INTERNATIONAL COFFEE REGULATION: A COMPARISON OF THE INTERNATIONAL COFFEE ORGANIZATION AND THE FAIR TRADE COFFEE REGIMES

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INTRODUCTION

The farming of coffee is no more glamorous than its study; but without the latter, one cannot appreciate the success—or failure—of the former. Statistics listing prices and production, imports and exports, quality differentiation and certification marks are all safely removed from the real work of coffee farming; work that is getting harder with each passing year. For at least thirty years, the price of coffee has fallen by an average of one U.S. cent each month. Coffee farming is increasingly difficult, and the cause is oversupply: much more coffee is being produced than the market demands. Oversupply is caused by the very nature of coffee production, which is cyclical and moved by temporary price spikes. Producers, acting rationally, have thus far been unable to escape the cycle and consistently improve their income on their own.

This Note will examine two attempts to regulate the coffee market so as to increase prices: an international commodity agreement overseen by the International Coffee Organization ("ICO") and a private attempt to create an alternative market by the Fairtrade Labelling Organization. Both bodies discussed in this Note propose to regulate the market differently, yet both seek to remedy oversupply by creating new demand.

Coffee producers are being priced out of production. Unable to cover their own overhead, their national governments have attempted to regulate the world coffee market—efforts that have been consistently unsuccessful. Some farmers have turned to the alternative market for Fairtrade coffee, with its promises of higher prices. Fairtrade farmers voluntarily embrace higher costs and more intense labor, but the return is indefinite at best.

Oversupply has caused the historical and current price crises facing struggling coffee farmers. This Note contends that only through embracing measures to reduce oversupply will producers be able to raise themselves from poverty. With the diversification of exporting economies, producers may now have options outside of production. It is the purpose of this Note to not merely illustrate the current state of international coffee regulation, but also to suggest that the market already has a solution: exit from production. Those who do so will be able to explore broader economic options. But the current regulatory regimes are geared towards keeping coffee farmers in production, with only minimal efforts to promote diversification and exit. Strategies to increase demand fail to address the problem underlying low prices, and oversupply

will only be eliminated through producer exit, finally making coffee production viable for those who remain.

Part I of this Note will explain the background of the International Coffee Organization. Section I.A will focus on the Organization's history, explaining the general progression of intergovernmental regulation of the world coffee market to the present day. In Section I.B, the most recent incarnation of the Organization, the 2007 International Coffee Agreement, will be detailed. In particular, this Note will explore the structure and authority of the Organization, which will inform the analysis of the body as a regulatory regime in Section III.A.

In Part II, this Note turns to the Fairtrade coffee market, beginning with the market's history in II.A. Section II.A is segmented for clarity into two sections: II.A.1, exploring the structural problems with the coffee market that led to the Fairtrade coffee movement, and II.A.2, which goes through the origins of Fairtrade itself. Historical price data, collected by the ICO, will clearly display the downward trend in world coffee prices that proponents of the Fairtrade regime feel necessitate Fairtrade itself. Section II.B of this Note deals with the Fairtrade Labelling Organizations ("FLO"), the umbrella body which oversees the entire Fairtrade market.

Section II.B.1 examines the mechanics of Fairtrade, specifically how the FLO and its constituent labeling initiatives have created the Fairtrade market. This Note then moves to the structure of the FLO in Section II.B.2. Part II concludes in Section II.B.3 with a detailed listing of the FLO's regulatory regime as set forth in its standards for small farmers.

Having laid the foundation of these two regulatory regimes, the Author moves on in Part III to examine the two systems. The ICO is examined in Section III.A, which will show how the current intergovernmental regulatory regime is hardly regulatory at all. Instead, the ICO of today has relegated itself to a role as an information clearinghouse for coffee data. Through the dissemination of information and technology to producers, the ICO hopes to improve the quality of coffee and, thus, drive up prices. In using the ICO's own data, this Note will illustrate why quality improvement is not a long-term solution to the low prices caused by the problem at the root of the coffee market disequilibrium: oversupply.

The FLO's regulatory regime is examined in Part III.B, where the practical realities facing Fairtrade certified farmers are assessed. The

Fairtrade Price ($1.31/lb) is the primary benefit of Fairtrade, but that benefit is dependant upon demand for Fairtrade Coffee. The FLO's task is to create and expand demand for Fairtrade coffee, which is apportioned among certified producers. Fairtrade is a costly system for producers, and the economic benefits are indefinite and not guaranteed. Those benefits will be examined, both in terms of how they truly reach the producer and what impact they may have on the livelihoods of producers. As will be seen, the FLO's inability to consistently deliver cost-covering revenues to participants only displays the shortcomings of the regime itself. Again, by failing to correct the long-term problem of oversupply, the FLO's regime cannot truly lift producers from the poverty they face.

I. THE INTERNATIONAL COFFEE AGREEMENT

It is the purpose of this Note to contrast two international legal frameworks used to regulate[1] the world coffee market. First, we will examine the intergovernmental approach. The international regulation of the coffee market is hardly a new solution to the problems inherent to the commodity. Since 1963, an international body known as the International Coffee Organization has existed in various incarnations to implement agreements reached between exporting and importing nations.[2]

A. *The Beginnings of International Governmental Regulation*

Coffee is a problematic crop. A tree will produce marketable coffee only after three to five years, and the principal cost of cultivation is the purchase, clearing, and tending of the land itself.[3] Harvesting adds to the cost of labor but historically has been carried out regardless of market price.[4] The long period between planting, coupled with the margi-

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[1] The FLO does more than simply regulate the Fairtrade market, of course. It and its national initiative components are largely responsible for the *creation* of the Fairtrade market and have assumed responsibility for increasing demand. The latter characteristic has a corollary in the international organization established by national governments to regulate the world coffee market. This section will explore the history and evolving function of that inter-governmental organization. *See infra* Part II.

[2] About ICO: History, http://www.ico.org/history.asp (detailing the development of the ICO as it implemented various International Coffee Agreements negotiated since 1963).

[3] Richard B. Bilder, *The International Coffee Agreement: A Case History in Negotiation*, 28 LAW & CONTEMP. PROBS. 328, 331 (1963), *available at* http://links.jstor.org/sici?sici=0023-9186%28196321%2928%3A2%3C328%3ATICAAC%3E2.0.CO%3B2-4 [hereinafter Bilder].

[4] *Id.*

nal cost of harvesting, creates an inefficient market wherein supply and demand exist in perpetual disequilibrium.

In a period of high prices, the coffee producer—often a small family farmer[5]—will plant more trees to take advantage of the higher price; these price spikes are typically related to temporary conditions, such as frosts and droughts.[6] Since such catastrophes are inherently unpredictable, coffee producers are put in the position of reacting to market conditions outside their control, leading to short-term market instability.[7] The increased planting, in turn, generates long-term problems.

Once the temporary condition that leads to a price increase is over, prices will return to the levels dictated by world demand. Historically, and currently, coffee demand has been relatively stable, growing very slowly.[8] Production typically outstrips demand, which leads to ever decreasing prices. Ever decreasing prices lead to smaller returns on existing coffee trees, which leads either to exit from the market or to increased planting.[9] Historically, producers took the latter course, often with the support of their national governments.[10] The unending cycle described above, and the unstable market it creates, incentivized national govern-

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5 *See* Néstor Osorio, *The Global Coffee Crisis: A Threat to Sustainable Development*, ICO, Aug. 21, 2001, http://www.ico.org/documents/globalcrisise.pdf, at 2 (last visited Nov. 18, 2007); *see also* Andrew Downie, *Fair Trade in Bloom: Coffee Farmers Relish Extra Pay for Crops that Meet Social and Environmental Goals*, N.Y. TIMES, Oct. 2, 2007, at C5.

6 *See The Arabica Coffee Market 1989-2007: Comparison of Fairtrade and New York Prices*, http://www.fairtrade.net/fileadmin/user_upload/content/Arabica_Price_Chart_89-07_01.pdf (last visited Nov. 19, 2007) (this website is a graph of historical prices compared to the Fairtrade minimum price, which will be discussed in section II, *infra*. Major price spikes are specifically demarcated.).

7 Bilder, *supra* note 3, at 333.

8 *Id.* at 333-34. Bilder states the following:

> Similarly, on the demand side, consumption of coffee is relatively stable, expanding or contracting gradually in response to sharp changes in supply and price brought about by short-run factors such as various changes in crops due to changes in weather. . . . On the other hand, consumption has grown quite slowly (about three to three and one-half per cent per annum), principally as a function of normal population growth and the gradual development of new markets.

Id.; *see also* Ruth Fend, *The Fair Trade Response to the Coffee Crisis: Achievements, Limitations and Prospects of a Voluntary Certification Scheme*, 10 (2005) http://fletcher.tufts.edu/research/2005/Fend.pdf (last visited Nov. 17, 2007) [hereinafter Fend] ("World production has risen by 1.8% per year on average since 1964/5 while demand has only risen by about 1% per year in the same time period.").

9 Increased planting only exacerbates the problem when such plantings are aggregated.

10 Bilder, *supra* note 3, at 334.

ments to intervene. National governments, unable to control the market individually, sought international solutions.

The first major international attempt to regulate the coffee market was made in 1940, when the United States tried to soften the blow of World War II for Latin American producers.[11] The 1940 attempt, called the Inter-American Coffee Agreement, created a quota system which apportioned the American market among Latin American producers, with the United States further agreeing to limit imports from non-member nations.[12] The Inter-American Coffee agreement failed to stabilize the coffee market, largely because it "did not attempt to deal with the root cause of the long-run coffee problem – overproduction – and was thus at best a temporary palliative."[13] Without a realistic international agreement to regulate the entire coffee market, the intrinsic problems of coffee would simply perpetuate the disequilibrium and its attendant socio-economic problems.[14] The next attempt was more inclusive and more targeted at the root cause of the coffee market disequilibrium.

In 1963, the major coffee exporting and importing nations met and negotiated an arrangement that they hoped would stabilize the price of coffee and bring production into equilibrium[15] with consumption.[16] The 1963 arrangement, called the International Coffee Agreement ("1963 Agreement"), brought into existence a new international body which still exists today: the International Coffee Organization.[17] The hallmarks of the 1963 Agreement were as follows:

> 1) A quota system under which each exporting member would receive a share of the total quota (calculated to reflect total world demand) based on its average exportable production.[18]

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11 *Id.* at 336

12 *Id.*

13 *Id.* at 338.

14 *See id.*

15 Throughout this Note, the Author will use the term "equilibrium" to refer to the economic ideal wherein aggregate supply equals aggregate demand.

16 Bilder, *supra* note 3, at 328 (for those interested in the topic of international treaty negotiation, Bilder's article is an exceptional, if dated, analysis).

17 Each new Agreement included a limited period in which the Agreement would remain in effect, hence the regular drafting and ratification of new Agreements. The International Coffee Organization has existed since 1963. It is controlled by the relevant Agreement even though its powers have varied between the various incarnations of the International Coffee Agreement.

18 Bilder, *supra* note 3, at 357.

2) A voting formula for the ICO wherein the power of the importing nations was evenly balanced[19] against that of the exporting nations.[20]

3) Certificates of Origin that would verify the producing country of origin for each bag of coffee sold.[21]

4) An Executive Board consisting of fourteen members, which would be the ICO's only continuing body, and which would have the ability to adjust quotas to meet changes in the world market.[22]

5) A Council consisting of all the member States, to which almost all significant decisions was reserved, such as setting initial quotas.[23]

At the time,[24] and still today, the United States was the largest single importer of coffee, and Brazil the largest exporter.[25] Under the 1963 Agreement voting system, an absolute limit was placed on the number of votes any one member could wield.[26]

One particularly significant feature of the 1963 Agreement was the Diversification Fund, which required compulsory contributions from all *exporting* members, the purpose of which was to finance reduction in coffee production.[27] At its inception, the ICO recognized that low prices were a signal indicating that producers should exit.[28] Seeing over-production as the root problem, the Diversification Fund was the only viable long-term solution in the 1963 Agreement. Today, the ICO still promotes diversification but limits such efforts to times of price-crises.[29] As shall be argued in this Note, overproduction remains at the root of low prices, and producer exit remains the long-term solution.

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19 The chief effect of this balancing was to eliminate any potential "veto" power in the hands of either Brazil or the United States, though it also allowed members to vote their stake in the market.

20 Bilder, *supra* note 3, at 380-81.

21 *See id.* at 361.

22 *Id.* at 363.

23 *Id.*

24 *Id.* at 362.

25 Exports by Exporting Countries to All Destinations: September 2007 and Coffee Year 2007/07, http://www.ico.org/prices/m1.htm (last visited Nov. 19, 2007); Imports by Importing Countries from All Sources: September 2006 to February 2007, http://www.ico.org/prices/m4.htm (last visited Nov. 19, 2007); *see also* Imports by Importing Countries from All Sources, March to August 2007, http://www.ico.org/prices/m5.htm (last visited Nov. 19, 2007).

26 Bilder, *supra* note 3, at 362.

27 ABRAM CHAYES, THOMAS EHRLICH & ANDREAS F. LOWENFELD, INTERNATIONAL LEGAL PROCESS: MATERIALS FOR AN INTRODUCTORY COURSE 627 (1968) [hereinafter CHAYES].

28 *Id.*

29 *Infra* note 182.

The impact of the 1963 Agreement on contemporary market conditions while in operation is debatable,[30] but it was renewed by the member States, indicating at least a belief that such an Agreement and Organization were valuable. The 1963 Agreement had a negotiated five-year lifespan, and a new Agreement was arrived at in 1968 ("1968 Agreement"). The 1968 Agreement largely continued the 1963 Agreement, maintaining the quota system requiring exporting members to withhold coffee in excess of the apportioned quota (i.e. their share of consumer demand) back from the market.[31]

During the tenure of both the 1963 and 1968 Agreements, problems arose with the quota system. A frost in Brazil in 1964 caused widespread fear among buyers, driving up prices and providing the first true test of the quota system.[32] The ICO responded by allowing for a six percent upward adjustment of quotas in response to market conditions.[33] Structurally, "[t]he incentives to cheat were great, particularly for countries with small quotas, rising production, and inadequate storage facilities."[34] In 1973, the 1968 Agreement was extended, though all economic provisions were deleted, effectively eliminating the quota system; the ICO's focus shifted to a largely information-gathering role.[35]

Eventually, another price shock led the member nations to renegotiate the Agreement to better bring the market into equilibrium. The resulting "1976 Agreement" provided for quotas to be imposed only when prices were low; when prices were high, quotas could be suspended to allow increased supply in order to meet the demand which presumably caused the price spike.[36] The 1976 Agreement was used as the basis for a new Agreement in 1983 ("1983 Agreement"), which introduced further reforms.[37]

By the terms of the 1983 Agreement, the price-linked quota system from the 1976 Agreement was continued, as was the requirement for

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30 *Compare* History of the International Coffee Organization, http://www.ico.org/history.asp (last visited Nov. 15, 2007) *with* CHAYES, *supra* note 27, at 624.

31 History of the International Coffee Organization, http://www.ico.org/history.asp (last visited Nov. 15, 2007).

32 CHAYES, *supra* note 27, at 597-600.

33 *Id.* at 599.

34 *Id.* at 618.

35 History of the International Coffee Organization, http://www.ico.org/history.asp (last visited Nov. 15, 2007).

36 *Id.*

37 *Id.*

certificates of origin.[38] Importing members were not permitted to admit non-member coffee or imports in excess of quotas, while quotas were in effect.[39] Further, the members explicitly agreed to coordinate national production to achieve market equilibrium.[40] Additionally, the 1983 Agreement created a public database service to provide information on coffee.[41] Notably, however, the 1983 Agreement did not attempt to regulate continuously, using quotas only as a brake for when falling prices would negatively impact producers in member States.[42] The failure to regulate prices, however, proved to be a major point of contention for ICO members and led to a collapse of the agreement in 1989.[43] Eventually, the ICO made a new agreement in 1994 ("1994 Agreement") that was focused on providing a high-level forum for members to discuss coffee policy and on creating a transparent marketplace through the collection and dissemination of data.[44] The 1994 Agreement created a new body, the Coffee Industry and Trade Associations Forum, to enable the private sector to participate in ICO deliberations.[45] A new Agreement was negotiated in 2001 ("2001 Agreement"); its highlights included a dedication to a "sustainable coffee economy"[46]

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38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.*

42 *See id.*

43 *Id.*; *see* The Arabica Coffee Market 1989-2007: Comparison of Fairtrade and New York Prices, http://www.fairtrade.net/fileadmin/user_upload/content/Arabica_Price_Chart_89-07_01.pdf (last visited Nov. 19, 2007). The collapse led to price fluctuations, which assisted the Fairtrade market in its initial expansion during the early 1990s.

44 History of the International Coffee Organization, http://www.ico.org/history.asp (last visited Nov. 15, 2007).

45 *Id.*

46 This term is used by both the ICO and the FLO and is prominent in the literature discussing Fairtrade, Alternative Trade, and general efforts to improve the lot of producers in developing countries. The Author must admit to complete ignorance as to the definition of this term; it appears to constitute a vague hope that producers will achieve a level of production at a price which allows said producers to cover the costs of production as well as some "acceptable" level of profit. *See* Standards Committee Minutes, Teleconference: 16 January 2007, http://www.fairtrade.net/fileadmin/user_upload/content/Approved_SC_minutes_Jan_2007.pdf (last visited Nov. 17, 2007).

The term "sustainable" also has ecological connotations, which this Author takes to indicate an amorphous desire that the growing of coffee not exhaust or despoil the environment in which it is grown. *See* DAVID HENDERSON, THE ROLE OF BUSINESS IN THE MODERN WORLD: PROGRESS, PRESSURES, AND THE PROSPECTS FOR THE MARKET ECONOMY 34 (2004) [hereinafter HENDERSON]; *see also* Developing a Sustainable Coffee Economic, http://www.ico.org/sustainable_coffee.asp (last visited Nov. 19, 2007).

and the promotion of technology transfers between members.[47] Most recently, an Agreement was penned in 2007 ("2007 Agreement"), which has yet to take effect. While the 2007 Agreement awaits ratification,[48] the 2001 Agreement remains in force.[49] The 2007 Agreement further focuses the ICO on sustainability, as well as allowing "stakeholders"[50] to share in the benefits of the coffee economy. The terms of the 2007 Agreement and the current structure of the ICO will be discussed in depth in the next section.

B. *The Current State of International Governmental Regulation*

The 2007 Agreement is not yet binding upon ICO members, and must be ratified by two-thirds of the votes of each the exporting and importing members and signatory governments.[51] The document will be open for signature between February 1 and August 31, 2008.[52] For the purposes of this Note, the author will treat the provisions of the 2007 Agreement as the authoritative statement of current regulation of the coffee market by the ICO.[53]

In its Preamble, the 2007 Agreement recognizes that the "livelihoods of millions of people, particularly in developing countries . . . on small-scale family farms" depend on coffee production.[54] The Preamble

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47 History of the International Coffee Organization, http://www.ico.org/history.asp (last visited Nov. 15, 2007).

48 I.C.C. Res. 431, 98th Sess. (Sept. 28, 2007).

49 International Coffee Agreement 2007, art. 50, 19 USC 1356k et seq., *available at* http://dev.ico.org/documents/wpwgfa3r8e.pdf (last visited Oct. 20, 2007) [hereinafter 2007 Agreement].

50 The Author is also unsure of the definition of this term. From the literature, a stakeholder is a party, individually or as a class, whose interests are affected by the economic activity in question. *See* HENDERSON, *supra* note 46, at 129. The degree of acceptable attenuation, as well as the true orbit of the "stakeholder," escapes this Author.

51 2007 Agreement, *supra* note 49, at art. 42.

52 E-mail from Helen Wright, Secretariat Officer, International Coffee Organization, to Scott Weese, Benjamin N. Cardozo School of Law (Dec. 6, 2007, 11:10 EST) (on file with Author).

53 Though not technically in force at the time of this writing, the Author anticipates the approval of the 2007 Agreement by the requisite proportions of importing and exporting members. As will be seen in below, the provisions of the 2007 Agreement are largely similar to those of the 2001 Agreement. Where differences exist between the 2001 and 2007 Agreements, those differences do not alter the Author's critique of the ICO's regulatory regime. The current incarnation of the ICO, whether under the 2001 or 2007 Agreement, does not seek to promote producer exit as a strategy for regulating the global coffee market and, thus, will be ineffective in the long-term goal of creating a global market that can sustain small producers.

54 2007 Agreement, *supra* note 49, at Preamble.

also recognizes "the need to foster the sustainable development of the coffee sector, leading to enhanced employment and income, and better living standards and working conditions in Member countries."[55] Broadly speaking, the ICO seeks to encourage members "to develop a sustainable coffee sector in economic, social and environmental terms."[56]

As a body, the ICO sets itself the goal of "providing a forum for consultations seeking understanding regarding the structural conditions in international markets and long-term trends in production and consumption *that balance supply and demand and result in prices fair both to consumers and to producers.*"[57] The original ICO was created to bring world production and consumption into balance through the use of quotas and the Diversification Fund. Having long abandoned quotas, the modern ICO claims the same long-term goal—balancing aggregate supply and demand—but through a much different set of mechanisms.

Like its most recent incarnations, the 2007 Agreement ICO is less a regulatory body than it is an information clearinghouse. It encourages the free flow of information, training, and even technologies between members, and presumably to producers as well.[58] Further, it encourages members to use coffee production to alleviate poverty in local communities.[59] Most significantly, the modern ICO sees the "development of consumption and markets for all types and forms of coffee, including in coffee producing countries,"[60] as one of its chief objectives.

To achieve these and other objectives, the member States held over much of the structure from the 2001 Agreement: there is an International Coffee Council ("Council"),[61] consisting of all the members of the Organization.[62] The Council is vested with all of the powers created by the agreement,[63] which include the ability to establish rules and regulations necessary to carry out the agreement,[64] a general strategy to guide the ICO's work,[65] and the general ability to govern its own proce-

55 *Id.*
56 *Id.* at art. 1(3).
57 *Id.* at art. 1(4) (emphasis added).
58 *Id.* at art. 1(11).
59 *Id.* at art. 1(12).
60 *Id.* at art. 1(7).
61 *Id.* at art. 6(3).
62 *Id.* at art. 8(1).
63 *Id.* at art. 9(1).
64 *Id.* at art. 9(3).
65 *Id.* at art. 9(4).

dures.[66] Voting power remains split between the two categories of members—exporting and importing members—neither group having more than 1,000 votes.[67] All members have five basic votes,[68] with the remainder of the votes being apportioned to individual members based on their average volume in the preceding four calendar years.[69] No member can hold two-thirds or more of the votes in its category;[70] this reflects the concerns of earlier agreements that large producers and importers should not dominate the Organization. Consensus is the stated goal of all votes of the Council, but only seventy percent is required to make a decision or recommendation.[71] All decisions of the Council are binding upon the members.[72]

Article 37 of the 2001 Agreement provided that the ICO "shall maintain links with appropriate non-governmental organizations" involved with the coffee trade.[73] In recognition of the increasing importance of NGOs in the coffee trade, the 2007 Agreement includes Article 16, which calls for the ICO to "establish and strengthen cooperative activities with appropriate non-governmental organizations."[74] Though not specifically directed at the rise of the Fairtrade movement, the ICO recognizes just how important NGOs are to the international coffee trade.[75] Article 16 can also be seen as an effort by the ICO to move further away from direct regulation of the coffee trade, cementing its role as information-gatherer, rather than market overseer.

Between the members, the 2007 Agreement requires that trade barriers be removed, though the requirement is far from unequivocal. Article 24 governs the removal of obstacles to trade and consumption. Subsection 1 states the following:

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66 *Id.* at art. 9(1).

67 *Id.* at art. 12(1).

68 *Id.* at art. 12(2).

69 *Id.* at arts. 12(3)-(4).

70 *Id.* at art. 12(8).

71 *Id.* at art. 14(1).

72 *Id.* at art. 14(3).

73 International Coffee Agreement 2001, art. 37, Feb. 3 2005, 19 USC 1356k et seq., *available at* http://dev.ico.org/documents/agreeme.pdf (last visited Oct. 18, 2007) [hereinafter 2001 Agreement].

74 2007 Agreement, *supra* note 49, at art. 16.

75 E-mail from Helen Wright, Secretariat Officer, International Coffee Organization, to Scott Weese, Benjamin N. Cardozo School of Law (Dec. 6, 2007, 11:10 EST) (on file with Author).

> Members recognize the importance of the sustainable development of the coffee sector and of the removal of current obstacles and avoidance of new obstacles which may hinder trade and consumption, while recognizing at the same time the right of Members to regulate, and to introduce new regulations, in order to meet national health and environmental policy objectives, consistent with their commitments and obligations under international agreements, including those related to international trade.[76]

Subsection 1 sets out a principle of balance between the overall goal—the elimination of trade barriers—and the national sovereignty concerns represented by some national regulations. The remainder of Article 24 lists specific kinds of trade barriers anathema to the Agreement: preferential import arrangements such as quotas, tariffs, and governmental monopolies;[77] export arrangements such as direct or indirect subsidies;[78] and "internal trade conditions and domestic and regional legal and administrative provisions which may affect consumption."[79] Reflecting the non-regulatory nature of the 2007 Agreement, Article 24 largely fails to bind members to any specific policies. Instead, members agree to "pursue tariff reductions,"[80] and "undertake to seek ways" to remove obstacles to increased trade and consumption.[81] Only subsection 5 requires action on the members, and therein they are obligated only to "inform the Council annually of all measures adopted with a view to implementing the provisions of this Article."[82]

Article 16 is not intended to regulate the international coffee market and is only loosely aimed at achieving long-term market equilib-

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76 2007 Agreement, *supra* note 49, at art. 24(1). The United States and European Union have not yet complied with the lofty principles of the ICO and still maintain agricultural trade barriers blocking a free market, indirectly inhibiting diversification. *See* Fend, *supra* note 8, at 15. The National Coffee Association of the U.S.A., Inc., an industrial group of coffee retailers, has pressured Congress to remove barriers to a free market in coffee. *The Coffee Crisis in the W. Hemisphere: Hearing Before the Subcomm. on the W. Hemisphere of the H. Comm. on Int'l Rel.*, 107th Cong. 7 (2002), *available at* http://commdocs.house.gov/committees/intlrel/hfa80964.000/hfa80964_0f.htm, at 97 [hereafter *Western Hemisphere*] (statement by Robert Nelson, President, National Coffee Association of the U.S.A. Inc.).

77 2007 Agreement, *supra* note 49, at art. 24(2)(a).

78 *Id.* at art. 24(2)(b).

79 *Id.* at art. 24(2)(c). Subsection (c) appears to be a catchall provision, directed at policies which affect consumption, rather than specific kinds of polices.

80 *Id.* at art. 24(3).

81 *Id.* at art. 34(4).

82 *Id.* at art. 24(5).

rium.[83] Trade barriers create inefficiencies in the market, which block access to markets for small producers. Rather than requiring that these barriers be eliminated, the Agreement binds members only to reporting their progress.

The ICO carries on the certificates of origin program found in previous agreements,[84] but its purpose is no longer to maintain a global equilibrium between supply and demand. The International Coffee Organization of today sees itself as "a centre for the collection, exchange and publication of . . . statistical information on world production . . . [and] technical information on cultivation, processing and utilization of coffee."[85] The information collected is to be used to prepare studies and surveys,[86] with particular emphasis on giving small producers information to assist them in improving their financial performance.[87] Here, perhaps more than any other section of the Agreement, one can see that the ICO has set aside its regulatory role in favor of information gathering.

As regards the market as a whole, the 2007 Agreement provides very little beyond principles. The members shall "give due consideration to the sustainable management of coffee resources"[88] and "consideration to improving standards of living and working conditions of populations engaged in the coffee sector."[89] The remainder of the Agreement deals with various miscellaneous features of the ICO, *e.g.*, a new Private Sector Consultative Board ("PSCB") is created to make recommendations to the Council.[90] The PSCB consists of eight private-sector representatives each from Exporting and Importing countries,[91] spread out geographically between the two groups.[92] Disputes about the Agreement are to go before the Council for binding decision.[93]

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83 *See infra* section III.A.

84 *Id.* at art. 33(2).

85 *Id.* at arts. 32(1)(a)-(b).

86 *Id.* at art. 34(1).

87 *Id.* at art. 34(5).

88 *Id.* at art. 36.

89 *Id.* at art. 37.

90 *Id.* at arts. 29(1)-(3).

91 *Id.* at art. 29(2).

92 *Id.* at arts. 29(3)(a)-(b).

93 *Id.* at art. 39(1). The FLO's Generic Standards does not contain a similar dispute provision, so if there is a disagreement over certification, a small producer would seem without remedy under the terms of the FLO's Generic Standards. It must instead rely on the appeals process established by the FLO's third-party certification company, FLO-CERT. *See infra* notes 135-137 and accompanying text.

II. NATURE OF THE FAIRTRADE MARKET

A. *History of Fairtrade*

1. Problems Leading to the Inception of Fairtrade Coffee

Before analysis of Fairtrade, it is necessary to understand exactly what Fairtrade is, why it came about, and how it works. This section will introduce the Fairtrade Coffee regime, explaining its underlying logic and overall structure. Fairtrade is a solution to the secondary problem of unsustainably low coffee prices. Like the ICO, Fairtrade ignores the fundamental problem of overproduction and, thus, cannot achieve the long-term goals of the body which oversees the entire Fairtrade Coffee Regime—the Fairtrade Labelling Organizations International.

According to the Fairtrade Labelling Organizations International, or FLO,[94] the goal of the system is as follows:

> Fair Trade is a trading partnership, based on dialogue, transparency and respect, that seeks greater equity in international trade. It contributes to sustainable development by offering better trading conditions to, and securing their rights of, disadvantaged producers and workers—especially in the South. Fair Trade organizations (backed by consumers) are actively engaged in supporting producers in awareness raising and in campaigning for changes in the rules and practices of conventional international trade.[95]

The conditions that coalesced into the impulse for Fairtrade will be examined in Section II.A.2, below. Exactly how the FLO functions will be explained in sections II.B.1 and II.B.2. For the moment, it is important to realize that the Fairtrade Coffee market applies *only* to small producers.[96] Finally, Section II.B.3 will show how producers qualify for

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94 As shall be seen in Section II.B.2 *infra*, FLO maintains standards for the entire Fairtrade Coffee movement, as well as several other commodities for which alternative markets have developed. The FLO acts as the certification clearinghouse for products such as Fairtrade Bananas, Cocoa, Flowers, Rice, Tea and others, alongside Fairtrade Coffee. *See* http://www.fairtrade.net/producers.html (last visited Oct. 1, 2007).

95 What is Fair Trade?, http://www.fairtrade.net/about_fairtrade.html (last visited Oct. 1, 2007).

96 Fairtrade Labelling Organizations International, Generic Fairtrade Standards for Small Farmers' Organizations, at § 1.2, http://www.fairtrade.net/fileadmin/user_upload/content/Generic_Fairtrade_Standard_SF_March_2007_EN.pdf.

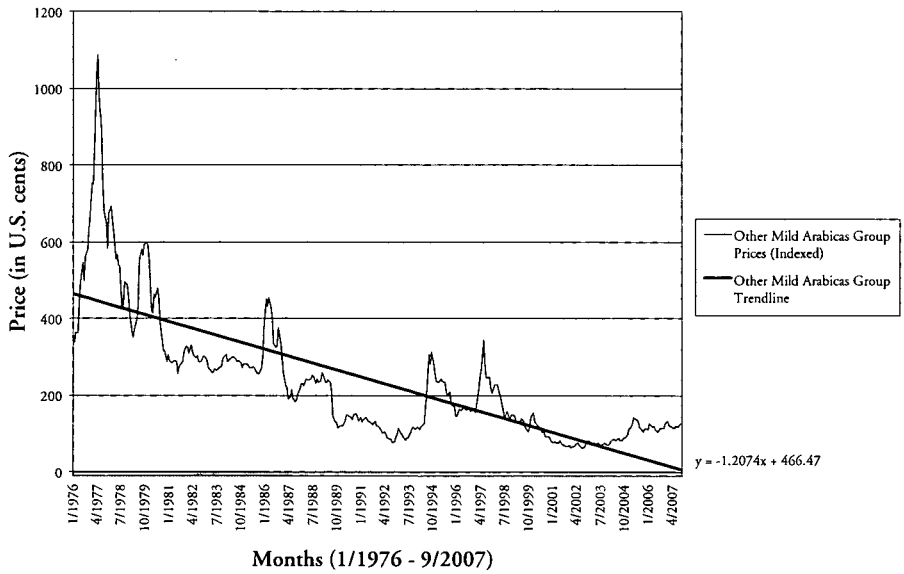
Fairtrade certification, specifically the standards which growers become obligated to meet.

2. Origins of Fairtrade

Two factors are generally credited with the creation (proponents would say need) of the Fairtrade alternative market: low commodity prices and inadequate access to the marketplace. The former is illustrated through the graph below and is documented in the Fairtrade literature. The latter is a circumstance peculiar to the agricultural sector and serves to exacerbate the problems of low prices.

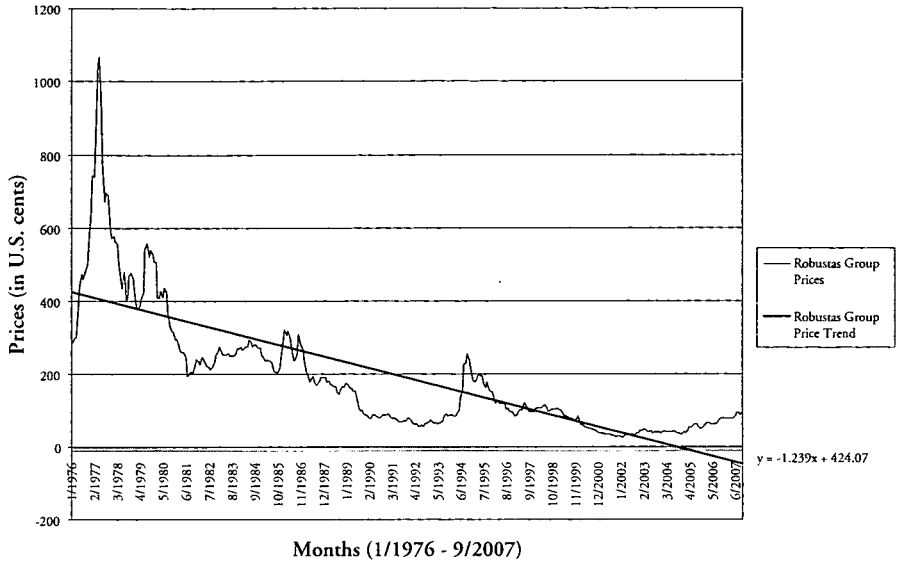
The following graphs represent the indexed monthly price of coffee in two varieties, Arabica and Robusta, as well as a Composite Indicator Price for all varieties:

OTHER MILD ARABICAS GROUP PRICE CHANGE (INDEXED)[97]

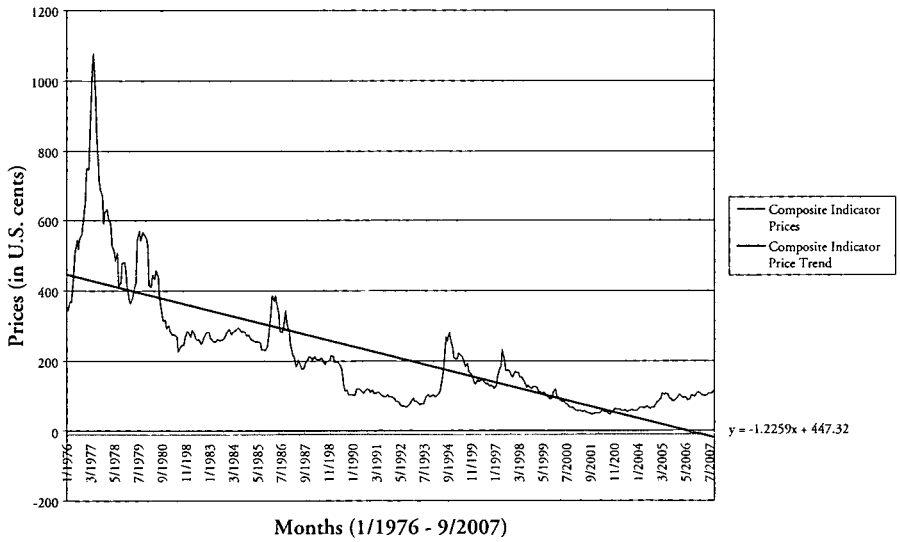


97 Historical Data – ICO Indicator Prices (monthly averages), http://www.ico.org/historical.asp (last visited Nov. 18, 2007). Prices indexed using CPI Inflation Calculator, http://data.bls.gov/cgi-bin/cpicalc.pl (last visited Sept. 17, 2008) (all prices were rounded to the nearest whole cent due to the limitations of the calculator).

ROBUSTAS GROUP PRICE CHANGE (INDEXED)[98]



COMPOSITE INDICATOR PRICE CHANGE (INDEXED)[99]



98 Historical Data – ICO Indicator Prices (monthly averages), http://www.ico.org/historical.asp (last visited Nov. 18, 2007). Prices indexed using CPI Inflation Calculator, http://data.bls.gov/cgi-bin/cpicalc.pl (last visited Sept. 17, 2008) (all prices were rounded to the nearest whole cent due to the limitations of the calculator).

99 Historical Data – ICO Indicator Prices (monthly averages), http://www.ico.org/historical.asp (last visited Nov. 18, 2007). Prices indexed using CPI Inflation Calculator, http://data.bls.

The Author constructed the above graphs using data collected by the ICO and published for public use. ICO prices are nominal, so each data-point was converted into its 2007 real value. The 2007 real value was used to construct the visual aids. The Author then generated the least-squares regression line to determine the monthly change in real prices over time. Focusing on the composite indicator price graph: Since 1976, the price of coffee has fallen significantly, with an average monthly loss of approximately 1.23 2007 U.S. cents. In economic terms, such a dramatic price decrease can be understood as a strong signal from the market indicating that production should be limited; i.e. producers should exit the market.

As the above graphs illustrate, since the early 1990s, the sharp decrease in prices has mellowed somewhat, and even reversed if one limits one's analysis to the years following 2000. Such data could indicate that the market is undergoing a period of expansion, which would justify the continued presence of producers in the market and perhaps the entrance of new producers; the central argument of the FLO, however, countermands that interpretation of the data. Even with recent price increases, many producers are still unable to earn a "living wage" through their sales on the non-Fairtrade coffee market.[100] Further, as can be seen on the Arabica and Robusta graphs, current market prices have not yet consistently exceeded the Fairtrade threshold price. Given the five- to seven-year price cycle, recent "rises" in price are more likely temporary than they are due to a fundamental long-term shift in global supply and demand. Altogether, the current difficulties faced by coffee farmers and the continuance of low market prices serve to reinforce the long-term market signal that market equilibrium requires.

The decrease in coffee prices can also be seen in the academic literature examining the roots of the Fairtrade System. One author noted in 2005 that "[w]orld production has risen by 1.8% per year on average since 1964/5 while demand has only risen about 1% per year in the

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gov/cgi-bin/cpicalc.pl (last visited Sept. 17, 2008) (all prices were rounded to the nearest whole cent due to the limitations of the calculator).

100 Impact, http://www.fairtrade.net/impact.html (last visited Nov. 19, 2007). The Fairtrade website contained the following:

> World market prices for coffee, rice and other commodities are highly volatile and often below the costs of production. A stable price, that covers at least production and living costs, is an essential requirement for farmers to escape from poverty and provide themselves and their families with a decent standard of living.

Id.

same period."[101] As supply outstrips demand, the price offered by purchasers on the open market falls below the cost of production.[102]

As indicated by the above graphs, the low price for coffee beans of all varieties remains a fact and has been characterized as a coffee "crisis" in many circles, including the halls of the United States Congress.[103] The House Subcommittee on the Western Hemisphere held hearings on the extent of the so-called coffee crisis, characterizing the price-fall beginning in 2001 as a consequence of a "glut in the coffee market."[104] To those who saw falling coffee prices as a problem, the greatest concern was that growers would be unable to earn even a living wage.[105] The ICO shared the concerns of Congress about a "coffee crisis" that threatened the livelihoods of the small farmers who supply the coffee market.[106]

Beyond the falling prices, small coffee growers were also faced with another impediment to profit: middlemen.[107] Producers often lack the

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101 Fend, *supra* note 8, at 11.

102 *Id.* at 21. Note: The cost of production for small coffee growers is difficult to determine. Standards Committee Minutes, Meeting 25: 20 and 21 Feb. 2007, http://www.fairtrade.net/file admin/user_upload/content/Approved_SC_minutes_Feb_2007.pdf, at 3 (last visited Nov. 17, 2007). The Author bases the statement that prices are below the cost of production, on the economic hardship faced by producers as reported in the literature.

103 *Western Hemisphere*, *supra* note 76, at 7-8 (statement of N.C. Cass Ballenger, Chairman, H. Subcomm. on the W. Hemisphere).

104 *Id.* These hearings were held in the context of H.R. Res. 491, 107th Cong. (2002).

105 IAIN A. DAVIES & ANDREW CRANE, INTERNATIONAL CENTRE FOR CORPORATE SOCIAL RESPONSIBILITY, ETHICAL DECISION MAKING IN FAIR TRADE COMPANIES 5 (2003), http://www.nottingham.ac.uk/business/ICCSR/pdf/ResearchPdfs/06-2003.pdf.

106 *See generally* NÉSTOR OSORIO, INTERNATIONAL COFFEE ORGANIZATION, THE GLOBAL COFFEE CRISIS: A THREAT TO SUSTAINABLE DEVELOPMENT (2001), http://www.ico.org/documents/globalcrisise.pdf.

107 *Western Hemisphere*, *supra* note 76, at 47 (statement of Adolfo Franco, Assistant Administrator for Latin America and the Caribbean, U.S. Agency for International Development); *see also* Fair Trade Federation: FAQs, http://www.fairtradefederation.org/ht/display/Faqs/faqcat_id/1737 (last visited Oct. 16, 2008) ("[F]air traders typically work directly with artisans and farmers, cutting out the middle men who increase the price at each level—enabling retail products to remain competitively priced in respect to their conventional counterparts, while more fairly compensating producers."). The Fair Trade Federation (FTF) describes its values and goals as follows:

> We value trading relationships that distribute power, risks and rewards more equitably. We believe that trade should be used as a tool to help alleviate poverty, reduce inequality and create opportunities for people to help themselves. Trade should promote fair compensation, safe and healthy conditions, direct and long-term relationships, transparent business practices, and workplaces free from discrimination and forced child labor. When trade encompasses these practices, the lives of all people and their communities improve.

means to transport their product to market or to process the coffee cherries into salable form. Intermediaries will often purchase the harvest of a small farm and then sell the coffee themselves at markets.[108] These middlemen are thus often able to negotiate lower-than-market prices with the growers by exploiting a local monopsony or, at best, oligopsony.[109] Perhaps most troubling, the intermediaries also lend money to growers in need of cash to pay workers and other costs of production; a function that only serves to enhance the already-superior bargaining position of the middlemen vis-à-vis growers.[110] Thus, unable to access markets on their own, small growers are often faced with the choice of selling to a regional middleman at a depressed price (depressed below the already-low market price) or seeing their crop rot in storage or the fields; this, of course, is no choice at all.

B. *The FLO and Fairtrade*

1. Mechanics of Fairtrade Coffee

The problems of low prices and inadequate market access place small growers in a precarious position: growing coffee becomes an untenable scenario in which wages can go unpaid, and growers face an ongoing cycle of debt owed to uncompetitive middlemen. In response, some actors felt a moral obligation to redress the situation faced by small growers; the response they developed was the Fairtrade regime.

Fairtrade works through a series of national and international NGOs whose main task is certification. The Fairtrade regime is basically a linked series of organizations whose purpose is to establish standards and to certify that both producers and purchasers comply therewith.[111] Typically, NGOs enforce standards through some variety of a certification regime.[112] Certification regimes are classified according to which group establishes and enforces the relevant standards: first-party certification, where a single firm develops its rules and compliance

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Our Values, http://www.fairtradefederation.org/ht/d/sp/i/7399/pid/7399 (last visited Oct. 16, 2008).

108 Fend, *supra* note 8, at 35.

109 *Id.*

110 *Id.*

111 About Fair Trade, http://www.fairtrade.net/about_fairtrade.html (last visited July 31, 2008).

112 Gary Gereffi, Ronnie Garcia-Johnson & Erika Sasser, *The NGO-Industrial Complex*, FOREIGN POL'Y, NO. 125, at 57 (2001), *available at* http://links.jstor.org/sici?sici=0015-7228%28200107%2F08%290%3A125%3C56%3ATNC%3E2.0.CO%3B2-L.

reports, is the most common;[113] second-party certification is when a trade or industry association develops and reports on standards;[114] third-party certification "involves an external group, often an NGO, imposing its rules and compliance methods onto a particular form or industry;"[115] and finally, there is fourth-party certification which involves government or multilateral agencies; the ICO is an example of fourth-party certification.[116]

Fairtrade is a third-party certification regime whereby a series of NGOs work in concert to enforce a single set of standards. In each nation where Fairtrade products are sold, there exists a national initiative, which holds a trademark for the national Fairtrade insignia. Each initiative is responsible for licensing its respective mark for use on products that meet Fairtrade standards.[117] Until recently, each national initiative had its own, distinctive mark. Now however, there is a single, international mark, which is used by all but three of the national initiatives.[118] The international insignia, shown in the footnote, is a signal to

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113 *Id.*

114 *Id.*

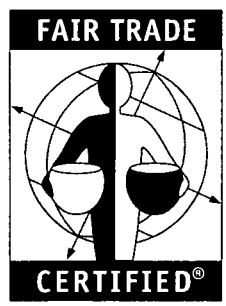
115 *Id.* at 57-58.

116 *Id.* (noting that the UN Global Compact lists principles to be considered for such fourth-party agencies). *See, e.g.*, United Nations Global Compact, http://www.un.org/Depts/ptd/global.htm (last visited Oct. 16, 2008).

117 Fairtrade Labeling Initiatives, http://www.fairtrade.net/labelling_initiatives.html (last visited Oct. 2, 2007).

118 TransFair Canada, TransFair US, and Max Havelaar Switzerland still use their own, respective insignias. The Certification Mark, http://www.fairtrade.net/certification_mark.html (last visited Oct. 2, 2007).

The TransFair US insignia, familiar to many U.S. consumers is:



The insignia shows a featureless human form, holding two bowls. The left half of the figure is black, and the right white; the left bowl is white and the right black. The figure and bowls are in the foreground, while the background shows a circle with right-tilted longitude and latitude lines, which project out of the circle as arrows at the north-south and east-west poles. Behind

consumers that the product bearing the mark was produced according to Fairtrade standards.[119]

All of the Fairtrade national initiatives now belong to an international umbrella-group called the Fairtrade Labelling Organization International. The FLO "unites 20 [Labelling Initiatives] in 21 countries and [Producer Networks] representing Fairtrade Certified Producer Organizations in Latin America, Africa and Asia."[120] It is the task of the FLO to actually set the Fairtrade standards, inspect producers for compliance, and admit or expel producers from the list of producers eligible for the Fairtrade price.[121] The actual inspection tasks are carried out by an independent certification form, FLO-CERT, discussed in Section II.B.2, below.

While the FLO has taken over many functions of the national initiatives, including the relevant mark used, it remains to these in-country NGOs to create demand for Fairtrade products;[122] they do this by providing information to potential consumers about the benefits of Fairtrade to producers and marketing certified products. In creating demand, the national initiatives ensure that the Fairtrade certified coffee has a market to sell to.

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the circle is a white background, and the top and bottom borders are black bands; in the top band are the words "FAIR TRADE," while the bottom reads, "CERTIFIED."

Note: While each national initiative has its own history, they are all now within the aegis of the FLO, which dictates the standards for producers, as well as the price a company must pay to a producer to be eligible for any of the Fairtrade marks.

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The international insignia is reminiscent of a yin-yang symbol; it is a circle with a large blue hemisphere to the top-right, with a black circle cut-out. The lower-left hemisphere is green and leaf-shaped, without a cut-out. Separating the two hemispheres is a black band, narrow at the top-left and widening towards the bottom—the effect on the Author is reminiscent of a river. The background is black, and the bottom reads, "FAIRTRADE."

120 Introduction to FLO, http://www.fairtrade.net/introduction.html (last visited Oct. 2, 2007).

121 What is Fair Trade Certification: FLO monitors producers, http://www.transfairusa.org/content/about/certification.php (last visited Oct. 2, 2007).

122 Frequently Asked Questions - Basic, http://www.transfairusa.org/content/resources/faq.php (last visited Oct. 16, 2008) ("FLO, based in Bonn, Germany, certifies and promotes Fair Trade products internationally . . . .").

2. Structure of the FLO

The FLO has a hierarchical structure, allowing various interest groups' representation within several bodies. Producer Networks are defined as "organisations which Fairtrade Certified Producer Organisations may join if they so wish and which are recognised by the Association as representative of farmers, workers and others belonging to Fairtrade Certified Producer Organisations."[123] Producer Networks have their own assembly that allows representatives to meet and discuss issues relevant mainly to them. Labelling Initiatives are similarly organized, with their own Assembly.[124]

Above the Producer Network and Labeling Initiatives Assembly sits the General Assembly, which includes all members of the FLO (including those in the above-discussed Assemblies). The General Assembly decides on "membership issues, such as approval of the annual accounts, possible admission or expulsion of members, and ratification of new board directors."[125] Above the General Assembly is the Board of Directors. The Board consists of five representatives from Labelling Initiatives, four from Producer organizations (at least one from Latin America, Africa, and Asia), two from Fairtrade Certified Traders, and two external members.[126] The Board's mission is "to guide FLO to becoming the worldwide reference for consumer and producer choice in Fairtrade Certification. It is primarily responsible for the strategic direction, sound financial management, risk management and employment of the Chief Executive of the association."[127]

Among its other responsibilities, the Board appoints members to three committees of particular significance: the Standards, Finance, and Nominations Committees. The Standards Committee, of greatest relevance in this Note, "supervises and guides the standards" of the FLO with which all members must comply.[128] Membership on the commit-

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123 FLO's Structure, http://www.fairtrade.net/structure.html (last visited Nov. 19, 2007). For an extensive discussion of a producer network, *see* Anne Tallontire, *Partnerships in Fair Trade: Reflections from a Case Study of Café direct*, 10 DEV. IN PRAC. 166, 175 (2000), *available at* http://links.jstor.org/sici?sici=0961-4524%28200005%2910%3A2%3C166%3APIFTRF%3E2.0.CO%3B2-%23. For a detailed explanation of Producer Networks, *see generally* Producer Networks, http://www.fairtrade.net/302.html (last visited July 31, 2008).

124 FLO's Structure, http://www.fairtrade.net/structure.html (last visited Nov. 19, 2007).

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.*

tee consists of stakeholders of the FLO and external experts;[129] trade union representatives hold the status of permanent observers, though they are not represented thereon.[130] The Standards Committee is, in effect, the regulatory body of the FLO: it establishes the standards by which producers are certified (and thus receive the Fairtrade price and premium) and guides the development of those producers with the progress requirements contained in those standards.[131]

The remaining two committees are not of particular significance for the purposes of this Note, though their importance for the FLO is not to be understated. The Finance Committee holds ultimate responsibility for the organization's finances, and oversees policies to ensure adequate funding.[132] The Nominations Committee "scrutini[zes] appointments to the Board and its Committees" and reviews the performance of the members thereof.[133] It is the task of the Nominations Committee to define the roles, responsibilities, and desirable qualities of directors.[134]

While not technically part of the FLO itself, one other body is of particular significance to the Fairtrade market: FLO-CERT GmbH ("CERT"). CERT is an independent international certification company, which "ensures that producers and traders comply with the Fairtrade Standards and that producers invest the benefits received through Fairtrade in their development."[135] CERT works through a network of sixty independent inspectors, which regularly visit all producer organizations to assess their compliance with the standards. The Certification Committee, which includes "stakeholders from producers, traders, Labelling Initiatives and external experts, takes the certification decisions."[136] An appeals committee exists to deal with appeals from

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129 *Id.*

130 Standards Committee Minutes, Meeting 27: 18 and 19 July 2007, http://www.fairtrade.net/fileadmin/user_upload/content/Approved_SC_Minutes_July_2007.pdf (last visited Nov. 17, 2007).

131 "Progress requirements" of the FLO will be discussed in detail in Section II.B.3, *infra*, at notes 140-142 and accompanying text. *See generally* Generic Fairtrade Standards for Small Farmer's Organizations: Current Version: 01.03.2007, http://www.fairtrade.net/fileadmin/user_upload/content/Approved_SC_Minutes_sept_06.pdf, at 3 (last visited Nov. 3, 2007).

132 FLO's Structure, http://www.fairtrade.net/structure.html (last visited Nov. 19, 2007).

133 *Id.*

134 *Id.*

135 Introduction to FLO – Who does the Certification?, http://www.fairtrade.net/introduction.html (last visited Nov. 19, 2007).

136 *Id.*

certification/decertification decisions,[137] though there does not appear to be a provision for a written record of decisions by either certification body. It is CERT, empowered by the FLO, which wields the power to certify and decertify and, thus, the power to dispense the potential benefits of the Fairtrade system.

3. Standards of the FLO

To receive the Fairtrade premium and price, a producer must meet the Generic Fairtrade Standards for Small Farmer's Organizations (hereinafter "Generic Standards," "Standards," or "standards"). These standards were updated in 2007 in an attempt to address a number of concerns that producers and stakeholders had brought to the attention of the Standards Committee;[138] the version discussed herein became applicable on April 1, 2007. The Generic Standards are available to any person with an Internet connection and explain the requirements of certification.[139]

To be certified, an organization must meet the minimum requirements "from the moment they join Fairtrade, or within a specified period."[140] Notably, producer organizations must also abide by any national legislation that sets a higher standard on a particular issue than the corresponding FLO.[141] Beyond the minimum requirements, there are also progress requirements "on which producer organizations must show permanent improvement. A report on the achievement of progress

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137 The Author assumes that appeals are generally taken only upon decertification decisions, but the information available to the public does not clarify the jurisdiction of the Certification Commission, and it may be possible for CERT to issue conditional certifications that a producer would appeal.

138 One of the concerns was that the old standards were "too long and cumbersome for everyone to read." Minutes of the Standards Committee, Meeting 23: 27 and 28 Sept. 2006, http://www.fairtrade.net/fileadmin/user_upload/content/Approved_SC_Minutes_sept_06.pdf (last visited Nov. 16, 2007).

139 Given the growth of Fairtrade in the coffee market, the Author assumes that small farmers without Internet access have some other means of learning about the Fairtrade movement and the Generic Standards.

140 *Id.* The "specified period" is not specified in the Generic Standards, so the Author assumes such period is left to the discretion of the CERT inspectors.

141 *Id.* Presumably, a producer organization would need some mechanism to stay abreast of current national legislation. Such a mechanism risks imposing additional and unforeseen costs upon a producer who, in good faith, expends resources to meet the Generic Standards but did not also conduct an exhaustive search of relevant laws. Without being sure of the current state of national legislation, a producer organization risks being de-certified for its inability to afford a lawyer or person with comparable skills.

requirements should be made each year."[142] The Generic Standards do not specify what level of progress is required each year.

The first requirement is that the producer be a "small farmer;"[143] the term "small farmer" is undefined in the document. Small farmers, assuming a producer qualifies, must have formed an organization with other small farmers.[144] This organization must be democratically controlled by the members and be able to contribute to the social and economic development of their members and communities.[145] It is the organization, rather than the farmer, that is certified, and which is eligible to sell coffee at the Fairtrade price of $1.31/lb; $0.10 of which is the Fairtrade premium.[146]

Democratic control is meant to be a "democratic structure and transparent administration, which enables an effective control by the members and its Board over the management, including the decisions about how the benefits are shared."[147] The structure of the organization is dictated by the Standards, which require at a minimum, a General Assembly, which acts as the decision-making body, where all members hold voting rights.[148] There must also be an elected Board, to which all staff must answer; the Board in turn answers to the General Assembly.[149] As progress requirements, the FLO expects the organization to promote participation in administration through training and education, and the policies of the organization are to be increasingly discussed at member meetings.[150] The progress requirements also demand that

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142 *Id.*

143 Generic Fairtrade Standards for Small Farmer's Organizations: Current Version: 01.03.2007, http://www.fairtrade.net/fileadmin/user_upload/content/Generic_Fairtrade_Standard_SF_Dec_2007_EN.pdf, at 3 (last visited Nov. 3, 2007) [hereinafter Generic Standards].

144 *Id.* at 5.

145 *Id.*

146 *See* Fair Trade Social Premium and Organic Differential for Coffee to Increase, http://www.transfairusa.org/content/about/pr/pr_070321.php (last visited Nov. 16, 2007). The premium was recently raised from $0.05 to $0.10 because the Standards committee received "important and relevant new information" (the publicly available documents fail to specify beyond that) assumedly showing that the five-cent premium was insufficient to meet the Cost of Sustainable Production (COSP). Standards Committee Minutes, Meeting 25: 20 and 21 Feb. 2007, http://www.fairtrade.net/fileadmin/user_upload/content/Approved_SC_minutes_Feb_2007.pdf, at 3 (last visited Nov. 17, 2007).

147 Generic Standards, *supra* note 143, at 5.

148 *Id.*

149 *Id.*

150 *Id.* at 5

"[m]easures will be taken to improve the members' commitment to the organization."[151]

The organizations can hire workers, on the condition that they be "organized" and that the "company they work for is prepared to promote workers' development and to pass on to the workers the additional revenues generated by Fairtrade."[152]

The FLO adheres to the International Labor Organization ("ILO") Convention 111, forbidding discrimination against workers on the basis of race, sex, religion, political orientation, nationality, and social extraction; all certified producers must also therefore adhere to the ILO Convention.[153] Over time, producers are expected to put in place programs "related to disadvantaged/minority groups within the organization."[154] ILO Conventions on working conditions are the authority for the FLO and are imposed upon producers; those Conventions are not, however, detailed in the Standards, further burdening producers with the cost of educating themselves on and implementing ILO standards.[155] When a

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151 *Id.* at 6. As innocuous as organizational standards may be, they are deeply problematic for a number of reasons. First, the Standards are vague, particularly as regards the progress requirements. The most immediate benefit of Fairtrade—the Fairtrade price and premium—depends on certification. Certification, in turn, depends on an organization's ability to meet the minimum and progress requirements over time. CERT, the body which determines certification, has it within its discretion to determine in what time-frame progress requirements must be met. Thus, there is the possibility of great disparity between producer organizations, which could be held to arbitrarily-different time-tables by the certification inspectors (one could argue that there is also a benefit to there being no set timetable: all producer organizations will be different in some degree or another, and thus face unique challenges to achieving progress requirements. Still, as shall be argued, the danger that increased competition for certification will create incentives for de-certification makes the discretion of FLO-CERT worrisome.). *See* note 225 *infra* and accompanying text.

Second, the actual terms of the progress requirements for the organization are as troublingly vague as the timing provision: How can "commitment to the organization" be measured objectively? To the extent that recertification depends on an organization's ability to meet progress requirements, vagueness in the language invites abuse of producers should the Fairtrade system ever be forced to decrease supply.

152 Generic Standards, *supra* note 143, at 3. Unions are the preferred form of organization in the Generic Standards. *See id.* The risk of decertification due to CERT's discretion when evaluating progress requirements is not merely academic, *see* Standards Committee Minutes, Meeting 27: 18 and 19 July 2007, http://www.fairtrade.net/fileadmin/user_upload/content/Approved_SC_Minutes_July_2007.pdf, at 8 (last visited Nov. 17, 2007) (Standards Committee references that CERT is not yet uniform in its application of progress requirements).

153 Generic Standards, *supra* note 143, at 6.

154 *Id.* at 6. Again, the wording is vague and leaves producers open to decertification for good-faith efforts to enact the requirements.

155 *Id.* at 22.

producer employs a "significant number"[156] of workers, new obligations are imposed: "if one or more independent and active trade unions exist in the sector . . . FLO *expects* that the workers will be represented by . . . trade union(s) and that the workers will be covered by a Collective Bargaining Agreement."[157] The Standards contain additional limitations which would be significant for producers, but which are not particularly germane to this Note.[158]

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156 The term is undefined in the relevant section of the Standards. *Id.* at 23, (4.2).

157 *Id.* (emphasis added). This is a progress requirement, though it is more specific than the other progress requirements discussed herein. Notably, a collective bargaining agreement has the potential of raising costs to the producer organizations, which costs must be borne whether or not the producer can sell any of its coffee at the Fairtrade price. *Infra* notes 192-199 and accompanying text.

158 Child labor is not explicitly banned, but it is extremely limited: children can work only if their education is not thereby impaired, and they cannot be given tasks "which are especially hazardous for them due to their age." Generic Standards, *supra* note 143, at 23 (emphasis supplied) (again, the Standards are vague, leaving it up to inspectors to determine if "children" are working at "especially hazardous" tasks). "Children" as a category of worker is not well-defined, but all persons under the age of fifteen are prohibited as a minimum requirement. *Id.* (by not defining the range of ages of "child," producers risk decertification for assigning tasks in good faith to a younger person with the understanding that they are not a "child." It is apparently left to the certification inspectors to determine both if the worker is a "child" and if the task is "especially hazardous."). Of particular note in the Generic Standards is minimum requirement in 4.1.1.3, which prohibits all "child labor" if it would "jeopardise [sic] schooling or the social, moral or physical development of the young person." *Id.* (this requirement further fuels confusion over the definition of a "child" within the Standards by using the term "young person." One could argue that only a ban on school-age children is implied, given the emphasis in the Standards on education, but the ultimate determination is left in the hands of certification inspectors). 4.1.1.3 would seem to allow inspectors to pass on the moral development of "young people," which risks imposing an unfamiliar and subjective standard upon producers; such imposition risks alienating the very producers that FLO seeks to help and illustrates that there may be situations in which the goals of producers are markedly different from those of the FLO. *See* Anne Tallontire, *Partnerships in Fair Trade: Reflections from a Case Study of Café direct*, 10 DEV. IN PRAC. 166, 175 (2000), *available at* http://links.jstor.org/sici?sici=0961-4524%28200005%2910%3A2%3C166%3APIFTRF%3E2.0.CO%3B2-%23 (illustrating a conflict between a producer by a particular Fairtrade Label, KNCU, to the point where cultural misunderstandings have weakened the relationship and the certifying body); *see also id.* (the expectations of labeling organizations as part of the FLO umbrella may be unrealistic when imposed upon producers without specialized knowledge in different areas of marketing).

FLO's Generic Standards regulate deeper than workers on farms: they also regulate how coffee farming is carried out. Various agrochemicals are forbidden to producers, and may only be used if an exception is made for a specific chemical. Generic Standards, *supra* note 143, at 11-13 (for a complete listing of specific prohibited chemicals see generally the *Generic Fairtrade Standards: FLO Prohibited Materials List: Current version: 15.12.2007*, http://www.fairtrade.net/fileadmin/user_upload/content/FLO_Prohibited_Materials_List_Dec_2007_EN.pdf (last visited Nov. 3, 2007). The term agrochemical "includes all synthetic inputs directly or indirectly used in the production of agricultural products or in the maintenance of processing equipment.

FLO standards are in place to ensure that producers qualify to receive the Fairtrade price and premium, but that premium is also subject to regulation. The premium (the ten U.S. cents that are guaranteed above Fairtrade or market price) must be administered fairly and transparently.[159] Only the General Assembly of the producer organization may decide upon the premium use, and that use must be "properly documented,"[160] a requirement which imposes an additional administrative cost upon the producer. Over time, a monitored plan must be developed to share the benefits of Fairtrade based on democratic deci-

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This includes pesticides, fertilizers and coadjutants such as cleansing substances, detergents and mineral oil products." Generic Standards, *supra* note 143, at 11 (original emphasis excluded). Where a producer is permitted use of a banned chemical, it must prove that the agrochemical is "necessary," yet another term left to the discretion of the certification inspectors. *Id.* at 14 (the relevant progress requirement, 3.2.2.4, includes an explanatory note which reads: "In all cases, the organization and its producers should be able to explain to inspectors their rationale for the use of agrochemicals."). By banning fertilizers and chemical pest-controls, the FLO is essentially requiring more coffee to be grown to achieve the same harvest that would otherwise be available with the use of chemical fertilizers.

Beyond agrochemicals, producers are also forbidden the use of Genetically Modified Organisms ("GMOs"). *Id.* at 20 (for an overview of genetically modified organisms, *see generally Genetically modified organism*, http://en.wikipedia.org/wiki/Genetically_modified_organisms (last visited Nov. 3, 2007)). GMOs have the potential to increase crop-yield, produce pest-resistant plants, and even introduce nutrients into the human diet that are otherwise scarce. *See, e.g.*, *Golden Rice*, http://en.wikipedia.org/wiki/Golden_rice (last visited Nov. 3, 2007). Strains of genetically modified coffee which are resistant to pests do exist, but they have not yet been put into widespread use. *See* Andy Coghlan, *Coffee trial survives insects, but not vandals*, NEW SCIENTIST, May 29, 2005, *available at* http://www.newscientist.com/channel/life/gm-food/dn7438-coffee-trial-survives-insects-but-not-vandals.html (last visited Dec. 12, 2007); *ICO Seminar on Genetically Modified Coffee*, http://www.ico.org/news/pr267.pdf (last visited Dec. 13, 2007). By denying producers the use of Genetically Modified coffee, the FLO is further limiting the ability of small coffee farmers to increase their crop yield and quality (ironically, they may thus be creating a "necessity" for the use of pesticides). Producers are also faced with the progress requirement to "monitor possible GMO usage by neighbours and, where necessary, take additional precautions to ensure that their crops or any seed or propagation material saved for future plantings are not contaminated by GMO traits." Generic Standards, *supra* note 143, at 21. Unlike other progress requirements, which impose long-term goals without specified tasks, producers must produce a written plan describing their interdiction methods. *Id.* Presumably, certification inspectors will pass on the adequacy of these plans. Both the agrochemical and GMO restrictions impose undefined costs on producers, and labor of undefined scope (If a neighbor uses GM coffee, does a producer have to enclose his fields and install an air filter to eliminate potential GMO "contamination?").

159 *Id.* at 6. FLO does not intend to prescribe how the premium is used, only how the organization determines that use, i.e. democratically. *See* Minutes of the Standards Committee, Meeting 23: 27 and 28 Sept. 2006, http://www.fairtrade.net/fileadmin/user_upload/content/Approved_SC_Minutes_sept_06.pdf, at 2 (last visited Nov. 16, 2007).

160 Generic Standards, *supra* note 143, at 21. Again, the Standards leave a critical term, "properly documented," undefined.

sion-making.[161] If, within producer organizations, there exists a minority of small producers growing Fairtrade products, the organizations need give "special attention . . . to ensure that they will always receive a cost-covering price."[162] This special attention seems somewhat contradictory: why would special measures be required to ensure some producers cover their costs if Fairtrade coffee is sold at an elevated price? The answer reveals a common misunderstanding of the Fairtrade system.

In the previous version of the Generic Standards, for a certified producer to sell his coffee for the Fairtrade price, demand for Fairtrade coffee must exist.[163] If supply outstrips demand, as it currently does, each producer is assigned a quota as its share of the Fairtrade market. Any coffee grown beyond the quota is sold at the market rate or not at all.[164] The 2007 Generic Standards eliminated that express notification and now relies on FLO-CERT to explain that certification does not guarantee the ability to sell coffee at the Fairtrade price.[165] All of the initial and ongoing costs of certification must be borne by the producer but can only yield the Fairtrade price if demand exists.

III. THE ICO AND FLO AS REGULATORY BODIES

A. *ICO as a Regulatory Body*

Since the collapse of the 1983 Agreement in 1989, the ICO has lacked the power to truly regulate the world coffee market. From the 1994 Agreement to the present day, statements of principle have been the focus of efforts towards achieving market equilibrium. Today, the ICO acts as an information clearinghouse, collecting data on production and sale and providing information and expertise to producers.[166]

Theoretically, binding decisions by the Council could force Exporting members, and indirectly, producers, to lower their output, but such measures would require considerable political will. Indeed, the col-

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161 *Id.* at 5.

162 *Id.*

163 Minutes of the Standards Committee, Meeting 23: 27 and 28 Sept. 2006, http://www.fairtrade.net/fileadmin/user_upload/content/Approved_SC_Minutes_sept_06.pdf, at 2 (last visited Nov. 16, 2007).

164 *Infra* notes 183 and 184.

165 *See* Minutes of the Standards Committee, Meeting 23: 27 and 28 Sept. 2006, http://www.fairtrade.net/fileadmin/user_upload/content/Approved_SC_Minutes_sept_06.pdf, at 2 (last visited Nov. 16, 2007).

166 2007 Agreement, *supra* note 49, at art. 1(11) ("[P]romoting training and information programmes designed to assist the transfer to Members of technology relevant to coffee.").

lapse of the Agreement in 1989 and its reformation as an essentially non-regulatory body indicate that the prior attempts to control output were a major point of contention. As discussed above, when a full-blown quota system was in place, members sought to cheat, further indicating that political will to enforce a quota system—however strict—is lacking.[167]

World supply of coffee outstrips world demand.[168] Between 2002 and 2007, world production rose by an average of 658,430 bags per year.[169] During 2007, 117,032,000 bags of coffee were produced,[170] but between January and June of 2007 (the only months in 2007 that ICO data is as, of the time of writing, yet available), only 16,637,443 bags were imported worldwide, yielding an average monthly import of 8,326,120 bags.[171]

Extrapolating forwards, for 2007, one could anticipate total annual imports being 99,913,469 bags. Thus, in 2007, approximately 117,032,000 sixty kilo bags were produced, but only 99,913,469 bags were imported, a disparity of 17,118,531 bags, or 14.62%. These numbers illustrate why world prices are so low and why small producers have difficulty staying in production. In the long term, the market must be brought into equilibrium for producers to receive a price that will allow them to remain in coffee farming at all.

Bringing market supply in line with market demand is an objective of the ICO, and there are two ways to accomplish that goal: first, the historical route of limiting supply; and second, increasing demand. Originally, the ICO sought to control the world supply of coffee through the quota system; regardless of actual production, exporting members could only sell a given amount. The quotas were intended to roughly reflect world demand, so that the artificial limits would force

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167 Not to compare the political will of the 1963 membership to the modern ICO, but national interests remain in giving domestic producers an advantage. *See generally supra* sections I.A-I.B.

168 Fend, *supra* note 8, at 11 ("World production has risen by 1.8% per year on average since 1964/5 while demand has only risen about 1% per year in the same time period.").

169 Total Production of Exporting Countries, Crop Years Commencing: 2002 to 2007, http://www.ico.org/prices/po.htm (last visited Nov. 18, 2007) (the data fluctuate during the period, but the overall point—that world production is increasing—is sufficiently illustrated).

170 *Id.*

171 *See* Imports by Importing Countries from all Sources: Dec. 2006 to May 2007, http://www.ico.org/prices/m4.htm (last visited Nov. 18, 2007); *see also* Imports by Importing Countries from all Sources: June to Nov. 2007, http://www.ico.org/prices/m5.htm (last visited Nov. 18, 2007) (bags are 60 kilos).

actual production to meet actual demand.[172] The failure of the quota system illustrated little more than the limitations of artificially controlling world supply; but regardless, the system did fail.

Now, the ICO has abandoned supply-side controls and seeks, instead, to increase world demand. The current strategy to secure equilibrium is to improve coffee quality, which will drive demand (and thus price) upwards.[173] There is some logic to the ICO's approach, as the specialty coffee market is one of the few areas of the coffee retail industry that is not stagnant;[174] farmers have been able to achieve a premium for higher quality coffee[175] (a premium not available for coffee sold on the Fairtrade market).[176] But will the mere improvement of quality truly raise demand sufficiently to bring prices high enough to support current production?

The current coffee price-levels are not sufficient to sustain all of the producers in the market; indeed, prices over the long-term are falling, indicating that supply is not simply in excess of demand, but that it is increasingly so. For prices to remain stable, supply and demand would have to change at identical rates; for prices to rise, demand would have

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172 *See supra* section I.A.

173 E-mail from Helen Wright, Secretariat Officer, International Coffee Organization, to Scott Weese, Benjamin N. Cardozo School of Law (Dec. 6, 2007, 11:10 EST) (on file with Author).

174 Bruce Horowitz, *P&G to sell fair trade coffee, giving boost to small growers*, USA TODAY, Sept. 15, 2003, at 1B, *available at* http://www.millstone.com/pages/pressroom/display_article.jsp?id=16&type=News; Fend, *supra* note 8, at 23 ("The US specialty coffee market offers a striking example, accounting for about 20% of the volume but more than 40% of the total value.").

175 Fend, *supra* note 8, at 37; *see also Global Exchange statement and directions for the Starbucks lobbying/boycott campaign in 2002*, http://www.globalexchange.org/campaigns/fairtrade/coffee/starbucks.html (last visited Dec. 12, 2007) ("Meanwhile coffee companies such as Starbucks have not lowered consumer prices but are pocketing the difference, even taking into account the quality premiums in the specialty industry.").

176 Standards Committee Minutes, Meeting 27: 18 and 19 July 2007, http://www.fairtrade.net/fileadmin/user_upload/content/Approved_SC_Minutes_July_2007.pdf, at 5 (last visited Nov. 17, 2007). The committee stated the following:

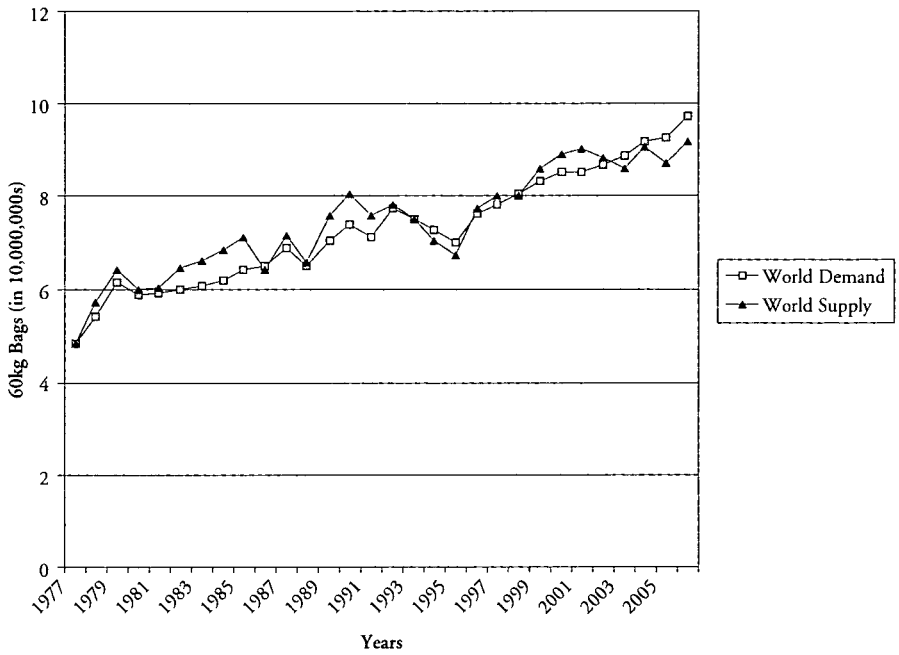
> The SC supports the view of the Advisory Group that quality differentials (QD) should not be introduced. The same arguments as at the teleconference call of the Advisory Group were raised: QD are too complicated; if traders want to have higher quality they should pay more than minimum price; quality is to some extent a subjective measure; sceptical [sic] about the idea that QD would help to increase overall quality of FT coffee.

Id.

to rise faster than supply. As illustrated above, however, world coffee supply has exceeded demand for decades.

The following graph compares historical world supply and demand:

COMPARISON OF WORLD COFFEE SUPPLY AND DEMAND (1977-2006)[177]



As can be seen in the above graph—which compares the respective supply and demand of coffee—for twenty of the thirty years covered by the data, world supply has exceeded demand. Recent data-points may indicate that demand is finally growing faster than supply, which would reverse the falling price of coffee; for the reasons below, however, the Author does not believe the data shows anything more than a repetition of long-term price-trends that do not sustain higher prices.[178] The following chart illustrates just how great the historical disparity between world supply and demand has been:

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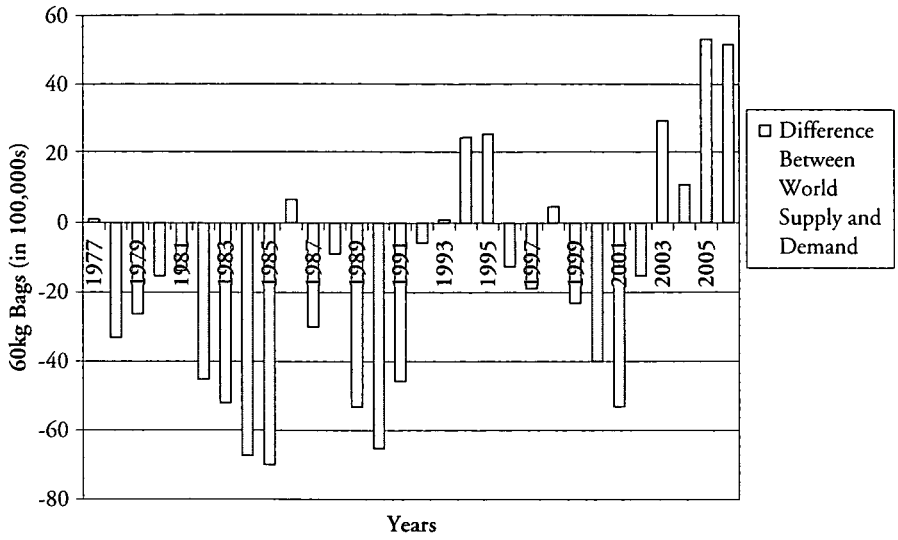
177 *See* Historical Data – Imports of importing Members (calendar years), http://www.ico.org/historical.asp (last visited Jan. 5, 2008) (for selected years 1977-2006); *see also* Historical Data – Exports of exporting Members (calendar years), http://www.ico.org/historical.asp (last visited Jan. 5, 2008) (for selected years 1977-2006).

178 *See infra* notes 179-180.

DIFFERENCE BETWEEN WORLD SUPPLY AND DEMAND[179]



The Author generated the above graph, which shows that from 1977 to 2007, supply has exceeded demand for twenty of the covered thirty years. In recent years, demand has obviously exceeded supply, leading to higher prices and possibly a reversal of the long-term trend of falling prices. The reason that world demand has outstripped world supply is not, however, obvious. The coffee market tends to move in five- to seven-year cycles,[180] and it is likely that the current spike is simply yet another iteration of the long-run market disequilibrium. Further, as will be seen in the section examining the FLO's regime, even producers benefiting from the elevated Fairtrade price are reporting an inability to cover their overhead.[181]

The ICO's program admittedly eschews most attempts to limit supply[182] and focuses exclusively on demand. Using the 2007 numbers explored above: for prices to rise to a profitable level under the ICO's current program, quality would have to improve so drastically as to cre-

179 *Id.*

180 Fend, *supra* note 8, at 9.

181 *Infra* note 201 and accompanying text.

182 The ICO still maintains limited diversification programs for the purpose of reducing the vulnerability of coffee producers, but these programs are in place only for times of "crisis" low prices and are not aimed at achieving producer exit. It is telling, however, that when times are truly tough, the ICO suggests that producers move away from—if not completely out of—coffee production. *See* E-mail from Helen Wright, Secretariat Officer, International Coffee Organization, to Scott Weese, Benjamin N. Cardozo School of Law (Dec. 6, 2007, 11:10 EST) (on file with Author).

ate demand not only for the additional 14.62% of coffee produced but not imported, but for enough high-quality coffee in excess of that amount as to drive prices up.[183]

The ICO's plan is not impossible, but given the long-term trends of coffee prices, notwithstanding recent cyclical upturns, expansion of demand through increased quality is not a practical solution. Instead, the harsh lesson of the market is, as seen in the graphs above, that producers should simply leave production and pursue higher-value sectors of the economy. Recent upticks in price and demand likely fall into the long-observed five- to seven-year price cycles that plague the coffee market, and the Author feels they do not negate the long-term market signal indicating that producers should exit production.

B. *FLO as a Regulating Body*

The FLO is much more regulatory than the ICO: it has in place a coherent body of rules that specify (to one degree or another) the actions required of producers. In return for compliance, a producer can be certified to receive the Fairtrade price and premium for that portion of the coffee crop for which demand exists.[184] Any coffee grown in excess of the amount allotted by the FLO must be sold on the international market at whatever price the coffee can command.[185]

Participation in the Fairtrade system is completely voluntary. Unlike the ICO, which technically covers all producers with or without their consent, a producer is free to accept or reject all of the FLO's requirements. The voluntariness of Fairtrade is also sufficient to defeat many critiques of the standards themselves: the prohibition on pesticides, various fertilizers, the requirements to organize labor, and the foregoing of child labor are all adopted knowingly. Even the increased

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183 *See* Bilder, *supra* note 3, at 338 ("[A]n effective long-run solution to the coffee problem could be attained only through a truly global pact including both exporting and importing countries in its membership, establishing realistic quotas, and making some sort of attack on the basic problems of overproduction and underconsumption."); *see also* Fend, *supra* note 8, at 58 ("Long-run prices would therefore only rise if demand was so high that it would always exceed supply by low-cost producers, an event that is very unlikely to happen at the moment. The only way to defy this logic seems to be through international governmental regulation in the form of commodity agreements.").

184 *See* Fend, *supra* note 8, at 36-37.

185 Note: Producers can be certified for a number of programs such as Fairtrade which offer a premium, such as shade-grown (*see id.* at 40) and organic certification (*see id.* at 39-40). These premiums are unaffected by access to the Fairtrade market and will accrue so long as the producer maintains the relevant certification.

labor (and associated costs) necessitated by the Standards are predictable[186] and undertaken freely by producers in return for the benefit of higher prices. And the work done by the FLO has yielded those benefits.

The Fairtrade price and premium have helped local farmers receive as much as a twenty percent premium over the normal market price.[187] Over time, the Fairtrade market has expanded its reach, becoming one of the fastest growing sectors of the coffee trade.[188] Between 1994 and 1997, the European Fairtrade market alone gained between 14.29% and 28.57% in value;[189] how much of that value reached the producers is questionable,[190] but it does illustrate historically growing demand for Fairtrade products. Growth in Fairtrade coffee has proceeded steadily, increasing eightfold between 2001 and 2006.[191] In response to the growing demand for Fairtrade coffee, many farmers are trying to qualify for certification. In an interview for the New York Times, Conceição Oeres da Costa, a coop producer said of the Fairtrade system: "Everybody is doing their best to come up to [the FLO's] standard so we can sell our coffee as fair trade . . . . Everybody wants to earn as much as he can."[192] But if "earning as much as he can" is Mr. da Costa's goal, is Fairtrade the best avenue?

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186 *See* Fend, *supra* note 8, at 42.

187 Andrew Downie, *Fair Trade in Bloom: Coffee Farmers Relish Extra Pay for Crops that Meet Social and Environmental Goals*, N.Y. TIMES, Oct. 2, 2007, at C1.

188 Bruce Horovitz, *P&G to sell fair trade coffee, giving boost to small growers*, USA TODAY, Sept. 15, 2003, at 1B, *available at* http://www.millstone.com/pages/pressroom/display_article.jsp?id=16&type=news).

189 *Communication from the Commission to the Council on "fair trade,"* at 7, COM (Nov. 19, 1999), *available at* http://trade.ec.europa.eu/doclib/docs/2006/january/tradoc_113080.pdf (last visited Nov. 18, 2007).

190 *See* Fend, *supra* note 8, at 22 ("The US specialty coffee market offers a striking example, accounting for 20% of the volume but more than 40% of the total value."). Fend makes the following claim:

> Fair Trade coffee may therefore have various effects: First, it may shift some roaster profits to retailer profits or even reduce profits for both. Second, it may increase both costs and margins of all operators in producing countries in equal proportions, having no effect on pure profits of some agents in consuming countries. A third possibility is that pure profits are actually increased for some actors.

Id. at 55.

191 Andrew Downie, *Fair Trade in Bloom: Coffee Farmers Relish Extra Pay for Crops that Meet Social and Environmental Goals*, N.Y. TIMES, Oct. 2, 2007, at C5.

192 *Id.* (quoting Conceição Oeres da Costa, a coop grower interviewed for the newspaper story).

Fairtrade certification is not free. As noted throughout this Note, minimum and progress requirements impose costs on producers, who hope to recoup their expenses with the Fairtrade price and premium. Little hard data can be found on the costs of certification, but they are admittedly substantial:[193] one study reported a unit cost of certification between three and five cents per pound.[194] Application for certification alone costs a flat fee € 250 ($370.63);[195] initial certification can cost between € 1,400 and € 3,400 (between $2,075.57 and $5,040.67).[196] Additional fees are levied for various situations, including the number of products certified,[197] the kinds of facilities maintained by the organization,[198] and even the number of members affiliated with the organiza-

193 Standards Committee Minutes, Meeting 24: 7 and 8 Dec. 2006, http://www.fairtrade.net/fileadmin/user_upload/content/Approved_SC_minutes_Dec_2006.pdf, at 5 (last visited Nov. 16, 2007); Fend, *supra* note 8, at 38; Mick Blowfield, *Ethical Trade: A Review of Developments and Issues*, 20 THIRD WORLD Q. 753, 762 (1999), *available at* http://links.jstor.org/sici?sici=0143-6597%28199908%2920%3A4%3C753%3AETAROD%3E2.0.CO%3B2-M.

194 *See* Fend, *supra* note 8, at 39 (the data was reported in 2005, but adjusted for inflation, the costs are the same in 2007 dollars).

195 FLO-CERT Producer Certification Initial Fees – Small Farmers, http://www.flo-cert.net/flo-cert/_admin/userfiles/file/Fees/PC%20Initial%20FeeSystemSF%20IS%2019en%20_2_.pdf, at 3 (last visited Jan. 3, 2008) (flat fees are more expensive proportionally to smaller organizations, which produce less coffee, than larger ones which can spread fees out over a larger volume). Prices converted using Currency Converter, http://finance.yahoo.com/currency/convert?amt=3400&from=EUR&to=USD&submit=convert (last visited Feb. 22, 2008) (all prices calculated at the exchange rate on Feb. 22, 2008 and rounded to the nearest whole cent).

196 FLO-CERT Producer Certification Initial Fees – Small Farmers, http://www.flo-cert.net/flocert/_admin/userfiles/file/Fees/PC%20Initial%20FeeSystemSF%20IS%2019en%20_2_.pdf, at 3-4 (last visited Jan. 3, 2008). Prices converted using Currency Converter, http://finance.yahoo.com/currency/convert?amt=3400&from=EUR&to=USD&submit=convert (last visited Feb. 22, 2008) (all prices calculated at the exchange rate on Feb. 22, 2008 and rounded to the nearest whole cent).

197 FLO-CERT Producer Certification Initial Fees – Small Farmers, http://www.flo-cert.net/flocert/_admin/userfiles/file/Fees/PC%20Initial%20FeeSystemSF%20IS%2019en%20_2_.pdf, at 4 (last visited Jan. 3, 2008) (€ 200 ($296.51) for additional products). Prices converted using Currency Converter, http://finance.yahoo.com/currency/convert?amt=3400&from=EUR&to=USD&submit=Convert (last visited Feb. 22, 2008) (all prices calculated at the exchange rate on Feb. 22, 2008 and rounded to the nearest whole cent).

198 FLO-CERT Producer Certification Initial Fees – Small Farmers, http://www.flo-cert.net/flocert/_admin/userfiles/file/Fees/PC%20Initial%20FeeSystemSF%20IS%2019en%20_2_.pdf, at 4 (last visited Jan. 3, 2008) (between € 200-600 ($296.51-889.53) depending on the number of workers at a processing installation). Prices converted using Currency Converter, http://finance.yahoo.com/currency/convert?amt=3400&from=EUR&to=USD&submit=convert (last visited Feb.22, 2008) (all prices calculated at the exchange rate on Feb. 22, 2008 and rounded to the nearest whole cent).

tion.[199] These fees are incurred both at the time of initial certification and during recertification inspections,[200] and they are imposed irrespective of a producer's ability to sell on the Fairtrade market.

Perhaps more disturbing, the FLO itself does not know the cost of compliance with its own system. The Fairtrade price is an arbitrary number which, according to the data available to the FLO, is not sufficient to cover the "cost of sustainable production,"[201] a term the Author understands to refer to at least the overhead costs of producers. Further, the benefits of Fairtrade are not constant. Until September 2007, the Fairtrade price was $1.26/lb.[202] While generally higher than the market price, the Fairtrade price is not indexed for inflation.[203] In other words,

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199 FLO-CERT Producer Certification Initial Fees – Small Farmers, http://www.flo-cert.net/flocert/_admin/userfiles/file/Fees/PC%20Initial%20FeeSystemSF%20IS%2019en%20_2_.pdf, at 5 (last visited Jan. 3, 2008) (€ 900 ($1,334.29) for fewer than fifty members, increasing to € 1,700 ($2520.33) for over one thousand members). Prices converted using Currency Converter, http://finance.yahoo.com/currency/convert?amt=3400&from=EUR&to=USD&submit=Convert (last visited Feb. 22, 2008) (all prices calculated at the exchange rate on Feb. 22, 2008 and rounded to the nearest whole cent).

200 *See* FLO-CERT Producer Certification Initial Fees – Small Farmers, http://www.flo-cert.net/flocert/_admin/userfiles/file/Fees/PC%20Initial%20FeeSystemSF%20IS%2019en%20_2_.pdf, at 3 (last visited Mar. 5, 2008) (the document references prices for "First Year," which implies that they are incurred in sequential years as well based on the certification demands set by the FLO).

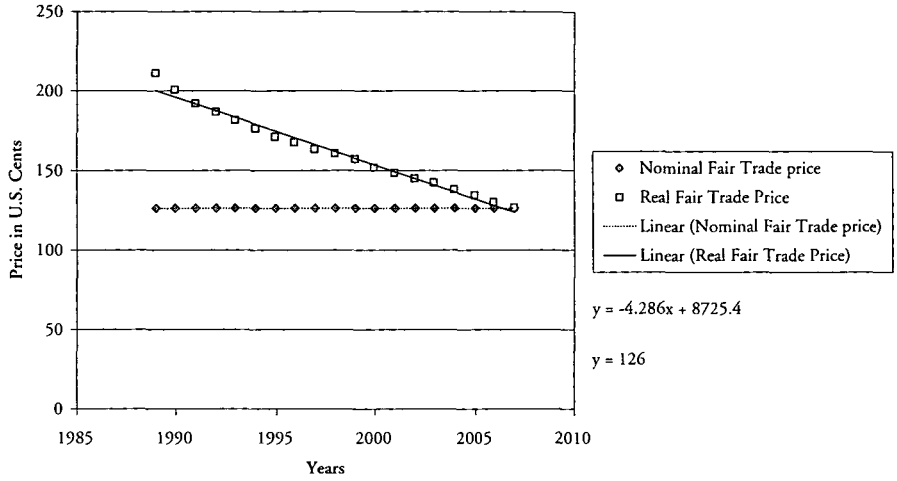
201 Standards Committee Minutes, Meeting 24: 7 and 8 December 2006, http://www.fairtrade.net/fileadmin/user_upload/content/Approved_SC_minutes_Dec_2006.pdf, at 4 (last visited Nov. 16, 2007) ("Producers feel current FT prices are not cost-effective. Board shared concerns that prices needed to be reviewed as soon as possible."); Standards Committee Minutes, Meeting 25: 20 and 21 Feb. 2007, http://www.fairtrade.net/fileadmin/user_upload/content/Approved_SC_minutes_Feb_2007.pdf, at 3 (last visited Nov. 17, 2007) ("The Standards Committee reaffirmed that further research on Cost of Sustainable Production (COSP) and a more thorough analysis of the different market situations is still needed before a decision on the Minimum Price is taken.").

202 Anne Tallontire, *Partnerships in Fair Trade: Reflections from a Case Study of Café direct*, 10 DEV. IN PRAC. 166, 169-70 (2000), *available at* http://links.jstor.org/sici?sici=0961-4524%28200005%2910%3A2%3C166%3APIFTRF%3E2.0.CO%3B2-%23; Fend, *supra* note 8, at 35; *see* Standards Committee Minutes, Meeting 25: 20 and 21 Feb. 2007, http://www.fairtrade.net/fileadmin/user_upload/content/Approved_SC_minutes_Feb_2007.pdf, at 3 (last visited Nov. 17, 2007). The Fairtrade price was "set by consultation with a number of international bodies, including the International Coffee Organization as the price that covers the costs of production and a reasonable margin." Fend, *supra* note 8, at 27. If the original price did, indeed, cover overhead and allow profit, the above citations reveal that, for many producers, it not longer does.

203 *See* Standards Committee Minutes, Meeting 27: 18 and 19 July 2007, http://www.fairtrade.net/fileadmin/user_upload/content/Approved_SC_Minutes_July_2007.pdf, at 5 (last visited Nov. 17, 2007) ("The SC agreed that information about exchange rates & inflation (not specific to coffee) should be collected on an annual basis to assess if a price review might be necessary. Information about the price breakdown will help to evaluate feedback from traders

the Fairtrade price has become less and less valuable to producers with each passing year:

COMPARISON OF NOMINAL AND REAL FAIR TRADE PRICE[204]



As seen in the Author-generated chart above, participants in the Fairtrade market from 1989 to 2007 actually lost slightly more than four cents ($.04) in real value each year.[205] Despite recent discussion of indexing within the Standards committee, the new price implemented in 2007 is not yet indexed for inflation;[206] thus, investment in the Fair-

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on price proposals."); *see also* Robusta Coffee Market 1989-2007: Comparison of Fairtrade price and London LIFFE price, http://www.fairtrade.net/fileadmin/user_upload/content/Robusta_Price_Chart_89-07.pdf (last visited Dec. 13, 2007); *see also* The Arabica Coffee Market 1989-2007: Comparison of Fairtrade and New York prices, http://www.fairtrade.net/fileadmin/user_upload/content/Arabica_Price_Chart_89-07_01.pdf (last visited Dec. 13, 2007).

204 *See* The Arabica Coffee Market 1989-2007: Comparison of Fairtrade and New York prices, http://www.fairtrade.net/fileadmin/user_upload/content/Arabica_Price_Chart_89-07_01.pdf (last visited Dec. 13, 2007); *see also* Anne Tallontire, *Partnerships in Fair Trade: Reflections from a Case Study of Café direct*, 10 DEV. IN PRAC. 166, 169-70 (2000), *available at* http://links.jstor.org/sici?sici=0961-4524%28200005%2910%3A2%3C166%3APIFTRF%3E2.0.CO%3B2-%23; Fend, *supra* note 8, at 35; Standards Committee Minutes, Meeting 25: 20 and 21 Feb. 2007, http://www.fairtrade.net/fileadmin/user_upload/content/Approved_SC_minutes_Feb_2007.pdf, at 3 (last visited Nov. 17, 2007). Prices indexed using CPI Inflation Calculator, http://data.bls.gov/cgi-bin/cpicalc.pl (last visited Nov. 18, 2007) (all prices were rounded to the nearest whole cent due to the limitations of the calculator). The Author generated this chart and added the regression-line to calculate the average depreciation in value of Fairtrade certification.

205 Note: The Fairtrade price was increased in 2007, but remained at $1.26/lb for a portion of the year, *see* note 146 and accompanying text.

206 *Supra* note 203.

trade system is itself, a depreciating asset for producers.[207] Notably, it is a depreciating asset that comes at a high initial cost and entails the ongoing costs discussed above. Given the nature of the Fairtrade market, which certifies both producers and traders, it is unclear whether the FLO could even implement price adjustments. Traders, not the FLO, agree to pay the Fairtrade price, and such traders may be unwilling to adjust their own costs upwards simply to keep pace with inflation.[208]

Structural problems aside, the FLO's regulatory regime suffers from the identical problem as the ICO: it ignores the true problem underlying the world coffee market—overproduction. While the FLO restricts itself to regulating a much smaller portion of the Coffee Market than the hands-off ICO, it is essentially applying the same tactic. The Fairtrade price is an attempt to put more money in the pockets of producers. Producers can only get that additional money if there is demand for Fairtrade coffee. The FLO's task in the Fairtrade market is to *create demand for Fairtrade products*. From 2005-2006, Fairtrade coffee grew forty-two percent by total volume sold, but in 2006 it remained at only three-point-three percent (3.3%) of total coffee sold in the United States.[209] In 2003, 321,550 sixty-kilogram bags (19,293 metric tons) of Fairtrade coffee was sold,[210] 403,700 sixty-kilogram bags (24,222 metric tons) in 2004,[211] and 556,517 sixty-kilogram bags (33,991 metric tons) in 2005.[212] Despite the obvious growth, Fairtrade remains a miniscule portion of the world coffee market.

For Fairtrade to reach all coffee producers, the Fairtrade market would have to expand faster than its current rate. The world demand

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207 Which is not to say that there is no benefit for certified producers; only that the actual benefit is being eroded by inflation and the FLO has, as of yet, done nothing to take inflation into account.

208 *See* Standards Committee Minutes: Meeting 24: 7 and 8 Dec. 2006, http://www.fairtrade.net/fileadmin/user_upload/content/Approved_SC_minutes_Dec_2006.pdf, at 4 (last visited Nov. 16, 2007) ("PBU is concerned that traders will not understand that prices will be changed at such short notice. Traders need some time to absorb price changes."); *see* Fend, *supra* note 8, at 27 ("Importers must pay producer cooperatives a guaranteed minimum price ($1.21 per pound of Arabica coffee) and pay an additional social premium ($0.05/lb) which is supposed to be used for community development projects by the producer organizations.")

209 Andrew Downie, *Fair Trade in Bloom: Coffee Farmers Relish Extra Pay for Crops that Meet Social and Environmental Goals*, N.Y. TIMES, Oct. 2, 2007, at C5.

210 Fairtrade Sales Volumes per Product 2003/2004, http://www.fairtrade.net/fileadmin/user_upload/content/FTvolumes0304.jpg (last visited Dec. 13, 2007).

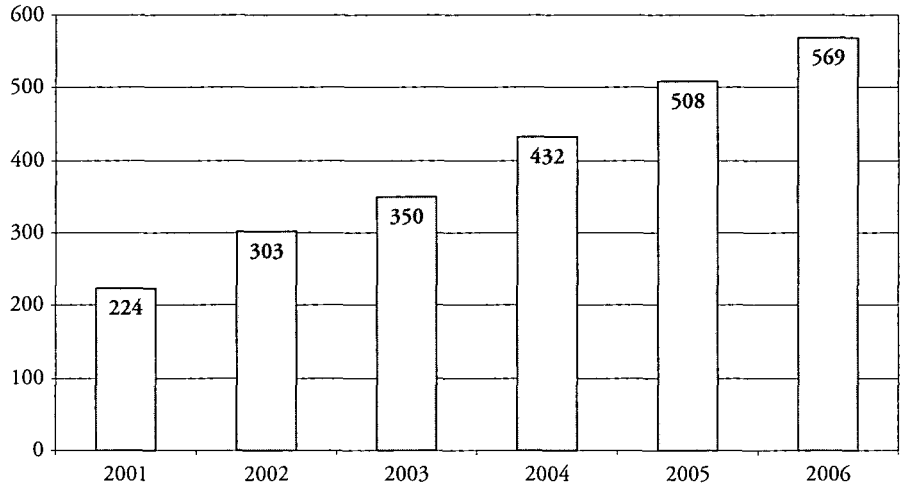
211 *Id.*

212 Fairtrade Sales Volume 2004/2005, http://www.fairtrade.net/fileadmin/user_upload/content/FTvolumes0405.jpg (last visited Dec. 13, 2007).

(i.e. total coffee imported) in 2003 was for 88,914,425 sixty-kilogram bags, 91,753,050 in 2004, and 92,414,730 in 2005.[213] Thus, Fairtrade's portion of the world demand was only .36% in 2003, .44% in 2004, and .60% in 2005. In terms of capturing the entire world market, the FLO has a long way to go. But the entire market for coffee is not specifically the FLO's goal.

Since 2001, the number of certified producer organizations has steadily grown:

EVOLUTION OF THE NUMBER OF FAIRTRADE CERTIFIED PRODUCER ORGANIZATIONS[214]



The graphic shows that from 2001 to 2006, the total number of Fairtrade Certified Producer Organizations more than doubled. As noted above, these producers are still not able to sell their entire crop at the Fairtrade price.[215] In other words, even as the FLO expands the supply of Fairtrade coffee, demand has not kept pace. The FLO has essentially recreated the world market, but with price controls. And since the Fairtrade market price is artificially inflated, the incentive is for farmers outside the system to seek certification. Thus, the FLO's continual certification of new producers expands supply, irrespective of demand.

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213 Historical data – Imports of importing Members (calendar years), http://www.ico.org/historical.asp (last visited Oct. 16, 2008) (for selected years 2003-2005).

214 Evolution of the number of Fairtrade Certified Producer Organizations, http://www.fairtrade.net/fileadmin/user_upload/content/ev_number_prod_organizations.png (last visited Dec. 13, 2007). The graph was taken from the referenced website and was not generated by the author.

215 Downie, *supra* note 5.

The FLO's general goal is to improve the standard of living[216] of coffee producers by giving them a higher price for their product. But the above analysis shows that the benefits of Fairtrade extend only to those producers who are able to participate in the Fairtrade market. And the ability to participate in the Fairtrade market is dependent upon two things: the demand for Fairtrade, which defines how much coffee can be sold at the elevated price, and the number of certified producers, among whom that demand must be apportioned. In its current state, the FLO admits that the benefits of Fairtrade are not covering the cost of sustainable production, which this Author understands to be at least the producer's overhead costs.[217] Thus, the FLO's system has not been successful at achieving its most basic goal because of the structure of the Fairtrade market itself: the FLO cannot create demand fast enough, and yet it adds producers to the system, which taxes the ability of the system to improve the standard of living of participants.

More importantly, however, the FLO's regulatory regime fails at a more basic level. Like the ICO, the FLO is attempting to resolve the long-term market instability caused by overproduction by keeping producers in the market. Not only are producers kept in the market by the hope for a higher price, but they incur substantial certification costs for access to that hope. These certification costs are an investment that can only be recouped by remaining in the coffee market,[218] and thus producers are essentially trapped in production regardless of potential alternatives outside of production. Moreover, the FLO has no policy to educate producers about those alternatives. By failing to address the problem that causes the market disequilibrium, the FLO offers "at best a temporary palliative."[219] But by involving large and ongoing costs, the FLO is actually working against the long-term interests of participants, who might be better off exploring options outside of coffee production.[220]

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216 The FLO's definition of "standard of living" may differ from the Author's.

217 *See supra* note 201 and accompanying text.

218 Preparing for certification and the payment of certification costs themselves are all related to agricultural production. Additionally, the foregoing various effective farming techniques (*e.g.*, the use of chemical fertilizers) increase the cost of labor.

219 Bilder, *supra* note 3, at 338.

220 One could imagine a test to determine whether Fairtrade is or is not keeping people in farming. As noted above, Fairtrade is a coherent system which really developed after the failure of the 1983 Agreement in 1989. A careful analysis of national employment data in coffee-producing nations could show the number of people employed in coffee farming prior to 1989. A fall-off in coffee employment in that period could be interpreted as producers leaving the

CONCLUSION: THE MARKET SOLVES

This Note has examined two international regulatory regimes for the world coffee market. The reason for both of these regimes is unsurprising and hardly new: the price of coffee in general is too low to sustain the current level of world production. The ICO, having recast itself as an information clearinghouse, seeks to raise world prices by providing information that producers can use to improve quality.[221] High quality offers its own premium, which raises the price of coffee and allows the producer to receive a better price. But improving the quality of coffee does not address the underlying problem with the market; i.e. it does not address oversupply in the market. If the goal is to help producers in the long term, the solution must be to allow market forces to bring supply and demand into equilibrium.

In the context of the world market for coffee, the market is sending a clear signal: leave production. Strategies to create demand may help producers achieve higher prices, but they do not address the fundamental historical problem of oversupply. Unlike in the past, when production was limited to a few undeveloped countries without economic options,[222] today, many coffee-producing nations (particularly in Latin America) are developing alternatives. With the growth of industry, the options for producers have also grown. Where in the past poor farmers may have had no alternatives to production, today those same farmers could move to industrialized cities, receive professional training, and move into new sectors of the economy where their skills may earn higher wages. The Fairtrade price, already significantly above market,

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market due to inadequate price; i.e. following the market signal to leave production for better-compensated work. After 1989, one could track the employment in the coffee sector against the growth of the Fairtrade market. If coffee producers did not leave the sector, or left it at a lower rate than prior to the emergence of Fairtrade, one could infer that Fairtrade was indeed creating an incentive to remain in production counter to the market signal to exit.

This Note restricts itself to a comparison of the ICO and FLO regulatory regimes, and considers the market signal to exit only as it relates to those signals sent by the regulatory regimes. The Author's focus was not on employment data, and thus this study remains to other interested parties to conduct.

221 *See supra* section I.B.

222 *See* Bilder, *supra* note 3, at 334. Bilder claims the following:

> The comparative ease of coffee cultivation, the many areas of the world suited to its production, and the high yields and returns possible for a successful grower per unit of area cultivated as compared with other tropical crops, have led to a rapid and continuing expansion of productive capacity – at first in Brazil, then throughout Latin America, and most recently central Africa.

Id.

does not predictably cover the costs of production; and the in market price leaves producers scrambling to pay their bills.[223] Outside the coffee sector, however, there may be other opportunities for producers.

Over time, producers, unable to reap the expected benefits of Fairtrade, could put pressure upon the FLO to change its certification policies. For a given producer, each newly certified organization represents a smaller portion of the overall pie. Thus, each new producer added to the system is a threat to already-certified producers. The incentive for the Fairtrade producer (who is represented in the Producer Network and General Assembly)[224] is to demand higher barriers to entry; i.e. stricter Standards. Or producers may demand stricter adherence to the current standards, meaning some producers already certified could face decertification. Or the FLO could anticipate such problems and tighten standards or demand stricter adherence independently. Perhaps most worrisome, CERT, the body granted the discretion to certify and decertify, could take such measures on its own.[225]

The data presented in this Note illustrate that even if the strategies of the FLO and ICO succeed in creating new demand for coffee, the price of coffee will not increase sufficiently to lift producers from the poverty they now face. While it is as yet unknown what price level will make coffee production consistently and sufficiently profitable, it is known that there are other routes out of poverty. By abandoning production, many growers will find alternative employment which *can* provide them economic growth. And with new economic opportunities, the long-term prospects of ex-producers may improve.[226] Admittedly, some ex-producers will fail and would have been better off in production, where they at least had a livelihood, albeit an unprofitable (and possibly debt-increasing) one. But many ex-producers are likely to succeed, and the only thing keeping them from that success is the hope that coffee prices will somehow rise to a level that can sustain them—to hope

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223 *See supra* section III.B.

224 *Supra* notes 123-127 and accompanying text.

225 While these dangers are merely hypothetical at this point, the reader ought to realize that producer expectations are to benefit from Fairtrade, not to incur large expenditures and be unable to cover their overhead.

226 *See* Fend, *supra* note 8, at 18 ("Agricultural protectionism of the US and the European Union further prohibits profitable diversification into other major food crops and distorts relative prices. We should also bear in mind that diversification out of coffee may not necessarily be socially optimal from a public goods perspective.").

for a profitable existence, as sadly displayed by the data, is too much to expect.

The Fairtrade system creates a massive opportunity cost for producers, who are incentivized to stay in an "unsustainable" sector of the world economy. The ICO's system is essentially the solution proposed by this Note: member States are allowing the market to solve. But the market would solve more easily if the ICO focused more of its efforts in promoting diversification or at least in educating producers about their other options. Instead, the International Coffee Organization is pursuing a non-solution; the market is over-supplied, and the historical growth of world demand does not indicate that an improvement in quality will make up the difference. The only real solution is for producers to exit and to let the evolving market solve.