<sup>49</sup> Its aims are to “identify and respond to reported child labor in the cocoa supply chain while tackling its root causes in communities.”<sup>50</sup> According to its 2016 Report, the initiatives of CocoaAction have reached over 55,000 farming households and are working to provide improve access to primary education, improved child protection capabilities, and income-generating activities to 2,100 men and women.<sup>51</sup> Farming assistance addressed “low productivity, pests and disease, environmental concerns, market challenges, access to education, child protection and gender equality.”<sup>52</sup> Additionally, McCoy stated “1,139 children and women” were reached in the first year of implementation, and “by 2020, our aim is to help 300,000 farmers adopt CocoaAction productivity practices and empower 1,200 communities through community development interventions in Côte d’Ivoire and Ghana.”<sup>53</sup>

Subsequent comments on behalf of the WCF have been made by its president, Richard Scobey. On May 1, 2019, he estimated there to be 2.1 million children at working “family farms” in Côte d’Ivoire and Ghana.<sup>54</sup> He also asserted the cocoa and chocolate industry spent \$150 million, since 2001, to “strengthen the protection of children,” with these funds focused on these areas: awareness raising, child monitoring and remediation, access to quality education, women’s empowerment, and improved livelihoods.<sup>55</sup> In an opinion piece published on February 14, 2020, Scobey claimed the cocoa industry has invested

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<sup>49</sup> WORLD COCOA FOUNDATION, *LEARNING AS WE GROW: PUTTING COCOAACTION INTO PRACTICE* (2016). The 2016 report is the most recent WCF report available.

<sup>50</sup> *Id.* at 37.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Richard Scobey, *Child Labor Has No Place in the Cocoa Supply Chain*, WORLD COCOA FOUNDATION (May 1, 2019), <https://www.worldcocoafoundation.org/blog/child-labor-has-no-place-in-the-cocoa-supply-chain/>.

<sup>55</sup> *Id.*

more than \$215 million, although independent sources have been unable to verify this amount.<sup>56</sup>

### *Non-Government Organizations*

Non-Government Organizations have consistently challenged the effectiveness of the cocoa industry's efforts against child labor.<sup>57</sup> Numbers of estimated child laborers have increased.<sup>58</sup> In view of the power of the multi-billion dollar cocoa industry, it "has done little to remove child labor, let alone aid survivors of child labor."<sup>59</sup> A lack of transparency regarding information of cocoa in the supply chain "is characteristic of the chocolate industry, which has the resources to address and eliminate child labor but consistently fails to take action."<sup>60</sup>

Issues with fair-trade labeling and certification affect the cocoa supply, and the efficacy of fair-trade certification in reducing child labor in the cocoa supply chain has not yet been established.<sup>61</sup> The fair-trade system is designed to "honor producers, communities, consumers and the environment" with a strict enforcement of human right and child labor laws.<sup>62</sup> The label indicates that "100% of the primary ingredient must be certified"; however, "certification alone is not enough to solve all fair-trade issues within a supply chain."<sup>63</sup> This is due to several conditions: research is often financed by the chocolate industry or certifiers themselves; findings are not always released;<sup>64</sup> there is a lack of rigorous enforcement of child labor laws; and fewer

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<sup>56</sup> Richard Scobey, *Valentine's Day Reminder: Together We Can End Child Labor in Cocoa*, FOODDIVE (Feb 14, 2020), <https://www.fooddive.com/news/valentines-day-reminder-together-we-can-end-child-labor-in-cocoa/572017/>.

<sup>57</sup> See, e.g., Judy Gearhart, *Forced Child Labor in Cocoa; Twenty Years of Failure*, INT'L LAB. RTS. F. (July 25, 2019), <https://laborrights.org/blog/2019-07/forced-child-labor-cocoa-twenty-years-failure>.

<sup>58</sup> Caroline Chen, *Three Ways to Take Action Against Child Labor*, GREEN AM. MAG. (June 11, 2018), <https://www.greenamerica.org/blog/3-ways-take-action-against-child-labor>.

<sup>59</sup> Child Labor and Slavery, *supra* note 7.

<sup>60</sup> *Id.*

<sup>61</sup> Tulane Report 2018, *supra* note 4, at 11.

<sup>62</sup> *What is Fair Trade/Fair Labor*, GREEN AM. MAG., <https://www.greenamerica.org/end-child-labor-cocoa/dean-foods/what-fair-trade-fair-labor>.

<sup>63</sup> *Id.*

<sup>64</sup> Tulane Report 2018, *supra* note 4, at 11.

than 10% of cocoa farms are visited by third-party inspectors.<sup>65</sup> Valid certification systems must have a set of standards, a process for verification, a certification mark or logo, and a system for auditing that ensures compliance.<sup>66</sup> These are absent in the cocoa industry's concept of certification. "There is no set of clear standards with related compliance criteria to ensure that these standards are being met, and in the absence of clear standards, naturally no process to verify that producers are meeting those standards."<sup>67</sup> And the bottom line? Consumers "have no sure way of knowing if the chocolate they are buying involved the use of slavery or child labor."<sup>68</sup>

2019 CHOCOLATE SCORECARD					Green America	
COMPANY	GRADE	LABOR CERTIFICATION	% OF COCOA CERTIFIED	100% BY 2020	BEYOND CERTIFICATION	EFFORTS TO END DEFORESTATION
Alter Eco <sub>m</sub>	A		100%	✓	Targeted assistance for farmers	Palm oil free; through certification; investing in agroforestry
Divine <sub>m</sub>	A		100%	✓	44% owned by Kuapa Kokoo cooperative	Investing in cocoa farms in Sierra Leone so the farms become climate friendly & don't hurt the rainforest
Endangered Species <sub>m</sub>	A		100%	✓	Fully traceable; donates 10% of profits to animals, habitat, and humanity	Through certification
Equal Exchange <sub>m</sub>	A	Authentic Fair Trade	100%	✓	Pre-harvest financing program	Matches fair trade & organic requirements; supporting farmers through building land resiliency.
Shaman <sub>m</sub>	A		100%	✓	100% of profits donated	Through certification
Theo Chocolate <sub>m</sub>	A		100%	✓	Negotiates higher prices to paid to farmers	Investing in a reforestation initiative
Tony's Chocolonely	A		100%	✓	Traceable cocoa; pay higher price for cocoa; agricultural training: CLMRS	Through certification
Guittard	B+		100%	✓	Investing in the World Cocoa Foundation's Cocoa Livelihoods program	Cocoa & Forest Initiative Signatory & investing in agroforestry projects
Mars	C+		47%	Yes	Income diversifying program	Cocoa & Forest Initiative Signatory
Nestle	C+		42%	No	CLMRS/ cocoa plan	Cocoa & Forest Initiative Signatory & No Deforestation by 2020 commitment
Lindt	C	Self-Verified	86%	Yes	Traceability & verification; CLMRS	Cocoa & Forest Initiative Signatory & No Deforestation by 2025 commitment
Hershey	C		80%	Yes	Cocoa for Good: investing in cocoa communities; CLMRS	Cocoa & Forest Initiative Signatory & 72% of farms mapped
Mondelez	D		43%	No, by 2025	CLMRS	Cocoa & Forest Initiative Signatory & Mapped 63% of farms, which are all not in priority protected area
Ferrero	D		75%	Yes	Child labor education program	Cocoa & Forest Initiative Signatory
Godiva	F	N/A	N/A	Yes, but no update	N/A	Cocoa & Forest Initiative Signatory

Updated October 16, 2019.<sup>69</sup>

<sup>65</sup> Whoriskey, *supra* note 14.

<sup>66</sup> Cocoa Protocol, *supra* note 25, at 4.

<sup>67</sup> *Id.*

<sup>68</sup> Child Labor and Slavery, *supra* note 7.

<sup>69</sup> Chocolate Scorecard, *supra* note 12.

*Past Trends in Decisions*

“The human rights at issue are widely accepted international standards prohibiting child labour, forced labour and trafficking in persons.”<sup>70</sup> The prohibition of slavery is a universally recognized principle of customary international law and is codified in international covenants.<sup>71</sup> Most countries have ratified international conventions to end child labor.<sup>72</sup> The Worst Forms of Child Labour Convention was adopted by the International Labour Organization in 1999 and ratified by 186 nations, including the United States, Côte d’Ivoire, and Ghana.<sup>73</sup> The “worst forms of child labour” under this Protocol [ILO C182] include all forms of slavery, forced or compulsory labor, and “work which, by its nature or circumstances in which it is carried out, is likely to harm the health, safety or morals of children.”<sup>74</sup> Member states are obligated to “take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.”<sup>75</sup> Member states must also provide assistance for the removal of children from the worst forms of labour and ensure access to basic education and training for these children.<sup>76</sup>

Recognizing the need for “more effective protection of individuals and communities against corporate-related human rights harms”,<sup>77</sup> in 2005, the United Nations Human Rights Council appointed Harvard Professor John Ruggie as Special Representative of the Secretary General on the issue of human rights and transnational

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<sup>70</sup> Schrage, *supra* note 2, at 101.

<sup>71</sup> *Abolishing Slavery and its Contemporary Forms*, OHCHR, ¶ 6, (2002); G.A. Res. 217(III) A, Universal Declaration of Human Rights, art. 4 (Dec. 10, 1948).

<sup>72</sup> *Ratifications of C182 – Worst Forms of Child Labour Convention, 1999* (No. 182), [https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312327](https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312327).

<sup>73</sup> Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, 1999 (No. 182), [hereinafter *ILO C182*]. ILO C182 was ratified by the United States in December 1999, Ghana in June 2000, and Côte d’Ivoire in February 2003. *Id.*

<sup>74</sup> *Id.* art. 3.

<sup>75</sup> *Id.* art. 1.

<sup>76</sup> *Id.* art. 7.

<sup>77</sup> U.N. Secretary General, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

corporations and other business enterprises.<sup>78</sup> Ruggie conducted extensive research and consultations with governments, business, and civil society over three years in furtherance of his mandate, and issued a report in 2008.<sup>79</sup> Contributing factors to the basis of his report included: the powerful force of business to “generate economic growth, reduce poverty, and increase demand for the rule of law”; the risks markets pose to individuals and society when “their scope and power far exceed the institutional underpinnings that allow them to function smoothly”; and the existence of governance gaps that allow a “permissive environment for wrongful acts by companies without adequate sanctioning or reparations.”<sup>80</sup> The U.N. Human Rights Council approved his framework on business and human rights in 2008,<sup>81</sup> and the “Guiding Principles on Business and Human Rights” in 2011.<sup>82</sup> The Guiding Principles apply to all business enterprises and are based on three foundational tenets:

- (a) States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
- (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;
- (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.<sup>83</sup>

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<sup>78</sup> U.N., *Protect, Respect and Remedy: Framework for Business and Human Rights Summary*, INSTIT. HUM. RTS. BUS. (Sept. 2010).

<sup>79</sup> U.N. Secretary General, *supra* note 77, at 3. Ruggie “convened 14 multi-stakeholder consultations on five continents; conducted more than two dozen research projects...produced more than 1000 pages of document; received some 20 submissions.”

<sup>80</sup> *Id.*

<sup>81</sup> *UN Framework*, *supra* note 78.

<sup>82</sup> U.N. HUM. RIGHTS OFF. HIGH COMM’R, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, New York and Geneva (2011).

<sup>83</sup> *Id.*

Following the media reports of child labor in the cocoa supply chain, an amendment to the Agriculture Appropriations Bill was introduced and passed by the U.S. House of Representatives in 2001 which would have required the development of “slave-free labeling requirements on cocoa products.”<sup>84</sup> Under this threat of pending legislation, the chocolate industry passed its own initiative and the legislation before Congress was subsequently withdrawn.<sup>85</sup> The initiative is known as the Harkin-Engel Protocol<sup>86</sup> (also referred to as the Cocoa Industry Protocol), a voluntary, non-binding agreement.<sup>87</sup> All members of the Chocolate Manufacturers Association and World Cocoa Foundation were “wholeheartedly to work with the other major stakeholders, to fulfill the letter and spirit of this Protocol . . . in accordance with the deadlines prescribed within.”<sup>88</sup> These obligations included compliance with the provisions of ILO Convention (No. 182) and a timetable for the development and implementation by July 1, 2005, of “credible, mutually-acceptable, voluntary, industry-wide standards of public certification, consistent with applicable federal law, that cocoa beans and their derivative products have been grown and/or processed without any of the worst forms of child labor.”<sup>89</sup> The protocol was endorsed by the Chocolate Manufacturer’s Association and “personally supported” by the heads of Nestle, Mars, Hershey, Archer Daniels Midland Company, Guittard Chocolate, World’s Finest, Blommer Chocolate, and Barry Callebaut.<sup>90</sup>

In July of 2005, United States Senators Tom Harkin and Eliot Engel made a joint statement extending the deadline to 2008 while reducing the goals of the original protocol:

While the July 1, 2005 deadline will not be fully met, industry has assured Sen. Harkin and Rep. Engel that it is fully committed to achieving a certification system,

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<sup>84</sup> Cocoa Protocol, *supra* note 25, at 1.

<sup>85</sup> *Id.* at 2.

<sup>86</sup> *Cocoa Industry Protocol*, *supra* note 9. The Protocol incorporated by reference ILO C182 in its entirety.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* See “Key Action Plan and Steps to Eliminate the Worst Forms of Child Labor” of the Protocol.

<sup>90</sup> Cocoa Protocol, *supra* note 25.

which can be expanded across the cocoa-growing areas of West Africa and will cover 50% of the cocoa growing areas of Côte d'Ivoire and Ghana within three years ... But I am pleased that they have committed to redouble their efforts to create a certification system and eliminate the worst forms of child labor and forced labor in the cocoa fields and throughout the supply chain. The farmers and children in the cocoa growing countries deserve no less.<sup>91</sup>

The statement also included a pledge from the chocolate and cocoa industry of “more than \$5 million annually to support the full implementation of the certification system for cocoa farming labor practices.”<sup>92</sup>

By 2010, a new “Declaration of Joint Action to Support Implementation of the Harkin-Engel Protocol” and its accompanying “Framework of Action to Support Implementation of the Harkin-Engel Protocol” provided another deadline extension, now to 2020, and a reduced goal in the worst forms of child labor in Côte d'Ivoire and Ghana of a 70 percent reduction.<sup>93</sup> The Declaration committed the U.S. Department of Labor to contributing \$10 million in 2010, while the International Chocolate and Cocoa Industry committed to “\$7 million in new funding over 5 years and further pledges to explore the

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<sup>91</sup> Sen. Tom Harkin & Rep. Eliot Engel, *Joint Statement from U. S. Sen. Tom Harkin, Rep. Eliot Engel and the Chocolate/Cocoa Industry on Efforts to Address the Worst Forms of Child Labor....*, VOTE SMART (July 1, 2005), <https://votesmart.org/public-statement/111420/joint-statement-from-u-s-sen-tom-harkin-rep-eliot-engel-and-the-chocolatecocoa-industry-on-efforts-to-address-the-worst-forms-of-child-labor#.XkuDBY2ZPPA>.

<sup>92</sup> *Id.*

<sup>93</sup> *Declaration of Joint Action to Support Implementation of the Harkin-Engel Protocol* (September 13, 2010). The Declaration was signed by representatives of the United States, Côte d'Ivoire and Ghana, as well as the President of the National Confectioners Association, U.S. Senator Tom Harkin, U.S. Congressman Eliot Engel and the Director of the International Labor Organization. *Id.*

possibility [emphasis added] of committing an additional \$3 million for remediation activities.”<sup>94</sup>

### *U.S. Litigation*

American consumers recently filed two separate class action lawsuits against The Hershey Company and Nestle USA, Inc. in California and Massachusetts U.S. district courts, respectively.<sup>95</sup> The claimants alleged the companies were violating states’ consumer protection laws by not disclosing that their cocoa suppliers rely on the worst forms of child labor.<sup>96</sup> The district courts dismissed both cases, finding that the companies had no duty to disclose the existence of child labor in its supply chain.<sup>97</sup>

A recent case extremely relevant to the subject matter is *Doe I v. Nestle USA, Inc.*<sup>98</sup> The plaintiffs, former child slaves in Cote d’Ivoire, filed claims under the Alien Tort Statute against Nestle USA, Inc., Archer Daniels Midland Company, Cargill Incorporated Company, and Cargill Cocoa, “alleging that [these companies] aided and abetted child slavery by providing assistance to Ivorian farmers.”<sup>99</sup> In the 2014 decision, the 9<sup>th</sup> Circuit Court of Appeals reversed the district court’s dismissal of the case and vacated for further proceedings.<sup>100</sup> The court found the prohibition of slavery to be customary international law, and that corporate tort liability exists for such violations.<sup>101</sup> The Court’s holdings were based in large part on the following aspects of the cocoa industry described in the opinion:

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<sup>94</sup> *Id.* Of the \$7 million commitment, \$2 million is to support ILO-IPEC and \$5 million is to support the “expansion of significant current industry work on cocoa.” *Id.* at ¶ 4.b.)

<sup>95</sup> *Dana v. Hershey Co.*, 180 F. Supp. 3d 652 (N.D. Cal. 2016), *aff’d*, 730 F. App’x 460 (9th Cir. 2018); *Tomasella v. Nestle USA, Inc.*, 364 F. Supp. 3d 26 (D. Mass. 2019), currently on appeal at *Tomasella v. The Hershey Co.*, 19-1132.

<sup>96</sup> *Dana* at 654 and *Tomasella* at 29.

<sup>97</sup> *Dana* at 670 and *Tomasella* at 36.

<sup>98</sup> *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013 (2014).

<sup>99</sup> *Id.* at 1016.

<sup>100</sup> *Id.* at 1029.

<sup>101</sup> *Id.* at 1018, 1022.

- their knowledge of child labor, both firsthand through their numerous visits to farms and through media reports;<sup>102</sup>
- their control over the cocoa market, operating “with the unilateral goal of finding the cheapest sources of cocoa”;<sup>103</sup>
- the industry’s lobby in 2001 against legislation that would “curb the use of child slave labor”;<sup>104</sup> and
- the implementation of the Cocoa Industry Protocol, which “in effect guarantee[d] the continued use of the cheapest labor available to produce [cocoa] – that of child slaves.”<sup>105</sup>

On January 13, 2020, the Supreme Court invited the Solicitor General to “file a brief in this case expressing the views of the United States.”<sup>106</sup> The Court agreed on July 2, 2020, to review the appellate court decision,<sup>107</sup> and oral arguments were heard on December 1, 2020. This case is currently pending before the Supreme Court.<sup>108</sup>

### *Prediction of Future Trends in Decision*

Whether the Alien Tort Statute will be extended by the US courts to include corporate liability for child labor within the cocoa supply system may be determined by the action of the U.S. Supreme Court. The decision of the 9<sup>th</sup> Circuit Court of Appeals in *John Doe I v. Nestle* finding corporate liability is one of factually based, sound reasoning.<sup>109</sup> The position that domestic corporations are not liable under the Alien Tort Statute had the aegis of the Trump administration,

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<sup>102</sup> *Id.* at 1016.

<sup>103</sup> *Id.* at 1024. “The defendants had the means to stop or limit the use of slavery, and had they wanted the slave labor to end, they could have used their leverage in the cocoa market to stop it. Their alleged failure to do so, coupled with the cost-cutting benefit they allegedly receive from the use of child slaves, strongly supports the inference that the defendants acted with purpose.” *Id.* at 1025.

<sup>104</sup> *Id.* at 1017.

<sup>105</sup> *Id.* at 1017-18.

<sup>106</sup> *Nestlé USA, Inc. v. Doe*, 140 S.Ct. 912 (2020).

<sup>107</sup> *The Court Could End Claims Nestle, Cargill Abetted Child Labor*, AP (July 2, 2020), <https://www.nytimes.com/aponline/2020/07/02/business/bc-us-supreme-court-overseas-abuses.html>. [hereinafter *The Court*].

<sup>108</sup> *Nestlé USA, Inc. v. Doe I*, Oyez, [www.oyez.org/cases/2020/19-416](http://www.oyez.org/cases/2020/19-416) (last visited Feb. 18, 2021).

<sup>109</sup> *John Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1022 (9th Cir. 2014).

which filed a brief in support of business groups. This decision to advocate on behalf of corporations and big business interests is problematic but consistent with policies of this administration that disregard of human rights issues in numerous areas (police brutality, climate change, immigration, to name a few) is clear.<sup>110</sup> This action will prompt backlash from human rights groups. There is a growing concern that opinions of the Supreme Court have favored big business.<sup>111</sup> In spite of this, as the Supreme Court has now chosen to take on this case,<sup>112</sup> it is hoped that the sound reasoning of the district court would be upheld.

In 2001, proposed legislation was perceived as a serious threat and provided an incentive to the cocoa industry to address child labor.

The critical development that transformed industry concern into collaborative action [2001] was the introduction of legislation in the US Congress to require chocolate to bear labels based on the existence of child labour in cocoa sourcing markets. The industry was galvanized into reaching agreement with its critics and to identifying other partners only when faced with the prospect of government intervention in the United States and the United Kingdom.<sup>113</sup>

Barring legislation forcing the chocolate and cocoa industry to comply with human rights standards and ensure child labor-free cocoa, the status quo will continue. Large sums of money will continue to be allocated by the U.S. Department of Labor in the form of grants. The cocoa industry will continue to fund projects with sizeable amounts of money, but these amounts will pale in comparison to their profits.

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<sup>110</sup> See, e.g., John Cassidy, *The Real Trump Agenda: Helping Big Business*, THE NEW YORKER (Apr. 21, 2017), <https://www.newyorker.com/news/john-cassidy/the-real-trump-agenda-helping-big-business>.

<sup>111</sup> Kent Greenfield & Adam Winkler, *Big Business Keeps Winning at the Supreme Court*, THE ATLANTIC (July 2, 2018), <https://www.theatlantic.com/ideas/archive/2018/07/big-business-keeps-winning-at-the-supreme-court/564260/>.

<sup>112</sup> The Court, *supra* note 107.

<sup>113</sup> Schrage, *supra* note 2, at 110.

They will boast of their efforts and progress. Blame will be cast on others. Deadlines will be extended.

*Appraisal, Alternatives and Recommendations  
of Solutions in the Common Interest*

Recommendations, according to policy-oriented jurisprudence, should be based on the goal of approximating a public order of human dignity, i.e. maximization of access by all to the processes of shaping and sharing all things humans value, i.e., power, wealth, affection, well-being, enlightenment, skills, rectitude and respect. Such solutions reflect the common interest in the community under consideration.<sup>114</sup>

*Appraisal*

The four leading chocolate producers reported gross sales in 2003 of \$103.5 billion.<sup>115</sup> Annual global revenue continues to grow every year.<sup>116</sup> More recently, in 2019, the one year combined gross sales of \$103 billion resulted in net sales of the six leading companies of over \$33.9 billion for that year alone.<sup>117</sup>

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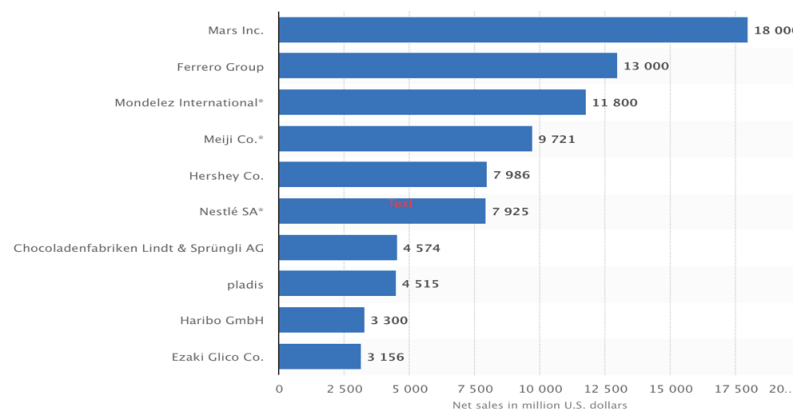
<sup>114</sup> W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 32 YALE J. INT'L L. 575, 580 (2007); Siegfried Wiessner, *The New Haven School of Jurisprudence: A Universal Toolkit for Understanding and Shaping the Law*, 18 ASIA PACIFIC L. REV. 45, 51-52 (2010),

<sup>115</sup> Schrage, *supra*, note 2, at 101 n. 5. (2003 gross sale figures reported for Nestle (\$71 billion), Mars (\$17 billion), Cadbury Schweppes (\$11.5 billion) and Hersheys (\$4 billion). *Id.*

<sup>116</sup> Vivek Voora, Steffany Bermúdez & Cristina Larrea, *Global Market Report: Cocoa*, INT'L INST. FOR SUSTAINABLE DEV. (Nov. 20, 2019).

<sup>117</sup> *Net Sales of the Leading Confectionary Companies Worldwide in 2019*, STATISTA (Feb 21, 2020), <https://www.statista.com/statistics/252097/net-sales-of-the-leading-10-confectionery-companies-worldwide/> [hereinafter *Net Sales 2019*]. Of these, Mars reported net sales of \$18 billion, Hershey of \$7.986 billion, and Nestle of \$7.925 billion. *Id.*

Net Sales of the Leading Confectionery  
Companies Worldwide in 2019 <sup>118</sup>



Efforts are made by the cocoa and chocolate industry...but are they enough? Websites of individual chocolate companies provide information regarding their programs concerning child labor in the cocoa supply chain.<sup>119</sup> These efforts are beneficial to some who are assisted but do little to eradicate child labor. A comparison of industry claims and independent research leads to the observation that the cocoa industry minimizes the problem of child labor while maximizing their efforts as a means to shape public perceptions.

The cocoa industry says it has spent more than \$150 million over the past 18 years to address the problem of child labor in the cocoa supply chain.<sup>120</sup> While \$150 million is obviously a significant amount money, it translates to an average of only \$8.3 million annually spent on this problem by an industry with annual net profits of over \$33 billion dollars.<sup>121</sup> Consider also the portion of funds spent to

<sup>118</sup> *Id.*

<sup>119</sup> See, e.g., *Protecting Children Action Plan*, Nestle (2019), <https://www.nestle.com/csv/impact/respecting-human-rights/workers-livelihoods>, (explaining that Nestle has built schools and has a program “Child Labor Monitoring and Remediation System”).

<sup>120</sup> Whoriskey, *supra* note 14.

<sup>121</sup> Net Sales 2019, *supra* note 117.

“improve livelihoods.”<sup>122</sup> This was done “through increased agricultural productivity, new and diversified income generating activities, expanded financial tools and services, capacity building of farmer organizations, and provision of premium payments for sustainably grown cocoa.”<sup>123</sup> Premium payments are an additional sum “made directly to a communal fund for workers and farmers.”<sup>124</sup> The amount of these “premium payments” is determined by the industry and are not the equivalent of a livable wage.<sup>125</sup> These efforts do not address the root problems described in the Tulane Report: “A generally low international market price for cocoa and seasonal price fluctuations as a result of changes in both the supply and demand of cocoa, put financial strain on cocoa workers already struggling with poverty.”<sup>126</sup> As cocoa workers are unable to earn a livable wage, their children become laborers on the farm.<sup>127</sup>

Estimates of Children, 10-17 years, in Child Labour  
in Cocoa Production in the Last 12 Months <sup>128</sup>

	Côte d'Ivoire n (%)	Ghana n (%)
Children in child labour in Cocoa*	829,391 (93.0%)	667,800 (94.3%)
Children in hazardous work in Cocoa	768,848 (86.2%)	632,100 (89.2%)
Exceeded allowable working hours	235,708 (26.4%)	326,100 (46.0%)
Total children working in cocoa agriculture	891,500 (100.0%)	708,400 (100.0%)

\* Children exceeding working hours and/or performing any of six different types of hazardous work

Consider the reliability and impact of these industry claims:

<sup>122</sup> Scobey, *supra* note 54.

<sup>123</sup> *Id.*

<sup>124</sup> Anthony Myers, *Fair Trade to Increase its Minimum Price for Cocoa and Farmers' Premium Payments*, CONFECTIONARY NEWS (Dec 3, 2018), <https://www.confectionerynews.com/Article/2018/12/03/Fairtrade-to-increase-its-Minimum-Price-for-cocoa-and-farmers-Premium-payments>.

<sup>125</sup> Oliver Nieburg, *Fairtrade CEO: Chocolate Industry Should Pay Double for Cocoa to Ensure Living Income*, CONFECTIONARY NEWS (Dec 30, 2015), <https://www.confectionerynews.com/Article/2015/10/21/Fairtrade-CEO-Chocolate-industry-should-pay-double-for-cocoa>.

<sup>126</sup> Tulane Report 2018, *supra* note 4, at 2.

<sup>127</sup> *Id.* at 9.

<sup>128</sup> *Id.*

- The 2016 WCF report states that CocoaAction initiatives reached over 55,000 farming households. These numbers can look impressive, and one of these households would be grateful for assistance, but according to the Ministry of Agriculture of Côte d'Ivoire, there are over 321,000 cocoa farming households in this country alone.<sup>129</sup>
- The BBC reported the building of projects in the village of Campement Paul. One of these was a small school accommodating 150 students, leaving 400 children in the community without access to education. The villagers had to pay half of the \$20,000 in costs.<sup>130</sup>
- Claims that increasing cocoa yields on farms have helped increase farmer incomes, but in reality, these yields have benefitted corporations but have done little to raise farmer incomes.<sup>131</sup>

On February 14, 2020, WCF President Richard Scobey referenced the Tulane Report of 2018 and claimed, “More than 99% of all children working on cocoa farms in West Africa do so within their families. This is different from forced labor, which a report [the Tulane Report of 2018] showed is extremely rare in the cocoa sector.”<sup>132</sup> He goes on to describe most farmers “are too poor to hire workers – so their children help with the farm work.”<sup>133</sup> This is misleading on several counts. First, children working on “family farms” does not mean children are necessarily working for a parent and does not imply all are receiving adequate education opportunities.<sup>134</sup> Second, even on family farms, the vast majority of these children are working in hazardous conditions (involved in land clearing, carrying heavy loads, exposed to agro-chemicals, long working hours, night work, and using

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<sup>129</sup> *Id.* at 7.

<sup>130</sup> Hawksley, *supra* note 29.

<sup>131</sup> Cocoa Protocol, *supra* note 25, at 14.

<sup>132</sup> Scobey, *supra* note 56.

<sup>133</sup> *Id.*

<sup>134</sup> Cocoa Protocol, *supra* note 25, at 13.

sharp tools).<sup>135</sup> Third, a closer reading of this report actually shows a higher percentage of children working in forced labor than the “less than 99%” Scobey claims the report states. The actual figures of forced labor are 1.7% in Côte d’Ivoire and 1.98% in Ghana.<sup>136</sup> While these differences may seem small, it means there are over 27,000 *known* children working as forced labor. The report also states that “While this result may indicate the problem is not widespread . . . it may otherwise reflect . . . the difficulty of identifying crimes of this nature through self-reports by children.”<sup>137</sup> It is assumed that the actual number of children in forced labor is much greater.<sup>138</sup> Additionally, in February of 2020, the president of the World Cocoa Foundation, in spite of now claiming (an unverified) \$215 million invested by the cocoa industry, admitted the 2020 goal of 70% reduction in child labor *still* “is not expected to be met.”<sup>139</sup> In actuality, the latest reports indicate there are now an estimated two million children engaged in dangerous child labor in West Africa, higher than when the cocoa industry pledged to reduce the worst forms of child labor in the cocoa supply chain.<sup>140</sup> The anticipated findings include:

[T]he prevalence rate of children in child labor . . . in cocoa production in agricultural households in cocoa growing areas of Côte d’Ivoire and Ghana *increased* between the 2008/2008 and 2018/2019 survey rounds (from 31% in 2008/2009 to 44% in 2018/2019) as did the prevalence rate of children involved in hazardous child labor in the cocoa sector between 2008/2009 and 2018/2019 (from 30% in 2008/2009 to 41% in 2018/2019).<sup>141</sup>

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<sup>135</sup> Tulane Report 2018, *supra* note 4, at 2.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 29; characteristics of hazardous conditions at 13.

<sup>138</sup> *Id.* at 13.

<sup>139</sup> Scobey, *supra* note 56.

<sup>140</sup> Anthony Myers, *New Report Reveals Child Labor on West Africa Cocoa Farms Has Increased in Past 10 Years*, CONFECTIONERY NEWS (May 7, 2020), <https://www.confectionerynews.com/Article/2020/05/07/New-report-reveals-child-labor-on-West-African-cocoa-farms-has-increased-in-past-10-years>.

<sup>141</sup> *Id.*

Fair trade labeling and certification are simply not enough to eradicate child labor. Industry commitments to source more sustainable cocoa is important; however, “certification programs alone are not enough to solve the underlying issues that contribute to child labor in cocoa, including farmer poverty and a lack of infrastructure.”<sup>142</sup> Disingenuous claims are made by the cocoa industry of helping farmers by increasing yields. The increased yields, however, “have benefitted corporations but done little to raise farmer incomes.”<sup>143</sup> Child labor will continue so long as farmers receive only a fraction of the cost of sustainable production. A practical consideration of fair trade labeling is that it puts the onus on the consumer, who must check unreliable certification lists, refrain from impulse buying, and ultimately give up some of their favorite chocolates.

The cocoa industry speaks as being equal partners, calling on others to step up, and yet ignores the reality that their power, means, and ability far exceeds that of other parties. Scobey states:

Ending child labor is a shared responsibility among all stakeholders in the cocoa supply chain. Companies and producing governments are stepping up – we urge governments of cocoa consuming countries, international development partners, civil society organizations, and other stakeholders to join us and support long-term solutions to safeguard a bright future for West African children.<sup>144</sup>

“National regulation and enforcement of local laws consistent with international labour standards are the most effective tools to stop child trafficking, eliminate forced and child labor.”<sup>145</sup> Member state obligations to address child labor are clear, but their limited budgets and ineffectiveness to enforce laws hinder their ability to impact child

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<sup>142</sup> Chocolate Scorecard, *supra* note 12.

<sup>143</sup> Cocoa Protocol, *supra* note 25, at 14.

<sup>144</sup> Scobey, *supra* note 54.

<sup>145</sup> Schrage, *supra* note 2, at 110.

labor.<sup>146</sup> “Efforts by individual companies to date have had little measurable impact on labour standards on the ground.”<sup>147</sup>

### *Recommendations*

Rather than casting blame and pointing fingers, perhaps the question to consider is: who can bring about change? The following recommendations are based on this concept.

#### *A. Passage of legislation mandating compliance of chocolate industry to end the use of child labor in the cocoa supply chain*

This recommendation was made in the 2018 Tulane Report. Simply stated, “Voluntary codes alone will not prevent forced labour and child labour in cocoa agriculture. Governments in cocoa-consuming countries must introduce legislation to require companies selling cocoa products to act to prevent modern slavery in their supply chains, in line with the UN Guiding Principles on Business and Human Rights.”<sup>148</sup> Legislation must require the payment of living wages and costs of sustainable production. Also necessary are provisions for expeditious deadlines along with civil penalties and criminal liability for lack of compliance.

#### *B. Activist involvement at the shareholder level of the chocolate and cocoa industry*

Corporate responsibility to promote human dignity is universally recognized.<sup>149</sup> The research in the 2018 Tulane Report concluded that businesses “throughout the cocoa supply chain should commit to paying a living wage (the cost for an average household to maintain a decent standard of living).”<sup>150</sup> Additionally, the chocolate industry giants are in a unique position to affect change, as “consumer brands are the most effective leverage point to push for collaborative standard-

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<sup>146</sup> Child Labor Reports, *supra* note 34.

<sup>147</sup> Schrage, *supra* note 2, at 110.

<sup>148</sup> Tulane Report 2018, *supra* note 4, at 32.

<sup>149</sup> UN Framework, *supra* note 78.

<sup>150</sup> Tulane Report 2018, *supra* note 4, at 32.

setting initiatives.”<sup>151</sup> History has shown, however, that profits are the main – and often only – objective of most corporations. When this is the case, outside forces must provide additional incentives for corporations to fulfill their social obligations. The activism of corporate shareholders has forced change in other businesses. The Dow Chemical Company manufactured and sold napalm that was used during the Viet Nam War.<sup>152</sup> In opposition to this activity, shareholders formed the “Medical Group of Human Rights” and proposed an amendment to the company’s charter prohibiting the sale of napalm that led to the harm of people.<sup>153</sup> Although this proposal was supported by only 2% of shareholders, Dow ceased the manufacture of napalm.<sup>154</sup> More recently, the divestment from companies doing business in South Africa by colleges and universities significantly contributed to the ending of Apartheid.<sup>155</sup>

Inasmuch as the chocolate industry giants have the financial means to eradicate child labor in the cocoa supply chains, shareholders should initiate proposals forcing corporate action in support of these basic human rights. These companies have the power and means to pay cocoa farmers a living wage.<sup>156</sup> One company, Nestlé, reportedly spent \$5.5 million in 2016 on the problem of child labor. “This is the same company that in 2017 reported sales of nearly \$90 billion—more than twice the GDP of the Ivory Coast.”<sup>157</sup>

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<sup>151</sup> Schrage, *supra*, note 2 at 110.

<sup>152</sup> *Napalm and the Dow Chemical Company*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/two-days-in-october-dow-chemical-and-use-napalm/> (last visited Feb. 23, 2020) [hereinafter *Napalm*].

<sup>153</sup> Sarah C. Haan, *Civil Rights and Shareholder Activism: SEC v. Medical Committee for Human Rights*, 76 WASH. & LEE L. REV. 1167, 1168 (2019).

<sup>154</sup> *Napalm*, *supra*, note 152.

<sup>155</sup> *Id.*

<sup>156</sup> Child Labor and Slavery, *supra* note 7.

<sup>157</sup> Rosa Furneaux, *Your Halloween Candy’s Hidden Ingredient: Child Slave Labor*, MOTHER JONES (Oct. 31, 2018), <https://www.motherjones.com/food/2018/10/halloween-candy-hidden-ingredient-chocolate-child-slave-labor-nestle-mars-cargill/>.

*C. The Rise of a Small Competitor*

A startup company that embraces a core philosophy of no child labor could lead the way to a change of corporate culture for all companies in the cocoa and chocolate industry, but especially for the chocolate industry giants. The economic success of the startup would put pressure on other companies, forcing change in their philosophy and action toward the eradication of child labor in their cocoa supply. For example, the impact of Starbucks Corporation in corporate culture has been profound. The company's use of fair-trade coffee since 2000 has caused other coffee shops to follow suit.<sup>158</sup> Starbucks also significantly improved employee benefits by being the first privately owned company to offer full-health benefits and stock option programs to part-time employees.<sup>159</sup>

*D. Public Awareness*

An increase in public awareness of the existence of child labor in the cocoa supply chain could have a major impact on cocoa companies. "Global brands value their public reputations, and the premium such positive reputations often bring in the capital markets."<sup>160</sup> Media coverage has brought the issue to light, and recent reports from prestigious sources have been prolific.<sup>161</sup> As previously mentioned, it is believed the average consumer would be appalled if they thought their purchase of chocolate contributed to child labor. One wonders, though, if the average consumer reads these reports that are readily available, preferring instead to use social media as a news source.<sup>162</sup>

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<sup>158</sup> FAIR TRADE: THE CHALLENGES OF TRANSFORMING GLOBALIZATION 56 (Laura T. Raynolds, Douglas L. Murray & John Wilkinson eds., 2007).

<sup>159</sup> *Ethical Sourcing: Coffee*, STARBUCKS CORP., <https://www.starbucks.com/responsibility/sourcing/coffee>. (last visited Feb. 23, 2020).

<sup>160</sup> Schrage, *supra* note 2, at 110.

<sup>161</sup> See, e.g., Whoriskey, *supra* note 14; *Your Halloween Candy Most Likely Comes From Child Labor in West Africa*, THE TAKEAWAY PODCAST, WNYC Studios (Oct. 22, 2019), <https://www.wnycstudios.org/podcasts/takeaway/segments/halloween-chocolate-most-likely-comes-child-labor-west-africa>.

<sup>162</sup> *Social Media Outpaces Print Newspapers in the U.S. as a News Source*, PEWS RES. CTR. (Dec. 10, 2018), <https://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/>.

The publicity brought to this issue by a civil rights group could produce a public outcry and subsequent shaming of the chocolate company giants.

*E. Major retailers choose to sell only fair-trade cocoa and chocolate products*

Consumers purchase what is sold by major retailers. Retailers choose what is sold in their stores. Retailers such as Wal-Mart, Target, and major groceries chains could shape the chocolate market. The economic competitive impact of Wal-Mart alone is felt everywhere. “With \$405 billion in sales in the last fiscal year, Wal-Mart is so big, and so obsessively focused on cost-cutting, that its actions shape our landscape, work, income distribution, consumption patterns, transport and communication, politics and culture, and the organization of industries from retail to manufacturing, from California to China. . . . They set the rules.”<sup>163</sup> Should a corporation such as Wal-Mart choose to sell only child labor-free chocolate and cocoa products, there would be an immediate reverberation felt across the cocoa industry. The industry would have no choice but to comply with the new demand for child labor-free chocolate this action would bring.

*Conclusion*

Media attention brought an initial, if limited, public awareness along with a corresponding threat of legislation. Avoiding an opportunity for real change, the cocoa industry passed its own voluntary protocol. In the twenty years since, the results of the industry’s self-regulation are disheartening. A most vulnerable segment of the world’s population remains unprotected. A generation of child laborers have grown and been replaced by another. Those childhoods and the opportunities inherent for them are lost forever, while in that same period of time the chocolate industry giants have continually and consistently earned billions of dollars – every single year.

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<sup>163</sup> David Moberg, *How Wal-Mart Shapes the World*, AM. PROSPECT (Apr. 19, 2011), <https://prospect.org/power/wal-mart-shapes-world/>.