Beginning in the 1990’s, researchers began documenting that cocoa beans were harvested by young children for processing and sale by the multinational cocoa companies like Nestle, Cargill, Hershey, Mars, Barry Callebaut, Mondelez, Olam, and many others:

The companies' responses were from page 1 of the Multinational Playbook:

- “We have no control over our suppliers”
- “We just buy the cocoa beans and have no way of knowing how they are harvested”
- “We are strongly opposed to child labor”
- We have policies against child labor

In 2001, based on the shocking news reports and photos that child slavery was a key ingredient of American chocolate, U.S. Congressman Eliot Engel introduced a bill co-sponsored by Bernie Sanders that would have forced U.S. chocolate importers and manufacturers to adhere to a certification and labeling system to demonstrate that their chocolate was “slave free”. The bill passed the House of Representatives with a vote of 291 to 115 in favor of the measure.

The U.S. chocolate industry immediately moved to eradicate the bill urging the U.S. Congress, concerned non-governmental organizations, and the public at large that there was no need for concrete, enforceable legislation against child slavery because they would instead implement a private, voluntary mechanism to ensure child labor-free chocolate.

**In 2001**, the Chocolate Manufacturers Association of the United States, including Nestle USA, Cargill and the other large cocoa companies, **signed** the 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 Labor (the "**Harkin-Engel Protocol**").

Section 1 of the agreed Key Action Plan of the Protocol provides that:

***"Industry has publicly acknowledged the problem of forced child labor in West Africa*** and will continue to commit significant resources to address it. West African nations also have acknowledged the problem and have taken steps under their own laws to stop the practice. More is needed because, while the scope of the problem is uncertain, the occurrence of the worst forms of child labor in the growing and processing of cocoa beans and their derivative products is simply unacceptable. ***Industry will reiterate its acknowledgement of the problem and in a highly-public way will commit itself to this protocol***." Protocol at p. 2.

Since 2001, the cocoa industry has given itself 4 unilateral extensions, and in July 2018, Vice President of the World Cocoa Federation, Tim McCoy, announced that the latest deadline set by the companies to by 2025, establish and implement a “credible and transparent sector-wide monitoring system” that will reduce “the worst forms of child labor” by “70 percent” would not be met.
NINETEEN YEARS LATER, THE COMPANIES ADMIT THEY ARE STILL KNOWINGLY USING CHILD LABOR IN THEIR SUPPLY CHAINS AND APPARENTLY CAN’T STOP THEMSELVES FROM DOING SO!!

In the first two weeks of March 2019 I returned to Cote D'Ivoire and Mali to continue doing fact development for our current and future legal actions against the cocoa companies. I easily and repeatedly found children trafficked from Mali and Burkina Faso doing hazardous work on cocoa plantations producing for Nestle, Cargill, and Barry Callebaut. I was shocked that virtually nothing had changed in the field since we first starting researching this in 1997 or 1998.


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Options for Legal Action Against Companies Using Child Slaves to Harvest Cocoa:

- **Alien Tort Statute (ATS),** 28 U.S.C. § 1350 (1789).
- Trafficking Victims Protection Reauthorization Act ("TVPRA"), 18 U.S.C. § 1595 *et. seq*.
- Common law – unjust enrichment, negligent supervision, and emotional distress.
- 19 U.S.C. § 1307 of the Tariff Act of 1930.
- Consumer Case – misleading statements

# ATS

28 U.S.C. § 1350 "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

In 2005 IRAdvocates filed an ATS case against Nestle and Cargill on behalf of six Malian boys who were trafficked to Cote D'Ivoire and forced to work on cocoa plantations.

After an incredibly long process, including two wins in the Ninth Circuit, the Supreme Court accepted the companies' cert petition. Last week, on June 17, 2021, the Supreme Court ruled 8-1 that our current allegations do not satisfy the Court's *Kiobel* test for extraterritorial application of the law. Five Justices rejected the companies' argument that corporations cannot be sued under international law.

# FUTURE OF ATS??

We will amend our complaint to try to satisfy the Supreme Court's *Kiobel* standard, which by a 5-4 decision it invented out of thin air. As Justice Thomas noted in the *Nestle* case, the claims must "focus" (from Nabissco case and appears to supplant Kiobel's "touch and concern" standard) on the territory of the United States. He then rejected our complaint, saying that we had only alleged "general operational decisions" were made in the U.S. In fact, we alleged that specific financing, purchasing, staffing, management of supply chains, reaction to child labor issues – ALL ASPECTS OF PRODUCTION – were handled from the U.S. Justice Thomas mischaracterized, but with an 8-1 vote against us on this, it seems we'd have to add Nestle and Cargill kidnapped kids from the U.S. and took them to Cote D'Ivoire. Not what ATS could have possibly be intended to do, but this Court is very protective of corporations.

Legislative fix would be easy to draft, but getting it passed with the filibuster in place in the Senate will be close to impossible.

On February 12, 2021, we filed a new case for eight former child slaves of Malian origin who were trafficked and subjected to forced labor harvesting and cultivating cocoa beans on farms in Côte d'Ivoire. They are suing Nestlé, Cargill, Barry Callebaut, Mars, Olam, Hershey, and Mondelēz for trafficking and forced labor in violation of the Trafficking Victims Protection Reauthorization Act ("TVPRA"), 18 U.S.C. § 1595 *et. seq.* , and have common law claims of negligent supervision, intentional infliction of emotional distress and unjust enrichment.

Justice Thomas specifically cited the TVPRA as an example of a statute in which Congress expressly authorized an extraterritorial claim for "indirect liability" for child slavery

## Key Issues/Elements in Bringing a Case Under TVPRA, 18 U.S.C. § 1595 *et. seq.*

**2008 amendments to the TVPRA plugged some holes established a viable CIVIL cause of action against users of forced labor allowing victims to recover monetary damages and attorneys' fees** in federal court. 18 U.S.C. § 1595.

**Focusing on a forced child labor case in the cocoa sector, based on section 1589, there are three elements to a claim:**

**(1) A person or company must "knowingly benefit" from participation in a "venture"**

The first element of § 1589(b)—"participation in a venture"—**raises the most novel legal question. Few cases have addressed this element and "venture" is not defined in § 1589.** One method of interpretation is to simply look to the ordinary definition, which would suggest "venture" refers to any risk-bearing activity. Another option is to look to § 1591(c)(3), which defines "venture" in the child sex-trafficking context as "any association in fact." The doctrine of criminal conspiracy may provide some answers. It appears that t**he cocoa supply chain is plausibly a "venture" in and of itself under the ordinary meaning of the term.**

The cocoa industry formed the World Cocoa Foundation to protect their collective interests and work to create the false impression they are making real progress on the child labor issue. They are acting in a "venture" and the member companies are knowingly benefiting from a steady supply of cheap cocoa harvested with illegal child labor.

**2) which has engaged in the providing or obtaining of labor or services by any of the means described in § 1589(a):**

[P]rovid[ing] or obtain[ing] the labor or services of a person by any one of, or by any combination of, the following means—(1) by **means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person; (2) by means of serious harm or threats of serious harm to that person or another person; (3) by means of the abuse or threatened abuse of law or legal process; or (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint**.

Many of the working children are trafficked – tricked by a labor broker to go to Cote D'Ivoire to work for a good paying job and then are told to work or starve. They have no resources, no travel documents, they speak a different language and do not even know where they are. Our seven Plaintiffs were trafficked but there are thousands of kids who were forced to work on cocoa plantations.

3 **Knowledge or reckless disregard that the venture has engaged in the providing or obtaining of forced labor.** This intent standard is much lower than under international law.

The companies all have knowledge based on admissions, public reports and their own claims that they have addressed child labor OR they are intentionally turning a blind eye to the existence of child labor and thus are recklessly disregarding the severe conditions for child workers.

# Common law claims for unjust enrichment, negligent supervision, and emotional distress

We normally include these claims but rarely get any serious assessment by courts. There are a few unique issues:

- Choice of law rules
- Much shorter statute of limitations (ATS and TVPRA are 10 years)
- Forum non conveniens
- Local judges hate these cases (but you are likely to be removed to federal court)

# Tariff Act of 1930, 19 U.S.C. § 1307

All **goods**, wares, articles, and merchandise **mined, produced, or manufactured** wholly or in part in any foreign country by convict labor or/and **forced labor** or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and **the importation thereof is hereby prohibited**, and the Secretary of the Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of this provision.

[1997 Sanders Amendment] "Forced labor", as herein used, shall mean all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily. For purposes of this section, the term "***forced labor or/and indentured labor" includes forced or indentured child labor***.

The U.S. Customs regulations that implement the Tariff Act, **19 C.F.R. § 12.42, *et seq*.**, entitle **"[a]ny person** outside the Customs Service **who has reason to believe** that merchandise produced [by convict, forced, or indentured labor] is being, or is likely to be, imported into the United States" to "communicate his belief to any port director or the Commissioner of Customs." 19 C.F.R. § 12.42(b).
The Commissioner of Customs, upon receipt of any such communication, "will cause such investigation to be made as appears to be warranted by the circumstances of the case . . . " 19 C.F.R. § 12.42(d).

If the Commissioner of Customs finds at any time "**that information available *reasonably but not conclusively*** indicates that merchandise within the purview of section 307 [of the Tariff Act] is being, or is likely to be, imported, he will promptly advise all port directors accordingly and **the port directors shall thereupon withhold release of any such merchandise pending instructions** from the Commissioner as to whether the merchandise may be released otherwise than for exportation." 19 C.F.R. § 12.42(e). (emphasis added).

If it is determined that the merchandise is indeed subject to the provisions of § 307, such merchandise ***must*** be denied entry into the United States, "**unless the *importer* establishes by satisfactory evidence that the merchandise was not mined, produced, or manufactured in any part with the use of a class of labor specified in the finding**." 19 C.F.R. § 12.42(f) and (g) (emphasis added).

Using these procedures, we brought a complaint in 2003 [Bush Administration] seeking to ban the importation of cocoa from Cote D'Ivoire. The Commissioner of Customs just ignored it. After sending four distinct demands, each time adding new information, they still did nothing. We sued for enforcement under the Administrative Procedure Act, arguing it was arbitrary and capricious to take no action in a mandatory statute.

We "won" on the issue of proving that the cocoa was produced by forced child labor, but the law at that time was there could be no trade ban if the U.S. itself did not produce enough of the product to meet domestic "**consumptive demand**." Based on this, the Court dismissed the case because the U.S. does not produce cocoa. ***ILRF v. U.S.,* 391 F. Supp. 2d 1370, 1374-75 (C.I.T. 2005).**

**In 2016 that loophole was finally closed**. 2016—Pub. L. 114–125 struck out "The provisions of this section relating to goods, wares, articles, and merchandise mined, produced, or manufactured by forced labor or/and indentured labor, shall take effect on January 1, 1932; but in no case shall such provisions be applicable to goods, wares, articles, or merchandise so mined, produced, or manufactured which are not mined, produced, or manufactured in such quantities in the United States as to meet the consumptive demands of the United States." after "enforcement of this provision."

At long last, on February 14, we filed a cocoa petition . There is an ongoing investigation.
PROBLEM – at mercy of bureaucratic process.

Our Petition asks CBP to issue a Withhold and Release Order (WRO) against the cocoa imports of: **Nestle, Cargill, Mars, Hershey, Barry Callebaut, World's Finest Chocolate, Inc., Blommer, Mondelēz, and Olam.** Most of these signed the Harkin-Engel Protocol 19 years ago and promised to end their use of child labor.

We demonstrate that the existing record plus our new evidence absolutely meets step 1 of 19 C.F.R. § 12.42 (b) – we have a **"reason to believe"** that the named cocoa companies are importing cocoa from CDI with child labor.

Normally this triggers an investigation under § 12.42(d). However, as there is an ongoing investigation and overwhelming evidence, we urged that CBP should take the next step of § 12.42 (e): "If the Commissioner [of CBP] finds **at any time** that information available **reasonably but not conclusively** indicates that merchandise within the purview of section 307 is being, or is likely to be, imported, he will issue a" WRO.

Once the WRO is issued, the importation of the identified cocoa is prohibited by section 307 … **unless the importer establishes by satisfactory evidence that the [cocoa] was not … [produced] in any part with [forced child labor]**" § 12.42 (e)(emphasis added). SHIFTS THE BURDEN OF PROOF

We opted to seek an order that the ban would not take effect for 180 days to give the companies time to show their cocoa is NOT produced with child labor. The companies have had 20 years to do this so we weren't concerned about fairness to them, but an immediate ban could wreak havoc on the CDI economy.

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**UNITED STATES DISTRICT COURT**

**SOUTHERN DISTRICT OF CALIFORNIA**

Renee Walker, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

Nestlé USA, Inc., a Delaware Corporation; and DOES 1 to 100;

Defendants.

Civil Case No.: '19CV0723 L KSC

**CLASS ACTION COMPLAINT**

**DEMAND FOR JURY TRIAL**

The *Walker* case is based on (i) California's Business & Professions Code §§ 17200, *et seq.* (the Unfair Competition Law or "UCL"); and (ii) California Civil Code §§ 1750,
*et seq.* (the Consumers Legal Remedies Act or "CLRA").

Omission cases based on failure to disclose use of child labor or unsustainable practices have uniformly failed.

*Walker* is based on Nestle's affirmative misrepresentations that its cocoa is "sustainable" and certified as being produced meeting environmental and social standards. In fact, Nestle's cocoa, like much cocoa produced in West Africa causes massive deforestation and is harvested by illegal child labor.

The Court directed us to amend the complaint to articulate more details about the misleading labels, but we feel confident that we will now prevail.