

Cocoa Crisis: Cartelizing West African Cocoa in Response to the Persistent Use of Child Labor

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Abstract

The lack of resources that afflicts Ghanaian and Ivorian enforcement of child labor prohibitions has allowed for the continued use of child labor in the cocoa industry. The current enforcement bodies not only suffer from serious coordination problems, but also fall victim to the harsh reality of cocoa farming, which pays pitiful daily wages to farmers. Child labor serves as a cheap, and perhaps even cost-free, option that allows farmers to maximize their profits. Many cocoa plantations are family-run, and thus the inclusion of children in the workforce is often a natural step, even where educational opportunities are available. To sacrifice productivity is to sacrifice one's livelihood. This Comment first analyzes Ghana's and Côte d'Ivoire's child labor statutory regimes along with their enforcement apparatuses. This entails a deep dive into the efforts being taken by government and non-government actors along with a discussion of contributing factors relating to the use of child labor. Finally, the Comment proposes a novel solution to establish an intergovernmental organization, or commodity cartel, between Ghana and Côte d'Ivoire to better regulate and coordinate cocoa export and growth, modeled after existing commodity cartels. This Comment focuses on the organizational feasibility of such an organization and the potential ramifications, both advantageous and detrimental, such consolidation would cause.

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I. INTRODUCTION

When you unwrap a chocolate bar, whether it be from Hershey, Mars, or Nestlé, do you question where the cocoa in your sweet treat has come from? Or, more importantly, how the ingredients, especially the cocoa, were harvested? The dark reality is that the cocoa industry is plagued with child labor.¹ The use of child labor in cocoa production has been known across the domestic U.S. for at least the last twenty-one years, marked by the signing of the Harkin-Engel Protocol (“the Protocol”) in September 2001.² The Protocol sought to join major stakeholders in the cocoa industry along with producer nations to jointly address child labor in cocoa production.³ Today, over twenty-one years later, there is still a strong presence of child labor in the cocoa industry.⁴ This holds especially true in Ghana and Côte d’Ivoire, which account for, by some estimates, up to seventy percent of the world’s cocoa production.⁵

To Ghana and Côte d’Ivoire’s credit, there have been domestic efforts in the last two decades to address the use of child labor, especially in the cocoa trade.⁶ Recently, the African Union (AU), of which Ghana is a member nation and Côte d’Ivoire is a suspended member nation, initiated the “African Union Ten Year Action Plan to Eradicate Child Labour, Forced Labour, Human Trafficking and Modern Slavery (2020–2030)” during an AU summit in February 2020.⁷ Despite such efforts, the United States Department of Labor’s Bureau of International Labor Affairs (ILAB) found in its most recent report that forty-three percent of children are involved in hazardous parts of the cocoa industry in both countries, and are thus forbidden by both nation’s domestic policies.⁸

The governments of both Côte d’Ivoire and Ghana have recognized the need for intervention by their central governments. In 1998, Ghana enacted The

¹ *Child Labor and Slavery in the Chocolate Industry*, FOOD EMPOWERMENT PROJECT (Jan. 2022), <https://perma.cc/29EC-WBU9> [hereinafter Food Empowerment Project].

² Chocolate Mfrs. Ass’n, 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 (2001) [hereinafter Harkin-Engel Protocol].

³ *Id.*

⁴ Food Empowerment Project, *supra* note 1.

⁵ *Id.*

⁶ Int’l Trade Admin., *Ghana – Country Commercial Guide*, DEP’T OF COMMERCE, <https://perma.cc/6MTH-VZU3> (last updated July 22, 2022); Dep’t for Int’l Trade (UK), *Exporting guide to Ivory Coast*, DEP’T OF INT’L TRADE (UK), <https://perma.cc/GVD7-RTZ8> (last visited Sept. 10, 2023).

⁷ African Union, *The African Union Ten Year Action Plan on Child Labour Plan Moves Toward Implementation*, AFRICAN UNION, <https://perma.cc/5KNJ-K4XD> (last visited Aug. 13, 2022).

⁸ Bureau of Int’l Lab. Affairs, *Child Labor in the Production of Cocoa*, U.S. DEP’T OF LAB., <https://perma.cc/MTJ2-TTPB> (last visited Sept. 10, 2023).

Children’s Act (“the Act”) as an effort to curb the use of child labor in various industries.⁹ The Act squarely addresses the use of child labor, and reasserts the labor rights of children.¹⁰ Part V, Sub-Part I of the Act is devoted to a discussion of what constitutes child labor, prohibitions regarding the use of children as laborers, and defines policies such as setting the minimum age for hazardous employment at eighteen years of age.¹¹ The Act additionally provides a description of potential offenses for use of prohibited labor, as well as sets up an enforcement structure for both the “formal” and “informal” sectors.¹² Côte d’Ivoire has similar prohibitive measures, which partly manifest in their ratification of the International Labour Organization’s (ILO) Conventions 138 and 182, addressing minimum age for work and the worst forms of child labor respectively.¹³ Domestically, Côte d’Ivoire’s regulations include the Prohibition on Hazardous Work List, Article 23.2 of their Labor Code, and Article 16 of their Constitution.¹⁴

Child labor in the cocoa industry is by no means disappearing. According to a 2018–2019 survey conducted by the National Opinion Research Center (NORC) at the University of Chicago on behalf of ILAB, among children living in agricultural households in cocoa growing areas, forty-five percent were engaged in child labor.¹⁵ NORC further revealed that thirty-eight percent and fifty-five percent of children in Côte d’Ivoire and Ghana respectively were working in hazardous child labor on cocoa production. This was an increase in six percentage points from their prior 2013–2014 report.¹⁶

Producers in both nations openly flout these pieces of legislation in their continued use of child labor in the harvesting of cocoa. Neither nation provides blanket exceptions for such work. As such, the disregard for the legislation is especially frustrating because there are seemingly few, if any, deficits in their language. However, without the consistent meting out of punishments to offenders, enforcement efforts are rendered toothless. Ultimately, this is a problem with the coordination and enforcement of the prohibitions against producers, a problem only exacerbated by the legal regime itself.¹⁷

⁹ The Children’s Act, 1998 (Act No. 560/1998) (Ghana).

¹⁰ *Id.*

¹¹ *Id.* §§ 87–96

¹² *Id.* §§ 95–96.

¹³ Bureau of Int’l Lab. Affairs, *Findings on the Worst Forms of Child Labor – Côte d’Ivoire*, U.S. DEP’T OF LAB., <https://perma.cc/2E6K-L9T5> (last visited Nov. 10, 2022).

¹⁴ *Id.*

¹⁵ NORC at the University of Chicago, *Assessing Progress in Reducing Child Labor in Cocoa Growing Areas of Côte d’Ivoire and Ghana* 10 (2020) [hereinafter NORC].

¹⁶ *Id.* at 84–87.

¹⁷ *See generally* 2020 Findings on the Worst Forms of Child Labor – Ghana, U.S. DEP’T OF LAB. (Sept. 20, 2018), <https://perma.cc/VTJ3-E8JE>; *see also* Bureau of Int’l Lab. Affairs, *Findings on the Worst Forms of Child Labor – Côte d’Ivoire*, *supra* note 13.

Given the leading roles in the world's cocoa production that Ghana and Côte d'Ivoire occupy, both nations have power to influence cocoa prices and supplies if they band together. While unorthodox, cartelization offers a novel solution to this historically intractable problem. Ghana and Côte d'Ivoire should establish a cocoa equivalent of the Organization of the Petroleum Exporting Countries (OPEC) as a means of coordinating their cocoa industries. Controlling the various facets of the cocoa industry in a targeted and coordinated manner can create a system that directly benefits producers through price adjustments, and thus can deter the reliance on child laborers.

The Comment will proceed as follows: Part II will summarize the relevant statutory regimes, which will include Ghana's and Côte d'Ivoire's passed legislation, labor codes, and salient conventions adopted from bodies like the ILO that pertain to the use of child labor. Part III will summarize the legal treatment of domestic violators by Ghana and Côte d'Ivoire given the enforcement apparatuses of both nations. Part IV will summarize recent non-governmental organizations (NGO) and governments attempts to combat the use of child labor in the industry. Part V will address how cocoa prices exacerbate the use of child labor for smallholder cocoa producers. Part VI will discuss broadly the cartelization of cocoa in both nations, with respect to not only its organizational feasibility, but also the legality. Finally, the Comment will conclude by discussing the implications of the broad economic regulatory intervention proposed in Part VII.

II. DOMESTIC STATUTORY REGIMES AGAINST CHILD LABOR

Between Ghana and Côte d'Ivoire, there are six statutes that govern the use of child labor in their various labor markets.¹⁸ These statutes all directly address child labor, except for the Ivorian Labor Code and the Ivorian Constitution, which are more general-purpose statutes.¹⁹

A. Ghana: The Children's Act of 1998 Part V: Employment of Children

The driving purpose behind the Children's Act was not just to reform child labor law, but to consolidate the laws into a single document.²⁰ The Act provides

¹⁸ See generally U.S. Dep't of Lab., 2020 Findings on the Worst Forms of Child Labor – Ghana, *supra* note 17. See also Bureau of Int'l Lab. Affairs, Findings on the Worst Forms of Child Labor – Côte d'Ivoire, *supra* note 13.

¹⁹ Loi no 95/15 du 12 janvier 1995 portant Code du travail [Act no. 95/15 of January 12, 1995 establishing the labor code], 8 JOURNAL OFFICIEL, 153-177 (1995) (Côte D'Ivoire) [hereinafter Loi no 95/15]; CONST. REP. CÔTE D'IVOIRE [CONSTITUTION] Jul. 23, 2000, art. 16 (Côte d'Ivoire).

²⁰ *The Children's Act*, WORLD HEALTH ORG., <https://perma.cc/T48Z-J9V5> (last visited Nov. 10, 2022).

for the rights of the child and establishes clear regulations for the use of child labor.²¹ The Act defines a child as “a person below the age of eighteen years.”²² This definition in turn interacts with the Act’s later descriptions of the three types of work that children may and may not engage in.

1. Legal provisions of the Children’s Act.

The Act explicitly forbids the use of child labor in “exploitative labour,” which is defined as labor that “deprives the child of its health, education or development.”²³ Additionally, the Act prohibits children from being engaged in “night work,” which is defined as work between 8:00 p.m. and 6:00 a.m.²⁴

The Act has several work categories with varying age requirements for specific types of work. The Act sets out minimum age requirements for light work, hazardous employment, and child labor (generally).²⁵ For light work the child must be thirteen years of age.²⁶ The Act defines light work as labor that “is not likely to be harmful to the health or development of the child and does not affect the child’s attendance at school or the capacity of the child to benefit from schoolwork.”²⁷ For hazardous employment the person must be eighteen years of age. In other words, definitionally not a child.²⁸ Labor is defined as hazardous “when it poses a danger to the health, safety or morals of a person.”²⁹ The Act lays out specifically what hazardous work constitutes, pertinent to this Comment’s analysis: “(c) portering of heavy loads; [and] (d) manufacturing industries where chemicals are produced or used . . .”³⁰

With respect to child labor in the cocoa industry, subsections (c) and (d) regarding hazardous labor are most relevant. For instance, to cut down cocoa bean pods, children often use large machetes.³¹ One mistake using the machete can injure them severely.³² Once the child has retrieved the pods they pack them into sacks, which weigh over 100 pounds.³³ They then carry these sacks throughout

²¹ The Children’s Act, 1998 (Act No. 560/1998) (Ghana).

²² *Id.* ¶ 1.

²³ *Id.* ¶ 87(2).

²⁴ *Id.* ¶ 88.

²⁵ *Id.* ¶ 89–91.

²⁶ *Id.* ¶ 90(1).

²⁷ *Id.* ¶ 90(2).

²⁸ *Id.* ¶ 91(1).

²⁹ *Id.* ¶ 91(2).

³⁰ *Id.* ¶ 91(3).

³¹ Tulane University Payson Center for International Development, 2013/14 Survey Research on Child Labor in West African Cocoa Growing Areas (2015).

³² *Id.*

³³ Peter Whoriskey & Rachel Siegel, *Cocoa’s Child Laborers*, WASH. POST (June 5, 2019), <https://perma.cc/BF69-AY3N>.

the forest.³⁴ This facially violates the portage limits found in the hazardous work prohibitions of the Act, yet it is a normal activity for child laborers on cocoa plantations.³⁵

With respect to subsection (d), Ghana, and Côte d'Ivoire for that matter, face the agricultural challenge of “prolific insect populations” due to their tropical climates, as well as invasive weeds.³⁶ In response, plantations have resorted to using industrial agrochemicals to assist in the protection of their cocoa farms.³⁷ This is a task that child laborers are often assigned.³⁸ Notwithstanding the clear violation of the Act's hazardous work provisions, child laborers are placed at even greater risk due to the lack of protective clothing worn while spraying the toxins.³⁹ Child exposure to agrochemicals is an increasing problem in both the Côte d'Ivoire and Ghana.⁴⁰ NORC's 2020 report assessing the progress of the reduction in child labor in Côte d'Ivoire and Ghana observed a twenty percent increase in agrochemical use for cocoa harvesting in cocoa growing households.⁴¹

2. Realities of domestic enforcement of law.

Due to the Act's registration system, the data is limited with respect to how many children are working in cocoa production, an agricultural field. The Act's registration requirements for the use of children and young persons for employment do not require employers to maintain a register of the children and young persons employed by them if they are not engaged in an “industrial undertaking.”⁴² Industrial undertaking is defined as not including agriculture: “[a]n industrial undertaking is an undertaking other than one in commerce or agriculture”⁴³ Thus, the Act exempts cocoa plantations from such registry requirements.

Enforcement of the Act is split into formal and informal sectors. Enforcement in the formal sector is carried out by a district labour officer.⁴⁴ If the officer is not satisfied with the compliance of the employer with respect to the Act, he is to report the matter to the police who will investigate and, if called for,

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Cocoa Farming*, RIGHT TO BE FREE (Nov. 7, 2023), <https://perma.cc/WTF7-YCBS>.

³⁷ CHOCOLATE'S HEART OF DARKNESS (Premières Lignes Sept. 29, 2020).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ NORC, *supra* note 15, at 16.

⁴¹ *Id.* at 16.

⁴² The Children's Act, 1998 (Act No. 560/1998) (Ghana), ¶ 93.

⁴³ *Id.* ¶ 93(2).

⁴⁴ *Id.* ¶ 95.

prosecute the offender.⁴⁵ Enforcement of the informal sector is tasked to the Social Services Sub-Committee of a District Assembly and the Department of Social Services.⁴⁶ Similarly, if they determine that the provisions are not being adhered to, they are to report the matter to the police.⁴⁷ The police investigate the matter and take next steps with respect to prosecution.⁴⁸ When the offender is a family member of the child whose rights are being violated, there is an additional request for a probation officer or social welfare officer to prepare a social inquiry report.⁴⁹ Such report will be considered by the police before action is taken against the offender.⁵⁰

B. Ivorian Labor Regimes

1. Prohibitions on Hazardous Work List.

The Ivorian Prohibitions on Hazardous Work for Children List (“List”) was an order administered by the Minister for Employment Protection in June 2017.⁵¹ The List operates similarly to Ghana’s Children’s Act in its definition of “hazardous work,” and what constitutes a child. A child is defined as “any natural person of either sex, under the age of eighteen (18) years regardless of race, nationality, religion, residing or staying in the territory of the Republic of Côte d’Ivoire.”⁵² Côte d’Ivoire, in its definition of “hazardous work,” explicitly prohibits its practice by children, as well as forbids particular jobs for children, which “by reason of nature or by the conditions in which they are carried out are likely to harm the health, safety and morals of the child.”⁵³ Article Four of the List, similar to a parallel provision from Ghana, states that to engage in “dangerous work,” a separate category from hazardous work, one must be eighteen years of age.⁵⁴ To engage in labor generally, one must be sixteen years of age.⁵⁵

Côte d’Ivoire departs from the Ghanaian framework in the specificity that permeates the List. For instance, Article Seven of the List directly addresses

⁴⁵ *Id.*

⁴⁶ *Id.* ¶ 96.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Déterminant la liste des travaux dangereux interdits aux enfants, Arrêté n°2017-017 (2017) (Côte d’Ivoire).

⁵² *Id.* art. 2.

⁵³ *Id.* art. 2.

⁵⁴ *Id.* art. 7.

⁵⁵ *Id.* art. 4.

agricultural work and prohibits children from “harvesting with a machete or a sickle” and “handling [] agrochemical products.”⁵⁶ Article Nine prohibits the portage of heavy loads, distinguishing how much weight a child is allowed to carry by age.⁵⁷ In no uncertain terms, Article Three states that the prohibition applies to paid and unpaid labor exercised by a child, whether on their own accord or for a third party. Article Three captures the cocoa industry by including agricultural work as a prohibited work area, notably including “family establishments.”⁵⁸

2. Article 23.8 of the Ivorian Labor Code.

The current labor code (“Code”) governing Côte d’Ivoire was passed in January 1995.⁵⁹ The Code mentions children in only six instances, with Article 23.8 being the sole article that deals with the employment and use of child laborers.⁶⁰ The article is straightforward: “children cannot be employed at a company before the age of fourteen, not even as apprentices, unless there is a derogation enacted by law.”⁶¹

3. Article 16 of the Ivorian Constitution.

The Ivorian Constitution is similarly sparse on details in its reference to child labor. The Constitution states “[c]hild labor is prohibited and punishable by law,” and declares a general prohibition of the use of child workers in jobs that “puts them in danger or affects their health, their growth, as well as their physical and mental balance.”⁶²

C. International Child Labor Obligations

Ghana and Côte d’Ivoire are both subject to three international child labor conventions: ILO Convention 138, ILO Convention 182, and the Convention on the Rights of the Child (CRC).⁶³ These three conventions make up the backbone of the ILO’s child labor framework.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Loi no 95/15, *supra* note 19.

⁶⁰ *Id.* art. 23.8.

⁶¹ *Id.* art. 23.8, at 10.

⁶² CONST. REP. CÔTE D’IVOIRE [Constitution], art. 16 (2016) [hereinafter 2016 Constitution].

⁶³ Off. of the High Comm’r, *Status of Ratification Interactive Dashboard-Ghana*, UNITED NATIONS HUMAN RIGHTS, <https://perma.cc/KJ6Q-KMFZ> (last visited Jan 9, 2023).

1. ILO Conventions 138 and 182.

ILO Convention 138, or the Minimum Age Convention, 1973, was adopted by Côte d'Ivoire in February of 2003.⁶⁴ Convention 138 sought to establish eighteen as the minimum age for employment in work “which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons . . .”⁶⁵ In addition to this provision in Article Three of Convention 138 Articles Five and Seven are the most relevant to this Comment.

Article Five states that its minimum age requirements apply to “plantations and other agricultural undertakings mainly producing for commercial purposes . . .”⁶⁶ Additionally, Article Five excludes “family and small-scale holdings producing for local consumption and not regularly employing hired workers.”⁶⁷

Article Seven addresses light work, which children are allowed to perform if they are between thirteen and fifteen years of age.⁶⁸ The Article defines light work as work that is “(a) not likely to be harmful to their health or development; and (b) not such as to prejudice their attendance at school, their participation in vocational orientation or training programmes approved by the competent authority or their capacity to benefit from the instruction received.”⁶⁹

The core mission of ILO Convention 182, or the Worst Forms of Child Labour Convention, was not only to define what the “worst forms of child labour comprise,” but also to commit signatories to eradicating it from their nations.⁷⁰ The pertinent Article provisions to this Comment are Articles Two and Three. Article Two plainly defines a child as all persons under the age of eighteen.⁷¹ Article Three provides a definition for what the worst forms of child labor constitute, and for purposes of this Comment subsection (d) is of particular interest.⁷² The subsection forbids “work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.”⁷³

These obligations render Ghana and Côte d'Ivoire's practices of child labor in the cocoa industry to be in violation of their commitment to ILO Conventions

⁶⁴ *Ratifications for Côte d'Ivoire*, ILO, <https://perma.cc/6XH4-BYVC> (last visited Nov. 10, 2022).

⁶⁵ ILO Minimum Age Convention, No. 138, art. 3, ¶ 1 (1973).

⁶⁶ *Id.* art. 5.

⁶⁷ *Id.*

⁶⁸ *Id.* art. 7.

⁶⁹ *Id.* art. 3.

⁷⁰ ILO Worst Forms of Child Labour Convention, No. 182, art. 3 (1999).

⁷¹ *Id.* art. 2.

⁷² *Id.* art. 3.

⁷³ *Id.*

138 and 182.⁷⁴ To review, there is no doubt that the use of sharp instruments, such as machetes, to cut down cocoa pods, portage of loads over 100 pounds, and the use of toxic agrochemicals without proper protective gear are in violation of ILO Conventions 138 and 182.⁷⁵ Yet this remains the day-to-day norm for many children in Ghana and Côte d'Ivoire. However, Ghana and Côte d'Ivoire's violations extend to ILO Convention 138's minimum age requirements by allowing for children under the age of eighteen to engage in hazardous work such as that described above. On top of this, the work that these children engage in can hardly be characterized as work that is "by its nature or the circumstance in which it is carried out, is likely not to harm the health, safety or morals of children."⁷⁶ There is no doubt these two nations are in violation of not just their domestic statutes but also international agreements to which they are party.

2. Convention on the Rights of the Child.

The CRC is a comprehensive set of principles and obligations adopted by the United Nations and signatory nations to provide for and prioritize the child's physical, mental, and social development.⁷⁷ Ghana and Côte d'Ivoire ratified the CRC in 1990 and 1991 respectively.⁷⁸ Article 32 of the CRC states that State parties to this Convention not only recognize the child's right to be protected from economic exploitation, but also to be protected from work "that is likely to be hazardous . . ." or "harmful to the child's health or physical, mental, spiritual, moral or social development."⁷⁹ Article 32 goes on to lay out the particular obligations of State parties which include "(a) [p]rovid[ing] for a minimum age or minimum ages for admission to employment; (b) [p]rovid[ing] for appropriate regulation of the hours and conditions of employment; [and] (c) [p]rovid[ing] for appropriate penalties or other sanctions to ensure the effective enforcement of the present article."⁸⁰

Ghana and Côte d'Ivoire, in contrast to ILO Conventions 138 and 182, are not in violation of CRC Article 32. As discussed in Sections I(A)(1) and I(B)(1), both Ghana and Côte d'Ivoire have provided domestic legislation to satisfy subsections (a)–(c) of Article 32. While technically not in violation of Article 32, Ghana and Côte d'Ivoire are inarguably in violation of the spirit and purpose of the CRC. In the last thirty years since both Ghana and Côte d'Ivoire's ratification

⁷⁴ Ghana ratified ILO 138 in June 2011 and ILO 182 in June 2000. Côte d'Ivoire ratified both ILO 138 and 182 in February 2003.

⁷⁵ CHOCOLATE'S HEART OF DARKNESS, *supra* note 37; Whoriskey & Siegel, *supra* note 33.

⁷⁶ ILO Worst Forms of Child Labour Convention, *supra* note 70, art. 2.

⁷⁷ United Nations Human Rights Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter UNHRC CRC].

⁷⁸ Office of the High Commissioner, *Status of Ratification Interactive Dashboard-Ghana*, *supra* note 63.

⁷⁹ UNHRC CRC, *supra* note 77, art. 32.

⁸⁰ *Id.*

of the CRC child labor has hardly diminished. As discussed previously in the Introduction to this Comment, in 2018–2019 nearly half of all children living in agricultural households were engaged in child labor.⁸¹ Simply put, children in Côte d'Ivoire and Ghana are not being sufficiently protected from the very evils that the CRC, and particularly Article 32, sets out to address.

III. ENFORCEMENT REGIMES TARGETING THE ERADICATION OF CHILD LABOR

Both Ghana and Côte d'Ivoire have several agencies that are tasked with enforcing child labor laws. Both nations have spread the task of enforcement across several bodies whose responsibilities often intermingle with one another.⁸² This leads to serious shortcomings in the overall enforcement of child labor law, leading to substantial underenforcement.

A. Ghanaian and Ivorian Labor Law Enforcement Apparatuses

1. Ghanaian enforcement apparatuses.

Ghana's law enforcement apparatuses relating to child labor violations rely on five key agencies: (a) Ministry of Employment and Labor Relations (MELR); (b) Ministry of Local Government and Rural Development's District Assemblies, (c) Ministry of the Interior (MOI), (d) Ministry of Justice's Office of the Attorney General (MOJAG); and (e) Ministry of Gender, Children, and Social Protection (MOGCSP).⁸³

2. Ghanaian criminal enforcement infrastructure.

In 2021, Ghana did take further steps toward addressing child labor in both the informal and formal sectors. Nevertheless, shortcomings and gaps continue to plague their criminal enforcement efforts. The U.S. Department of Labor's (DOL) report was unable to determine how many investigations were conducted by the Ghana Police Service (GPS) in 2021. However, in 2020, there were 119 investigations, an increase from 2019 which had only thirty-six.⁸⁴ In the DOL's 2021 report, investigators discovered 265 violations, but only sixteen prosecutions were initiated, which resulted in three convictions.⁸⁵ To say the least, these

⁸¹ NORC, *supra* note 15.

⁸² See generally 2021 Findings on the Worst Forms of Child Labor - Ghana, U.S. DEP'T OF LAB., <https://perma.cc/WXY6-MU4Z>, (last visited Nov. 10, 2022); 2021 Findings on the Worst Forms of Child Labor - Côte d'Ivoire, U.S. DEP'T OF LAB., <https://perma.cc/S4AQ-C22S>, (last visited Nov. 11, 2022).

⁸³ 2021 Findings on the Worst Forms of Child Labor – Ghana, *supra* note 82, at 4.

⁸⁴ 2020 Findings on the Worst Forms of Child Labor – Ghana, *supra* note 17.

⁸⁵ 2021 Findings on the Worst Forms of Child Labor – Ghana, *supra* note 82.

numbers are troubling. Out of 265 violations, the conviction rate totals to a paltry 1.13%. The unfortunate reality for Ghana's enforcement agencies is that they desperately "lack the resources to properly monitor sectors in which the worst forms of child labor are known to occur."⁸⁶

The DOL report on Ghana's efforts to combat child labor reveals that between 2020 and 2021, Ghana saw a drop from sixty-two labor inspectors to forty-eight.⁸⁷ But there was an increase in labor inspections from 213 in 2020 to 749 in 2021.⁸⁸ Nevertheless, as the DOL reports, "[t]he number of labor inspectors is likely insufficient for the size of Ghana's workforce."⁸⁹ Ghana's labor force totals nearly 12.5 million in both the formal and informal sectors.⁹⁰ Given the ILO's technical advice for a ratio of one inspector to every fifteen thousand workers, Ghana would need to employ 833 inspectors.⁹¹ Ghanaian labor inspectors further suffer from inadequate resources in their available "funding, shelter space, and transportation for victims."⁹²

3. Ivorian enforcement apparatuses.

Côte d'Ivoire principally relies on four agencies to handle child labor law enforcement across their nation.⁹³ The task of enforcement is distributed among the Ministry of Employment and Social Protection (MEPS), the Ministry of Defense, the Ministry of Justice and Human Rights, and the Ministry of Women, Family, and Children.⁹⁴

Unlike their Ghanaian counterparts, Ivorian labor law enforcement agencies do not have a clear agency that houses labor inspectors. The DOL report appears to suggest that MEPS is where the problem lies.⁹⁵ Notably, there are potentially operational gaps in the Ministry that "may hinder adequate labor law enforcement . . ."⁹⁶ Nonetheless, the DOL report classified Côte d'Ivoire's 2021 efforts in addressing child labor as a "significant advancement."⁹⁷ Unlike Ghana, Côte d'Ivoire saw an increase in labor inspectors between 2020–2021, going from

⁸⁶ *Id.* at 5.

⁸⁷ *Id.* at 4.

⁸⁸ *Id.* at 5.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ 2021 *Findings on the Worst Forms of Child Labor—Côte d'Ivoire*, *supra* note 82.

⁹⁴ *Id.*

⁹⁵ *Id.* at 4.

⁹⁶ *Id.*

⁹⁷ *Id.* at 1.

281 to 310.⁹⁸ This is especially encouraging given that, as reported in the 2018–2019 DOL report, there was a decrease in inspectors from 292 to 258.⁹⁹ At minimum this shows that Côte d’Ivoire is on track towards reaching the ILO recommended 584 inspectors. This recommendation relies on the ILO’s one inspector to 15,000 workers ratio as applied to Côte d’Ivoire’s nearly 8.8 million worker population.¹⁰⁰ With respect to the number of labor inspections conducted, at first glance, an increase from 1,659 to 2,836 is laudable. However, it is reasonable to question the fact that there were zero child labor violations found in 2021, and thus no penalties imposed or collected.¹⁰¹ This appears attributable to the fact that the majority of the inspections conducted in the Côte d’Ivoire are in the formal sector, which has a much lower use-rate for child laborers than the informal sector.¹⁰²

4. Ivorian criminal enforcement infrastructure.

The DOL 2021 report on the worst forms of child labor for the Côte d’Ivoire was unable to disaggregate the criminal enforcement information “from other information related to child abuse . . .”¹⁰³ An important note is that this was not a result of the Côte d’Ivoire withholding information, but rather an inability by the DOL to determine the salient data from other information related to child abuse.¹⁰⁴ Thus, data for the number of investigations, violations, prosecutions, and convictions for 2021 is unknown.¹⁰⁵ However, data for 2020 is, for the most part, available and known. In 2020, there were 500 investigations that resulted in 298 violations, of which 298 prosecutions were initiated.¹⁰⁶ Unfortunately, the DOL was unable to determine how many convictions resulted from the prosecutions.¹⁰⁷ Despite this, the DOL was able to determine that there were no penalties imposed for violations of the worst forms of child labor in 2020.¹⁰⁸ A notable difference is that, in 2021, the DOL was able to confirm that Côte d’Ivoire had imposed penalties for such violations.¹⁰⁹

⁹⁸ *Id.* at 4.

⁹⁹ *2019 Findings on the Worst Forms of Child Labor – Côte d’Ivoire*, U.S. DEP’T OF LAB., at 4, <https://perma.cc/B2Z3-8HPX> (last visited Nov. 10, 2022).

¹⁰⁰ *2021 Findings on the Worst Forms of Child Labor – Côte d’Ivoire*, *supra* note 82.

¹⁰¹ *Id.* at 4.

¹⁰² *Id.*

¹⁰³ *Id.* at 5.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

B. Connection Between Cocoa Cartelization and Domestic Labor Enforcement Shortcomings

An observation that becomes readily apparent upon viewing the child labor enforcement structure in both Ghana and Côte d'Ivoire is that they have a sprawling apparatus that is under-resourced, under-trained, and at best facially organized. The DOL's reports on both Ghana and Côte d'Ivoire reveal as much.¹¹⁰

The little resources that both nations do possess to fund their enforcement efforts include the profits from their cocoa exports. Ghana's cocoa export constitutes 3.5% of their gross domestic product (GDP), roughly a quarter of their total exports, while "providing about two-thirds of cocoa farmers' incomes."¹¹¹ Cocoa export as a funding mechanism is even more pronounced in Côte d'Ivoire, where cocoa constitutes fourteen percent of their GDP.¹¹²

This reveals not only the role that cocoa plays in Ghana's and Côte d'Ivoire's economies, but more importantly its centrality in funding the various initiatives of both nations' governments. Thus, a cocoa cartel, which stands to exert greater control over cocoa pricing to the benefit of members, lends itself not only to creating greater profits for producer nations, but also in stabilizing the chaos of domestic labor law enforcement.

C. International Response to West African Child Labor Violations

Given the domestic shortcomings of both Côte d'Ivoire and Ghana in their efforts to curb child labor, what international action has been taken, either against violators or in assistance to their national governments? The answer is that very little, if anything, has been done. Such inaction is by design. One cannot find in ILO Conventions 138 or 182 or in the CRC any affirmative penalties against state parties who violate their obligations post-ratification. For instance, Article 32 of the CRC eschews any such responsibility for internationally formulated punishment by obligating nations to create their own penal structure.¹¹³ To the credit of Ghana and Côte d'Ivoire, both nations have stepped up in their domestic

¹¹⁰ See generally *id.*; 2020 Findings on the Worst Forms of Child Labor – Ghana, *supra* note 17.

¹¹¹ Michael Ekow Amoah, *Ghana is Cocoa, Cocoa is Ghana*, OPEC FUND (June 2, 2022), <https://perma.cc/3QD7-V86E>.

¹¹² Ivory Coast and Ghana Note Progress in Making Buyers Pay Cocoa Premiums, AFRICANEWS (Nov. 2022), <https://perma.cc/XWS4-Y29D>.

¹¹³ UNHRC CRC, *supra* note 77, art. 32.

regimes to create such penalties, but as discussed at length in Section II of this Comment, those structures are ineffective and sorely lack resources.¹¹⁴

The sort of accountability that seems common today comes in the form of critical articles from predominantly Western news writers who provide commentary and investigations regarding the use of child labor in West African cocoa production.¹¹⁵ The court of public opinion is a far cry from a formal penalty structure. This cynicism is not unwarranted. There have been no trials or sanctions placed by the U.N., ILO, World Trade Organization (WTO), or any of their associated bodies against Ghana or Côte d'Ivoire for their continued violations of international treaties and agreements regarding child labor. The international legal instruments that have been exercised thus far come across as something more akin to unfunded mandates¹¹⁶ than substantive remedial legislation. To call upon nations to make potentially sweeping and expensive changes to their economic structure, without in turn providing financial and strategic resources, does little to address the complex and delicate humanitarian problem that is child labor use.

IV. GOVERNMENTAL AND NON-GOVERNMENTAL ACTOR IMPACT ON COCOA PRICE

Each nation has its own official cocoa regulatory body, which acts in some ways as domestic level cocoa cartels: Cocobod (Ghana) and Le Conseil du Café-Cacao (Côte d'Ivoire). There are also NGOs, like Fairtrade International, that seek to operate in parallel with such regulatory boards by supporting smallholder cocoa producers.¹¹⁷ It is this Comment's position that the greatest tool available to both Ghana and Côte d'Ivoire in their efforts to curb child labor is controlling the price and supply of cocoa. Ghana and Côte d'Ivoire have taken some economically centered measures, notably a bilateral institution of a flat price increase.¹¹⁸ Nevertheless, their efforts require greater coordination and scope if they wish to stop falling short of their goals.¹¹⁹

¹¹⁴ See generally 2020 Findings on the Worst Forms of Child Labor – Ghana, *supra* note 17. See also Findings on the Worst Forms of Child Labor – Côte d'Ivoire, *supra* note 13.

¹¹⁵ Ellen Peltier & Andrew Caballero-Reynolds, Ivory Coast Supplies the World With Cocoa. Now It Wants Some for Itself, *NEW YORK TIMES* (Aug. 13, 2022), <https://perma.cc/J2WW-7QLS>; Oliver Blach, Chocolate Industry Slammed for Failure to Crack Down on Child Labour, *THE GUARDIAN* (Oct. 20, 2020), <https://perma.cc/NQ3G-LXFP>; Whoriskey & Siegel, *supra* note 33.

¹¹⁶ In other words, a directive that lays out specific requirements demanded of the relevant parties without providing subsequent funding to satisfy such demands.

¹¹⁷ Fairtrade, *Cocoa*, FAIRTRADE, <https://perma.cc/FA6T-JBEX> (last visited Nov. 10, 2022).

¹¹⁸ Aljazeera, *Chocolate Gold: Ivory Coast and Ghana Set a Fixed Price for Cocoa*, *ALJAZEERA* (Aug. 6, 2019), <https://perma.cc/8CFZ-RKE6>.

¹¹⁹ Blach, *supra* note 115.

A. The Living Income Differential

Both Ghana and Côte d'Ivoire instituted a flat price increase¹²⁰ to per-ton cocoa exports in 2019.¹²¹ This increase was labeled as a “living income differential” (LID).¹²² Ghana and Côte d'Ivoire, in conjunction with large cocoa corporations, agreed to charge an additional 400 USD per ton of exported cocoa.¹²³ The rationale for the LID was to provide assistance to cocoa producers by increasing their “share of the profits and buffer[ing] them from volatile prices.”¹²⁴ This legislation acted as a directive on both nations’ cocoa regulatory entities, Ghana’s Cocobod¹²⁵ and Côte d'Ivoire’s Le Conseil du Café-Cacao (“Cocoa Board”).¹²⁶

This played out in Côte d'Ivoire in the form of the Cocoa Board fixing the minimum “farmgate”¹²⁷ price for the main crop harvest from farmers at “CFA 1,000 per kg.”¹²⁸ At the time, this constituted a price that was nearly “20% higher than the previous year.” This would bring in an additional CFA 500 billion, or roughly 752.4 million USD. An increase of cocoa sales with the direct purpose of assisting farmers’ bottom line is encouraging; however, the aftermath of the LID is far grimmer. The implementation of the LID came just before the COVID-19 pandemic, which caused cocoa demand to plummet.¹²⁹ For Côte d'Ivoire, this demand drop was due to both the higher prices set by the LID and a stored un-exported cocoa crop.¹³⁰ In response, the Cocoa Board “slash[ed]” the quality premium, otherwise known as the “country differential,” to entice buyers to sign purchase contracts.¹³¹ This did not directly eliminate the LID; however, the result was a discount that “neutralised the surplus earned through the LID.”¹³²

The Cocoa Board did not stop with neutralizing the LID surplus. Côte d'Ivoire went on to take over 10.5 billion CFA from the LID coffers, funds meant

¹²⁰ A “flat price increase” is a fixed increase in the amount of money spent per unit that is being dealt with, in this case per-ton cocoa exports.

¹²¹ Anand Chandrasekhar, *Has a New Price Premium on Cocoa Really Helped Struggling African Farmers?*, SWISSINFO.CH (Jul. 20, 2021), <https://perma.cc/9PYF-FPAZ>.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Ghana Cocoa Board*, COCOBOD, <https://perma.cc/9GMH-JRKA> (last visited Nov. 10, 2022).

¹²⁶ *Coffee Coffee-Cocoa Board*, LE CONSEIL DU CAFE-CACAO, <https://perma.cc/NF88-MEGQ> (last visited Nov. 10, 2022).

¹²⁷ A farmgate price is the minimum price that is paid directly to the farmer for their crop harvest, either for the main harvest between October–March or the less profitable mid-crop harvest; Chandrasekhar, *supra* note 121.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

to pay farmers, and bailed out eighty exporting firms, both national and international.¹³³ The actions by the Cocoa Board would lead to a downward spiral of the farmgate price, dropping to 750 CFA per kilogram, 75 CFA less than the pre-LID price.¹³⁴ It is important to note that the LID may have been more effective if it were not for a global pandemic wreaking havoc on the world economic stage. Nevertheless, it remains an uncertain solution given the inherent volatility of the commodities market and the sudden need for liquid capital in a downturn.

B. Fairtrade International and Cocoa

Fairtrade International (“Fairtrade”) is principally concerned with the equalization of the producer-consumer relationship, especially for small scale producers. Fairtrade describes such producers as “among the most marginalized by the global trade system.”¹³⁵ On the consumer side, Fairtrade serves an informational role with the Fairtrade Mark. Fairtrade describes the Mark as an indicator of producers and businesses meeting their “stringent Fairtrade social, economic and environmental standards.”¹³⁶

Fairtrade has several buckets of standards depending on who is interacting with them. For the purposes of this Comment their regulations for “[s]mall-scale [p]roducer [o]rganizations” (SPO) for cocoa are salient.¹³⁷ Fairtrade’s requirements are further broken down into “[c]ore requirements,” “[d]evelopment requirements,” and “[v]oluntary [b]est [p]ractices.”¹³⁸ Core requirements and development requirements are mandatory for SPOs. The former reflects Fairtrade’s principles, and the latter reflects continuous developmental goals that are scored by the certification body.¹³⁹ An example of how Fairtrade forces traders to better compensate SPOs is through these core trade requirements, which set explicit conversion ratios for cocoa liquor, cocoa butter, and cocoa beans.¹⁴⁰ For instance, if you are selling one metric ton (MT) of Fairtrade cocoa beans you are able to sell “up to 0.41 MT Fairtrade butter and 0.41 MT Fairtrade powder.”¹⁴¹ In other words, depending on what cocoa product

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *How Fairtrade Works*, FAIRTRADE, <https://perma.cc/G4HL-6B82> (last visited Nov. 11, 2022).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Fairtrade Standard for Cocoa, 01.04.2017_v.1.6, FAIRTRADE 4 (2022).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 9.

you wish to sell more of, you will also need to increase the purchase amount of a coordinate Fairtrade cocoa product.¹⁴²

Fairtrade's 2020/2021 household survey of their policies impact on Ivorian cocoa production revealed promising numbers with respect to Ivorian SPO incomes. The study found that the average Ivorian cocoa producer household income among 384 Fairtrade farmers across sixteen "certified cocoa cooperatives" increased "from 2,670 USD in 2016/17 to 4,937 USD in 2020/21."¹⁴³ For reference, the living income for the median household according to Fairtrade is 7,468 USD, placing the Fairtrade Ivorian SPO at roughly sixty-six percent of that target.¹⁴⁴ Without the Fairtrade regime, Ivorian cocoa farmers made a median household income of 3,186 USD in 2020, nearly 2,000 USD less than under Fairtrade.¹⁴⁵ A factor of note is that Fairtrade's presence in the cocoa industry is most concentrated in Côte d'Ivoire. In 2020, their membership constituted 440,226 reported Ivorian farmers.¹⁴⁶ However, there are roughly one million cocoa farmers in Côte d'Ivoire, with approximately 550,000 living below the global poverty line,¹⁴⁷ and nearly as many who are not members of Fairtrade.

Fairtrade has undoubtedly had a positive impact on Ivorian SPOs, but its ability to act is severely hampered by its inability to dictate the price of cocoa. In response, Fairtrade makes use of both a minimum price for Fairtrade marked cocoa and a price premium structure, which is an added payment provided by Fairtrade to Fairtrade farmers.¹⁴⁸ Those who wish to purchase Fairtrade cocoa beans will have to pay the Fairtrade-determined minimum price per metric ton of cocoa, which is 2,400 USD/MT compared to the current 1,890 USD/MT.¹⁴⁹ The price premium that Fairtrade pays to farmers is not applied to every bean sold or even when a bag of cocoa is sold by the producer.¹⁵⁰ It operates more like a bonus, paid typically at the end of the main harvest and only for the product that Fairtrade determined to be "export quality."¹⁵¹ Ultimately, while producers are paid more money, private organizations are left very little room to operate within the field of

¹⁴² *Id.*

¹⁴³ *New Study Shows Higher Incomes for Fairtrade Cocoa Farmers*, FAIRTRADE (Jul. 28, 2021), <https://perma.cc/ML29-5EJG>.

¹⁴⁴ *Cocoa Farmer Income-The Household Income of Cocoa Farmers in Côte d'Ivoire and Strategies for Improvement*, FAIRTRADE 11 (July 18, 2021).

¹⁴⁵ *Id.* at 25.

¹⁴⁶ *Top 7 Products Dashboard*, FAIRTRADE, <https://perma.cc/YEV5-5DFE> (last visited Oct. 8, 2022).

¹⁴⁷ Peltier & Caballero-Reynolds, *supra* note 115.

¹⁴⁸ Fairtrade America, *Fairtrade Announces New Minimum Price for Cocoa, Establishes Living Income Benchmarks*, GLOBENEWSWIRE (Jan. 18, 2019), <https://perma.cc/TA7N-6FYJ>.

¹⁴⁹ The current price of cocoa was taken on Oct. 31, 2022, at 9:05 AM CT.

¹⁵⁰ Brett Beach & Dr. Kirsty Leissle, *Reality Check: What Can We Do About Cocoa's Price?*, CONFECTIONERY NEWS (Sept. 12, 2022), <https://perma.cc/9QKQ-NXJ7>.

¹⁵¹ *Id.*

price fixing due to the national regulatory bodies in both Ghana and Côte d'Ivoire.¹⁵²

Fairtrade's utilizes financial incentives in its efforts to address the problem of child labor in both Ghana and Côte d'Ivoire. Thus, "Fairtrade[']s] ability to tackle the issue of child labour and poverty in cocoa is directly related to the amount of cocoa producers can sell on Fairtrade terms."¹⁵³ Therefore, Fairtrade's effectiveness as a force against child labor use in West Africa is directly connected to SPOs' willingness to make potentially drastic—or ruinous—changes in their production of cocoa for benefits that may not materialize conterminously with their immediate costs. This provides a potential explanation as to why Fairtrade-sold cocoa accounted for only five percent of globally exported cocoa, and a paltry eight percent for Côte d'Ivoire's exports.¹⁵⁴

V. FACTORS CONTRIBUTING TO THE USE OF CHILD LABOR IN WEST AFRICA

A. Economic Exacerbation

Cocoa production is a harsh and unforgiving market: it is a labor-intensive process with insufficient financial rewards to make child labor less appealing.¹⁵⁵ With such thin margins, the cost of labor is a key concern of SPOs who cannot afford to lose out on available profits.¹⁵⁶ For reference, Fairtrade's Living Income Reference Price for Cocoa provides the calculated income cocoa farmers in both Ghana and Côte d'Ivoire need to be earning to constitute a "living income."¹⁵⁷ A living income is "defined as sufficient income to afford a decent standard of living for all household members . . . once farm costs are covered."¹⁵⁸ Examples of such a "decent standard," include "a nutritious diet, clean water, decent housing, education, health care and other essential needs, plus a little extra for emergencies and savings."¹⁵⁹ The 2022 Fairtrade income report recommends 2.12 USD and 2.39 USD as the farmgate prices for Ghana and Côte d'Ivoire respectively.¹⁶⁰ As

¹⁵² *Id.*

¹⁵³ "Shocked but not Surprised": Fairtrade Responds to Report of Widespread Child Labour in West African Cocoa Industry, FAIRTRADE, (Jul. 24, 2020) <https://perma.cc/77ZC-8PTC>.

¹⁵⁴ *Id.*

¹⁵⁵ Milande Busquet, Niels Bosma & Harry Hummels, A Multidimensional Perspective on Child Labor in the Value Chain: The Case of the Cocoa Value Chain in West Africa, 146 *WORLD DEVELOPMENT* 105601 6 (2021).

¹⁵⁶ *Id.*

¹⁵⁷ *Fairtrade Living Income Reference Prices for Cocoa: update October 2022*, FAIRTRADE, <https://perma.cc/NE5E-NKB6> (last visited Oct. 16, 2023).

¹⁵⁸ *Living Income*, FAIRTRADE, <https://perma.cc/J3EB-85ZV> (last visited Nov. 11, 2022).

¹⁵⁹ *Id.*

¹⁶⁰ FAIRTRADE, *supra* note 158.

it currently stands, Ghanaian and Ivorian cocoa producers are earning far less for their maincrop harvest, at 1.24879 USD/kg and 1.36 USD/kg, respectively. Simply put, farmers are not earning a sufficient wage to sustain their work without child labor.

Scholars like Milande Busquet, Niels Bosma, and Harry Hummels have stated that increasing farmer negotiation power is “an important aspect of most programs” that seek to address child labor.¹⁶¹ They point to increasing negotiating power through “productivity increase and/or additional premiums and certifications,” but note that the use of child labor is not a problem resolved simply by higher incomes for farmers.¹⁶² Nevertheless, the price of cocoa and the income of farmers are incredibly salient factors in solving the issue.

As discussed in Section III(A), after the institution of the LID between Côte d’Ivoire and Ghana, the Ivorian farmgate price quickly went into a freefall.¹⁶³ To put these numbers in context, the Ivorian farmgate price for the middle crop harvest pre-spiral was 825 CFA/kg.¹⁶⁴ This translates to 1.25 USD/kg. After the failure of the LID, the farmgate price dropped to 750 CFA/kg, or 1.14 USD/kg. Neither of those prices come close to the Fairtrade recommendations referenced above.¹⁶⁵ Given that cocoa is sold by the metric ton on the open market, the difference between the pre-LID and post-LID breakdown translates to 120 USD/MT, or roughly a difference of 79,000 CFA.

As discussed above, SPOs suffer from insufficient income and resources, and this disadvantage makes child labor an asset that farmers cannot ignore. The obvious alternative—the use of outside laborers—is not an option to many cocoa producers.¹⁶⁶ Given their low incomes, hiring labor is exceptionally difficult, especially if an SPO is also trying to balance other expenses such as their child’s education.¹⁶⁷ Even when there are educational facilities, SPOs “don’t have the means to send their children to school.”¹⁶⁸ Ultimately, these small producers are “forced to include their children in the farm labor . . . because they are not paid enough for the cocoa they sell.”¹⁶⁹

Farmers in both Côte d’Ivoire and Ghana possess very little bargaining power within their respective cocoa regulatory schemes and the international trade of cocoa. Cocoa farmers are by all rights price takers, meaning they are not in the

¹⁶¹ Busquet et al., *supra* note 155, at 8.

¹⁶² *Id.*

¹⁶³ Chandrasekhar, *supra* note 121.

¹⁶⁴ *Id.*

¹⁶⁵ Fairtrade Living Income Reference Prices for Cocoa: Update October 2022, *supra* note 157.

¹⁶⁶ Busquet et al., *supra* note 155, at 7.

¹⁶⁷ *See id.*

¹⁶⁸ *Id.*

¹⁶⁹ Food Empowerment Project, *supra* note 1.

position to set their own independent pricing for their cocoa crop.¹⁷⁰ This state of affairs has in part come about as a result of the centralization of the international trade of cocoa.¹⁷¹ The value of cocoa, while regulated, is largely buyer-driven.¹⁷² In other words, big chocolate companies like Mars Inc., Mondelez International, Ferrero Group, Nestlé SA and the Hershey Company wield great power in price setting.¹⁷³ What the Ghanaian Cocobod and Ivorian Cocoa Board attempt to do is stabilize the volatility of the cocoa market, but with little to no room made for farmer negotiation. For instance, in Ghana, the entire sale and export apparatus of cocoa is controlled by the state.¹⁷⁴ If a coalition of Ghanaian cocoa farmers wanted to make a sale to an international buyer at their own price they are prohibited by the State from doing so.¹⁷⁵ This highly centralized structure in Ghana is markedly different from Côte d’Ivoire, which allows for farmers to sell their beans “to either cooperatives, farmer groups or local traders who resell to other intermediates and/or international clients.”¹⁷⁶ Nevertheless, under both regimes, farmers are turning towards child labor to supplement the losses that they incur due to their price taker positions.

B. Cultural Forces

As touched upon briefly in Section V(A), farmer income does not capture the entire story of the use and proliferation of child labor in cocoa production in West Africa. The role of children in rural West Africa with respect to a family’s ability to maintain a livelihood is a factor that influences the use of child labor.¹⁷⁷ In West African culture, it is normal for a young male child on a family cocoa farm to learn from their father how cocoa is produced, with the expectation the child will later take on more responsibilities to assist their family.¹⁷⁸

By no means does this Comment advocate for cultural erasure in its call to significantly reduce child labor in cocoa production. The use of children in the cocoa supply chain is a complex and delicate issue given its cultural role within West African families and communities. What this Comment seeks to accomplish is to provide cocoa farmers a national structure that coordinates over two-thirds of the world’s cocoa production to increase bargaining power with cocoa buyers. This would provide for a system in which benefits are passed down to farmers so

¹⁷⁰ Busquet et al., *supra* note 155, at 7.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Busquet et al., *supra* note 155, at 7.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

that, at minimum, they can balance their child's cultural and formal education. While a discussion of the cultural context which surrounds child labor use in West Africa is beyond the scope of this Comment, this is an aspect of the issue that is ripe for future analysis.

VI. CONSOLIDATION OF COCOBOD AND LE CONSEIL DU CAFÉ-CACAO

At its core this Comment's proposal is the consolidation of both the Ghanaian and Ivorian cocoa regulatory bodies into an intergovernmental entity that oversees and unifies the cocoa policies of both nations. This institution's primary objective is to have both nations' interests "individually and collectively"¹⁷⁹ being advanced most advantageously. This proposed solution takes inspiration from the success of The Organization of the Petroleum Exporting Countries ("OPEC"). An article in the *Wall Street Journal* intimated that there is already a cocoa cartel between Ghana and the Côte d'Ivoire, which was dubbed "COPEC."¹⁸⁰ However, the title appears to be in reference to the LID agreed upon between the two nations.¹⁸¹ This Comment's proposal focuses on forming a formal entity, a commodity cartel, as opposed to ad hoc pricing agreements, distinguishing it from the current situation between Ghana and Côte d'Ivoire. This understanding is further supported by reporting by Peter Whoriskey at *The Washington Post* on the acts of both Ghana and Côte d'Ivoire. Whoriskey describes the institution of the LID as an act by a "two-country cartel."¹⁸² Nonetheless, there appears to have been no official creation of a cocoa cartel between Ghana and Côte d'Ivoire beyond media labeling their joint efforts as constituting cartelization of cocoa.

Briefly, this Comment relies on Mark W. Charlton's definition of "cartel." Charlton defines international commodity cartels "as being essentially alliances or coalitions among producing nations who agree to limit their competitive activity in order not only to achieve immediate economic benefits, such as a 'fairer' market price, but also to attain broader political objectives."¹⁸³

¹⁷⁹ 2021 Organization of the Petroleum Exporting Countries, *OPEC Statute* (2021).

¹⁸⁰ Alexandra Wexler, *Cocoa Cartel Stirs up Global Chocolate Market*, WALL ST. J., <https://perma.cc/ETW3-VG6S> (last visited Nov. 11, 2022).

¹⁸¹ *Id.*

¹⁸² Peter Whoriskey, *Producers of Cocoa Create Cartel*, WASH. POST, <https://perma.cc/2PNK-7FXJ> (last visited Nov. 11, 2022).

¹⁸³ Mark W. Charlton, *Politics and Commodity Cartels*, 9 PEACE RES. 67 (1977).

A. Legality of Government Formed Commodity Cartels

1. Ghana.

Currently, Ghana does not have any general antitrust or competition laws on the books.¹⁸⁴ There is currently only one piece of legislation that is non-specific in its mandate and makes explicit reference to competition, that being the Protection Against Unfair Competition Act, 2000 (“Act”).¹⁸⁵ The Act addresses key areas of competition regulation, specifically: “(1) [c]ausing confusion with respect to another’s enterprise or its activities, (2) [d]amaging another person’s goodwill or reputation, (3) [m]isleading the public, (4) [d]iscrediting another person’s enterprise or its activities, (5) [u]nfair competition in respect of secret information, and (6) [u]nfair competition in respect of national and international obligations.”¹⁸⁶

Notably missing from the express language of the Act is any reference to cartels, much less government-initiated international organizations. Ghana does have specific legislation targeting a variety of industries found within its borders, such as banking with the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930), or energy in the Energy Commission Act, 1997 (Act 678).¹⁸⁷ However, comparable legislation for cocoa or agriculture generally does not appear to exist. This makes logical sense given the role that Cocobod plays in Ghana as a national-level price fixer.

The closest approximation to language that may prohibit cartel-like conduct is in Section Six of the Act, titled “[u]nfair competition in respect of national and international obligations.” The section states that “[a]ny act or practice in the course of industry or commercial activity”¹⁸⁸ that breaches either Ghanaian law or international/regional obligations “which *a person* engaged in business or commercial activity in Ghana is subject and in a manner *contrary to honest business practices* constitutes an act of unfair competition.”¹⁸⁹ One can argue that this language impliedly captures cartel conduct. The argument would be that corporations who act in concert to price fix and intentionally limit supply to their benefit and the detriment of consumers would be acting in a manner facially “contrary to honest business practice.”¹⁹⁰ Thus, private cartelization would be captured under the Act. Importantly, the language of the Act does not appear to be directed at government activities but rather at private entities and persons

¹⁸⁴ Bowmans Law, *Africa Guide-Competition*, 2016 vol. (2016).

¹⁸⁵ *Id.*

¹⁸⁶ Protection Against Unfair Competition Act, 2000 (Act No. 589) (Ghana).

¹⁸⁷ See Bowmans Law, *supra* note 184.

¹⁸⁸ See Protection Against Unfair Competition Act, *supra* note 186 (emphasis added).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

seeking to engage in acts “contrary to honest business practice[s].”¹⁹¹ This choice of language leaves room for further government-initiated cartelization of cocoa. Once again, this makes perfect sense given that Ghana has already instituted a national-level cocoa cartel in the form of Cocobod. Therefore, as far as Ghanaian law is concerned, there is no impediment for the Ghanaian government to engage with the Côte d’Ivoire in a formalized international commodity cartel.

2. Côte d’Ivoire.

The Côte d’Ivoire, in contrast to Ghana, has several pieces of national competition legislation. The Ivorian government has passed: (1) The Order No. 2013-662 of 20 September 2013 (the Competition Order), The Rule No.02/2002 of the West African Economic and Monetary Union (“WAEMU”) which relates “to anti-competition practices in the WAEMU,”¹⁹² The Rule No.03/2002 of WAEMU which relates “to procedures applicable to concerted practices and abuse of dominant positions inside the WAEMU,”¹⁹³ and “Articles 88-90 of the WAEMU Treaty”¹⁹⁴ 2003.¹⁹⁵ These various pieces of legislation constitute the WAEMU Regulations.¹⁹⁶

Unlike Ghana, the anti-competitive legislative infrastructure of the Côte d’Ivoire does explicitly prohibit cartel conduct. This prohibition comes directly from the Competition Order which establishes in Article 1 that anti-competitive agreements are “all agreements between undertakings, decisions by an association of undertaking and concerted practices between undertakings having as their object or effect the restriction or distortion of competition.”¹⁹⁷ Article Two states that “[t]he prices of goods, products, or services exchanged in Côte d’Ivoire are freely determined by competition.”¹⁹⁸ Côte d’Ivoire was clearly cognizant that the language of Article One and Two would capture the non-competitive practices of their Cocoa Board, which may have driven the inclusion of Article Three. Article Three provides an exemption to the Government’s regulation of prices of “basic necessities or consumer goods, products and services”¹⁹⁹ after a consultation with the Commission for Competition and the Fight Against High Cost of Living.²⁰⁰

¹⁹¹ *Id.*

¹⁹² *See* Bowmans Law, *supra* note 184.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Ordonnance No. 2013-662 du 20 Septembre 2013 Relative à la Concurrence [Competition Ordinance] (Côte D’Ivoire).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

Article Thirteen of the Competition Order provides potentially even more explicit affirmative language for government-led commodity cartels. Article Thirteen exempts agreements or decisions “by associations”²⁰¹ from its prohibited anti-competitive agreement (Article Eleven) and abuse of dominant position (Article Twelve) provisions that “contribute to improving the production or distribution of products or to promoting technical or economic progress,” so long as users receive their “fair share of the resulting profits . . .”²⁰²

The Competition Order’s language in their Third and Thirteenth Articles make it clear that if the Ivorian government decided to form a cocoa cartel with Ghana, its anti-competitive legislation would pose no obstacle. Taking a literal reading of the text, the only impediment to such efforts would be found in Article Three’s consultation requirement with the Commission for Competition and the Fight Against High Cost of Living.²⁰³ However, the Commission’s role as articulated in Article Eight is to carry out a “general market surveillance mission in order to detect malfunctions,”²⁰⁴ in addition to publishing an annual report advising improvements that “could be made to the economy.”²⁰⁵ As far as the Ivorian government describes the Commission, it appears to be first and foremost an advisory body as opposed to an enforcement apparatus that can unilaterally effectuate its determinations. Thus, as far as Ivorian legislative prohibitions are concerned, a cocoa cartel with Ghana is allowable.

3. International legality of cartels.

The principal body tasked with international trade obligations, competition laws, and agreements is the WTO. Both Ghana and Côte d’Ivoire are subject to the WTO’s agreements and obligations as members.²⁰⁶ The WTO’s principal agreements that are of interest to this Comment are the General Agreement on Tariffs and Trade (“GATT”) and the WTO’s 2003 Ministerial Conference in Cancún.

The GATT does not mention cartels by name, while the WTO’s singular discussion of cartels was at the WTO Cancún Ministerial conference in 2003. The WTO was concerned with the evils posed by private anti-competitive practices, as opposed to state run operations.²⁰⁷ However, in a 2018 manuscript published

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ World Data, *Member States of the WTO: World Trade Organization*, <https://perma.cc/J7UK-D3GK> (last visited Jan. 9, 2023).

²⁰⁷ World Trade Organization, *Trade and Competition Policy Dealing with cartels and other anti-competitive practices*, <https://perma.cc/VP8J-XSE7> (last visited Jan. 9, 2023).

by the WTO's Economic Research and Statistics Division, the authors admit that "efforts to establish general agreement on competition policy in the framework of the international trading system have been unsuccessful."²⁰⁸ Nevertheless, the message from the WTO that cartels are undesirable comes through implicitly in several key articles of the GATT. Articles VI and XVII provide the implicit rebuke of cartelization, even by State actors.

Article VI deals with anti-dumping and the subsequent condemnation of the practice by State parties. Dumping is the act of introducing a product, for instance cocoa, into the market of another nation at a price lower "than the normal value of the product."²⁰⁹ The relation of Article VI to cartels and the cartelization of a commodity is that dumping is something that a well-organized cartel can accomplish to capture greater market share. For instance, if a cocoa cartel wanted to expand its share of the cocoa market in a particular nation that purchased the product from multiple sources, they could dump cocoa at a lower price than their competitors. The purpose of this practice is to put competitors out of business and potentially acquire their assets. If the cartel was concerned about their losses, they could, in turn, re-raise the price of cocoa without the presence of competition.²¹⁰ Article VI fights back against dumping by permitting the use of tariffs to be placed against such actors as a means of "offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise."²¹¹ However, the WTO does not have an international punishment apparatus against offending nations and leaves it up State parties to react.

Article XVII directly addresses state trading enterprises, a role which cartels occupy. The Act states that when or if contracting parties grant an enterprise "exclusive or special privileges . . ." that enterprise "shall, in its purchases of sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment . . . for governmental measures affecting imports or exports by private traders."²¹² That is the antithesis of what a cartel would seek to accomplish. If the interests of members call for the cartel to be discriminatory in the export of the cartelized commodity, then that is precisely what they must do if the cartel is to operate as intended. This is especially true in

²⁰⁸ Robert D. Anderson et al., *Competition Policy, Trade and Global Economy: Existing WTO Elements, Commitments in Regional Trade Agreements, Current Challenges and Issues for Reflection* (WTO Economic Research and Statistics Division, ERSD-2018-12, 2018), <https://perma.cc/D9AL-TTD7>.

²⁰⁹ World Trade Organization, *The General Agreement on Tariffs and Trade*, art. VI (1986) [hereinafter *WTO General Agreement*].

²¹⁰ For a more in-depth analysis of dumping and its connection to commodity cartels, see Thomas R. Howell, *Cartels and Dumping: A Response*, 68 *ANTITRUST L. J.* 297 (2000).

²¹¹ See *WTO General Agreement*, *supra* note 209, art. VI.

²¹² *Id.* art. XVII.

the context of a cocoa cartel where the principal importers of cocoa are private traders. A cocoa cartel would invariably make decisions that adversely affect the imports of such traders if it was determined to be best situated to advance their interests, which would be in flagrant violation of Article XVII.²¹³

The WTO, and members of the international community, certainly frown upon the practice of cartelization,²¹⁴ but there is no international legal infrastructure, nor total international opprobrium of cartelization that substantively prevents the creation and operation of commodity cartels. The threat of potential individual actors enacting sanctions against a cartel remains viable, but it is a dangerous game to play. Looking at OPEC, which according to current estimates controls “80.4% (1,241.82 billion barrels) of the world’s proven oil reserves . . . located in OPEC Member Countries,”²¹⁵ it seems to logically follow that any nation that relies on OPEC nations for crude oil would be hard-pressed to find alternatives in the event they utilize sanctions. This does not even reference OPEC’s history of using embargos in retaliation against nations, such as when OPEC instituted an embargo against the U.S. for their support of Israel during the Arab-Israeli War in 1973.²¹⁶ A cartel formed between Ghana and Côte d’Ivoire would not be so dissimilar in the amount of market pressure they could exert given their control of over sixty percent of the world’s cocoa production. A cocoa cartel may even be better situated than OPEC, since those who may balk at their policies are not necessarily national governments but private importers who do not have direct access to international levers of power like tariffs and embargos. To place this in perspective, in 2020 during the Trump Administration in the U.S., President Trump threatened tariffs on crude oil imports from OPEC member nations in response to plummeting crude prices.²¹⁷ Whereas cocoa producers in response to the joint institution of the LID by the Ghanaian and Ivorian cocoa boards was something that cocoa importers either had to acquiesce to in purchasing at the increased rate or reduce their cocoa buy orders.²¹⁸

²¹³ *Id.*

²¹⁴ WTO Working Group on the Interaction between Trade and Competition Policy, Report on the Meeting of 1–2 July 2002 (2002).

²¹⁵ *OPEC Share of World Crude Oil, 2021*, OPEC, <https://perma.cc/MTF4-53F5> (last visited Feb. 15, 2023).

²¹⁶ *Oil Embargo, 1973-1974*, OFFICE OF THE HISTORIAN, <https://perma.cc/R6J9-GGBZ> (last visited Feb. 15, 2023).

²¹⁷ Jeff Mason & Timothy Gardner, *Trump threatens tariffs on oil imports to ‘protect’ U.S. energy workers*, REUTERS, Apr. 4, 2020, <https://perma.cc/GT7G-KRK7>.

²¹⁸ Ange Aboa & Maytaal Angel, *Ivory Coast, Ghana add ‘living income’ cocoa premium to fight poverty*, REUTERS, July 10, 2019, <https://perma.cc/R74X-YMHX>.

B. Organizational Feasibility

1. Factors that favor cartelization.

Ghana and the Côte d'Ivoire appear to be well positioned to establish an international trade alliance given that together they constitute a majority of the world's cocoa export, they have expertise in the area, and they possess similar objectives and values.

In Charlton's article, *Politics and Commodity Cartels*, he goes into detail as to the sort of conditions that create an ideal environment for the cartelization of a commodity.²¹⁹ Charlton particularly focuses on the "[i]nter-[a]ssociation [c]onditions"²²⁰ that make up a solid foundation on which to build a commodity cartel. These conditions are where the Côte d'Ivoire and Ghana are best situated.

The number of members within the cartel is "[i]deally . . . small,"²²¹ such that the members' ability to communicate, negotiate, and come to an agreement is not hampered by too many voices.²²² As the adage goes, too many cooks in the kitchen spoils the broth. As first discussed in the Introduction, Ghana and Côte d'Ivoire provide for roughly seventy percent of the world's cocoa production.²²³ This market share falls in line with the various cartels cited by Charlton, such as how "CIPEC with only four members controls 80% of the world's export copper,"²²⁴ or that "[t]here countries control 70% of the export of tropical timber,"²²⁵ or even how the "IBA controls 75% of bauxite exports."²²⁶

Ghana and Côte d'Ivoire may additionally benefit from their long-standing involvement in the cocoa industry, and thus the wealth of knowledge and expertise that come from such practice. For reference, Ghana has been exporting cocoa since the "end of the 19th century,"²²⁷ and the Côte d'Ivoire "massively promoted"²²⁸ the practice upon gaining their independence in 1960.²²⁹ Given the

²¹⁹ Charlton, *supra* note 183.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Child Labor and Slavery in the Chocolate Industry*, FOOD EMPOWERMENT PROJECT (Jan. 2022), <https://perma.cc/QV9R-LETU>.

²²⁴ *See* Charlton, *supra* note 183.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Divine Chocolate, *Cocoa and Ghana*, DIVINE, <https://perma.cc/4TYT-6F6S> (last visited Nov. 11, 2022).

²²⁸ David Esnault, *Boom times for organic cocoa in Ivory Coast*, PHYS ORG (May 16, 2021), <https://perma.cc/9SMA-HHNS>.

²²⁹ *Id.*

combined experience of both Ghana and Côte d'Ivoire there appears to be at minimum a tentative foundation upon which to base a cartel.

Finally, Ghana and Côte d'Ivoire share a variety of cultural values and economic objectives. This is in no small part due to cocoa production taking place in predominantly rural West African communities,²³⁰ and the countries' commitment to making cocoa exporting economically viable as evidenced by their co-institution of an LID.²³¹ Given their shared history, formal cartelization appears to be the next logical step in their coordinated efforts to cement cocoa production as a viable stream of economic revenue.

2. Organizational structure of a cocoa cartel.

As has been alluded to prior in this Comment, the proposed cartelization of cocoa derives inspiration from the success of OPEC, one of the oldest formal cartels of the twenty-first century.²³² Officially this partnership between Ghana and Côte d'Ivoire would be labeled as an intergovernmental organization ("IGO"). An IGO "refers to an entity created by treaty, involving two or more nations, to work in good faith, on issues of common interest."²³³ The OPEC Statute is what serves as the treaty that binds OPEC members to the goals of the organization.

The Comment's proposed cocoa cartel between Ghana and Côte d'Ivoire would first call for a governing "[s]tatute," which would lay out in clear terms the agreement between both nations to come together and form a physical body to control their domestic cocoa production and export. The benefit of an official treaty between Ghana and Côte d'Ivoire is that, opposed to merely grouping themselves informally, a treaty provides "the ability to enter into enforceable agreements among themselves or with states."²³⁴ The creation of formal ties firmly linking the interests of Ghana and Côte d'Ivoire would only enhance the deep similarities that both nations share culturally and economically.

IGOs are by no means "new" creations in the international landscape, and OPEC was not the first. Familiar organizations like the U.N., the North American Atlantic Treaty Organization, the E.U., and the WTO are all IGOs.²³⁵ All of these organizations occupy positions of immense importance on the international stage. These IGOs can serve as potential sources of inspiration for the structuring of an

²³⁰ Milande Busquet et al., *A multidimensional perspective on child labor in the value chain: The case of the cocoa value chain in West Africa*, 146 *WORLD DEV.* 105601 (2021).

²³¹ Blach, *supra* note 115.

²³² *Brief History*, OPEC, <https://perma.cc/3U6X-A26J> (last visited Jan. 9, 2023).

²³³ *Intergovernmental Organizations (IGOs)*, HARVARD LAW SCHOOL, <https://perma.cc/S556-RMGP> (last visited Jan. 9, 2023).

²³⁴ *Id.*

²³⁵ *Id.*

IGO between Ghana and Côte d'Ivoire, but moreover they serve as a reminder of IGOs' importance in gaining a voice on the international stage.

3. Factors that disfavor cartelization.

What Charlton dubs “[e]nvironmental [c]onditions” may present significant obstacles for the cartelization of cocoa.²³⁶ Charlton begins his discussion with “[d]emand inelasticity,” which is that the demand for a commodity must be unresponsive to its price.²³⁷ At the end of 2020 there was a drop in global demand for cocoa beans, with a subsequent price drop of the commodity. However, this was also at the onset of the Covid-19 pandemic where between 2019 to 2020 the “median global GDP dropped by 3.9% . . . making it the worst economic downturn since the Great Depression.”²³⁸ Support of Ghana and Côte d'Ivoire's ability to overcome demand elasticity is evidenced in the response of cocoa buyers. Major cocoa importers, amidst accusations by the Ivorian Cocoa Board of reducing their share of LID Ivorian and Ghana cocoa, have stated that they are not reducing their share of the higher priced cocoa.²³⁹ This position is further substantiated by Nestlé's disclosure of its share and volumes of cocoa from West Africa.²⁴⁰ For the last four years Nestlé's share of West African cocoa “has remained stable . . . and it plans to buy an additional 40,000 tons from the Côte d'Ivoire in the 2021/2022 season.”²⁴¹ Further support comes from Swiss chocolate maker Lindt & Sprüngli who confirmed that they “have already purchased cocoa with full LID pricing and will be continuing to do so.”²⁴² Understandably, the statements of two chocolate importers who do not together constitute a majority of cocoa demand are not determinative in setting the wider trend of cocoa importers. Nonetheless, giants like Nestlé wield significant influence through their ability to compete. Thus, it may be the case that demand inelasticity is not much of a problem when it comes to cocoa.

The fact that cocoa production is so tightly regulated by the governments of both Ghana and Côte d'Ivoire may pose a coordination challenge with respect to the “production-marketing structure” of commodity cartelization.²⁴³ As discussed by Charlton, when production and marketing of a commodity is primarily in government hands, as is the case for both Ghana and Côte d'Ivoire, “[s]uch tactics

²³⁶ See Charlton, *supra* note 183.

²³⁷ *Id.*

²³⁸ Stephanie Oum et al., *Economic Impact of Covid-19 on PEPFAR Countries*, KFF, <https://perma.cc/PWU6-34FW> (last visited Nov. 11, 2022).

²³⁹ Anand Chandrasekhar, *Has a new price premium on cocoa really helped struggling African farmers?*, SWISSINFO.CH (July 20, 2021), <https://perma.cc/JU7B-J6QV>.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ See Charlton, *supra* note 183.

pose greater difficulties for implementation.”²⁴⁴ The reason for such difficulties is because it “necessitates the use of production and export quotas, or the creation of buffer stocks.”²⁴⁵ Buffer stock is “an excess amount of raw materials kept on hand to guard against any unplanned inventory shortages”²⁴⁶ These additional measures increase the risk towards individual members in the implementation of a cartel as they involve “a cut in production [which] might result in a long term loss of market share.”²⁴⁷ Thus, this incentivizes members to cheat to deflect perceived, or real, future harms to their production revenue.²⁴⁸ The impact of this obstacle will largely turn on inter-governmental coordination and cooperation between Ghana and Côte d’Ivoire. There is already evidence of the two nations’ ability to cooperate shown by their co-institution of an LID on their cocoa exports.²⁴⁹ As discussed previously, a cocoa cartel appears to be the next logical step after an LID. An LID is an act of price fixing. What this coordinated effort lacked was the subsequent use of export and supply caps to ward off an influx of farmers trying to capture the higher farmgate prices. All this is to say that Ghana and Côte d’Ivoire have a foundation of cooperation, which may prove instrumental in overcoming the obstacles discussed above. Of course, there is the worry that child labor may increase if cocoa prices plunge due to a potential global cocoa market; however, as will be explained in Section VI.E, such exacerbation is likely to be short-term.

C. Criticism of Commodity Cartelization

There is no avoiding one of the prevailing views of commodity cartels as creating instability in the world marketplace.²⁵⁰ A key objection against cartels is that they are unstable institutions and framed as entities that die both in times of economic depression, which perhaps can be forgiven, but also, and more to their detriment, in prosperity.²⁵¹ Several answers exist for such instability, such as divergent interests among member nations, price volatility in connection to product demand,²⁵² and potentially long lag times due to the temporal limitations

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ Accounting Tools, *Buffer Stock Definition*, ACCOUNTINGTOOLS, <https://perma.cc/GVW5-L2NE> (last visited Nov. 11, 2022).

²⁴⁷ *See* Charlton, *supra* note 183.

²⁴⁸ *Id.*

²⁴⁹ *See* Blach, *supra* note 115.

²⁵⁰ Klaus E. Knorr, *The Problem of International Cartels and Intergovernmental Commodity Agreements*, 55 YALE L. J. 1097 (Aug. 1946).

²⁵¹ *Id.*

²⁵² *Id.*

of crop growth²⁵³ which all contribute to volatility within a cartel. If one member nation finds that its interests are better served by cheating the agreement without sufficient ability to retaliate from other member(s), the entire system is liable to collapse.²⁵⁴ Though, as J.D. Jaspers notes in his piece *Managing Cartels: how Cartel Participants Create Stability in the Absence of Law*, this view of “inherent stability”²⁵⁵ comes from a game-theoretical framing of the issue.²⁵⁶ In other words, because there are assumed incentives for member nations to cheat (i.e. break from cartel policy), this creates inexorable stability problems for cartels that are seemingly only solved through sufficiently severe and robust punishment and detection structures.²⁵⁷ To put it differently, cartels create more problems than they solve.

Another popular criticism of commodity cartelization is that for it to be successful it necessarily harms not just overall economic efficiency but also consumers.²⁵⁸ The success of a cartel is partly contingent on its ability to raise prices “above the competitive level,”²⁵⁹ while decreasing the amount of supply available to the market.²⁶⁰ Thus, such actions push customers to either “pay the cartel price”²⁶¹ or reduce in part or in whole their purchase of the cartelized product.²⁶² Commodity cartels, through their structural organization, allow for the shielding of member nations from “full exposure to market forces,”²⁶³ by their ability to fix prices, control output, and rig bids to favor member nations.²⁶⁴ All of this contributes to a generalized sentiment that institutions like OPEC and similarly successful commodity cartels are detrimental additions to the world marketplace, and that the further proliferation of cartels should be strongly discouraged if not prohibited.²⁶⁵

²⁵³ Rob S. Pindyck, *The Cartelization of Commodity Markets*, 69 AM. ECON. REV. 154, 155-57 (1979).

²⁵⁴ J.D. Jaspers, *Managing Cartels: how Cartel Participants Create Stability in the Absence of Law*, 23 EUR. J. CRIM. POL'Y RES. 319 (2016).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Hard Core Cartels – Harm and Effective Sanctions*, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (May 2002).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Cartels*, AUSTRALIAN COMPETITION & CONSUMER COMMISSION, <https://perma.cc/N864-Y3UH> (last visited Feb. 16, 2023).

²⁶⁵ See generally OECD, *Reports: Hard Core Cartels* (2000) (OECD membership includes all current G7 nations.).

D. Differences from Alternative Solutions

1. LID.

This proposal importantly differs from other proposed solutions, such as increases in farmgate pricing in the form of an LID, insofar as it is a more directed and precise approach in the larger effort to ensure that producers are receiving the benefits of higher cocoa prices. As discussed in Part III.A the LID implemented in both Ghana and Côte d'Ivoire collapsed quickly amidst the Covid-19 pandemic, and the Ivorian model was quickly transformed into a bailout of major cocoa exporters.²⁶⁶ Simply increasing the price of cocoa exports is an incomplete solution, especially when regulatory boards can raid the coffers of the collected premiums and bail out interested parties. The idea of a cocoa cartel is that, through coordination with respect to the pricing and supply, both nations will be able to avoid a glut of cocoa being produced in the wake of a “fair” price set by the nations and be better positioned to negotiate with cocoa buyers.

2. Diversification of crops.

The argument for diversification of crops sounds promising on paper, but it is less viable in practice. By having cocoa producers reduce their reliance on the volatility of cocoa prices they may find themselves in a better bargaining position with buyers. In cocoa they are “price-takers,” meaning they have little to no say in the sale price for cocoa.²⁶⁷ This is evidenced by their inability to directly influence regulatory bodies like Cocobod or the Ivorian Cocoa Board’s decisions as to the farmgate price, or what is done with LID earnings.

Crop diversification directly impacts production costs, such as the introduction of crops that require less fertilizer or assist in pest reduction.²⁶⁸ The problem that this solution runs up against is the financial situation that many smallholder farmers find themselves in. “Their incomes are low,” so therefore, they “often cannot invest enough to improve their often low yields . . .” and often do not have sufficient farm size or the ability to invest in such diversification.²⁶⁹ A cocoa cartel does not impose the costs of crop diversification, instead it focuses resources on the performance of a singular commodity.

²⁶⁶ See Section III.A.

²⁶⁷ See generally Maninder K. Walia, *Crop Diversification, Extension*, UNIV. OF NEV., RENO, <https://perma.cc/LGR6-T48Z> (last visited Nov. 11, 2022); Yuca Waarts, *Living income in cocoa*, WAGENINGEN UNIV. & RSCH. (Nov. 17, 2021), <https://perma.cc/5PD3-84AN>.

²⁶⁸ See Walia, *supra* note 267.

²⁶⁹ See Waarts, *supra* note 267.

3. Land reform.

Land reform is focused on bringing smallholder farms to “sustainable farm sizes,” which are “farm sizes needed to earn a living income.”²⁷⁰ This refers to the literal expansion of the amount of farmable land that smallholder producers have. As noted by Waarts et al.’s article *A living income for smallholder commodity farmers and protected forests and biodiversity: how can the private and public sectors contribute?*, this is “often not an option”²⁷¹ as “most land is already occupied and buying land is costly.”²⁷² The means by which such expansion could occur, as noted by Waarts et al., is through the expansion of land of some farmers and the cessation of farming by others.²⁷³ This would subject those who are no longer producers to seek employment outside of agriculture.²⁷⁴ This sort of solution only works if there are sufficient employment opportunities for those exiting agriculture. “[Y]oung people in rural areas of developing countries leav[ing] the countryside since they no longer see a future in farming” provides an extra wrinkle in the expansion of farmable land.²⁷⁵ Cocoa cartelization, while perhaps benefiting from a smaller number of individual producers that fall under its umbrella, does not require similar reforms.

E. Ramifications of a Cocoa Cartel

To be clear, cocoa cartelization is not a solution without faults, though as will be explored here such worries are not insurmountable.

First, there is a potential worry that while Ghana and Côte d’Ivoire enter this intergovernmental organization there are other cocoa producing nations, like Brazil and Indonesia, who will not be inspired to follow suit and take advantage for the demand of cheap cocoa.²⁷⁶ In other words, the scope of the solution may not be large enough to be effective. Additionally, one may worry that with increased prices for cocoa that there will be farmers in West Africa that will seek to flood the market. That is less of a concern given the mandate of the cartel which would in its structure address oversupply through set export demands.²⁷⁷

²⁷⁰ Yuca Waarts et al., *A living income for smallholder commodity farmers and protected forests and biodiversity: how can the private and public sectors contribute?*, WAGENINGEN UNIV. & RSCH. 13 (Nov. 17, 2021), <https://perma.cc/K8PR-AVWS>.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ See Waarts, *supra* note 267.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

Notably, this proposed solution does not necessarily consider things like land size that other scholars like Waarts et al. have described as a key factor in addressing the income of smallholder commodity farmers. A cartel may simply be an incomplete solution and perhaps will further aggravate price volatility as opposed to resolving it.²⁷⁸ This is not to say that a cartel is out of the question. Given the correct structuring of an intergovernmental organization between Ghana and Côte d'Ivoire, there is the possibility for real benefits to be realized. The key to success for a cocoa cartel is through thoughtful balancing of not only economic realities, and their connection to child labor use, but other key factors that cause the proliferation of child labor in the cocoa industry. By addressing these issues bilaterally as opposed to individually, there are more resources available to both nations to utilize in their enforcement efforts.

To address the elephant in the room, what happens if the market responds poorly? There is a distinct worry that the global cocoa market will react negatively to the institution of a cocoa cartel, and potentially drive down cocoa prices to a level that neither Ghana nor Côte d'Ivoire have had to deal with in the past, thus potentially leading to a spike in the use of child laborers. By way of example, look at OPEC's journey as a petroleum cartel. OPEC was founded in September 1960 in Baghdad, Iraq, and at the time crude oil was selling at 29.78 USD/barrel.²⁷⁹ Crude oil barrel prices would drop until the early 1970s, settling at 23.85 USD/barrel in July 1973.²⁸⁰ Crude oil would then see a moderate spike on the thirteen-year anniversary of OPEC's founding to 28.30 USD/barrel.²⁸¹ Subsequently, crude oil barrel prices would dramatically increase, and would not see a price lower than what it was in July 1973 until November 1998.²⁸² The price then rebounded and stayed well above the November 1998 crash levels until 2020 during the Covid-19 pandemic.²⁸³ As of writing this Comment, crude oil pricing has once again rebounded and is sitting at 91.12 USD/barrel.²⁸⁴

The aim of this cocoa cartel is to find success comparable to that of OPEC such that the child labor crisis in Ghana and Côte d'Ivoire can be more substantially addressed. Cocoa is by no means completely analogous to crude oil, nonetheless, the market's reaction is perhaps informative of what may occur in the event of cocoa cartelization. OPEC member nations in the short-term found

²⁷⁸ See Waarts, *supra* note 267. See also Jiska A. van Vilet et al., *A Living Income for Cocoa Producers in Côte d'Ivoire and Ghana?*, 5 FRONT. SUSTAIN. FOOD SYST. 1 (2021).

²⁷⁹ Macrotrends, *Crude Oil Prices - 70 Year Historical Chart*, MACROTRENDS, <https://perma.cc/9RYG-JUS7> (last visited Nov. 11, 2022).

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

themselves suffering for roughly thirteen years, but then enjoyed twenty-five years of crude oil prices trending upward. This trend would only be temporarily interrupted in 2020 when the global economy at large shrank.²⁸⁵ OPEC's success is undeniable. While a cocoa cartel will likely suffer in the short-term, to the detriment of child laborers, there does appear to be a light at the end of the tunnel if Ghana and Côte d'Ivoire pursue cartelization.

VII. CONCLUSION

There is undeniable similarity in both Ghana's and Côte d'Ivoire's governing child labor laws, their important relationship to one another as both being major exporters of cocoa, and the fact that both face similar problems with respect to the issue of child labor and in their lackluster efforts to address it. All this sets the stage for a truly close and mutually beneficial relationship with one another. This is not a situation in which the parties involved have disparate interests or a lack of history dealing with one another. The 2019 agreement between both nations to institute the LID is proof enough of that. By joining together in a dual-nation approach there is the potential that pooling together their resources may be sufficient to create a workable system of regulation with respect to the export and growth of cocoa. A dual-nation approach could create the sustainable and reliable environment which would enable each country to become less reliant on child labor as a tool to keep up with market volatility.

²⁸⁵ See Oum, *supra* note 238.