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## THE ROLE OF TRANSNATIONAL PRIVATE REGULATION IN STANDARD SETTING AND THE CREATION OF DIFFERENTIATED MARKETS WITHIN THE COFFEE INDUSTRY

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## I. INTRODUCTION

Coffee is one of the most traded commodities in the world, with global production averaging over 160 million in 60 kg bags, and consumption over 175 million in 60 kg bags, as of 2021.<sup>1</sup> However, since the 1980s, the international coffee market has been marked by declining and unstable prices, causing a heavy reliance on cheap production for large coffee corporations, and socioeconomic policy concerns for producer states.<sup>2</sup> Meanwhile, consumers have become increasingly concerned with the sustainable and ethical practices of coffee corporations when deciding whether to buy a product.<sup>3</sup> Differentiated concerns between producers and consumers, coupled with the geographical threshold between exporting and importing states have created a push-and-pull environment of opposing preferences within the industry for private and public regulatory systems.<sup>4</sup> Hitherto production has largely taken place in the Global South, with exporters consisting of over 50 developing countries.<sup>5</sup> Meanwhile, the largest consumer nations have typically belonged to the Global North, with the European Union, the United States and Japan being the largest coffee importers in 2021, according to the International Institute for Sustainable Development (“IISD”).<sup>6</sup> While corporations in importing countries focus on the cost efficiency of social and environmental sustainability compliance, exporter countries are more concerned with addressing price instability and providing farmers with support in the face of low prices.<sup>7</sup>

For over 30 years, the rise of neoliberal ideologies and absence of coordinated state action to regulate the industry have led to the steady development of international private self-regulatory mechanisms and third-party standard-setting certification schemes.<sup>8</sup> Pioneers among these are the Fair-Trade label, and the Rainforest Alliance, which have emerged as private, international initiatives, largely concerned with

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<sup>1</sup> INTERNATIONAL COFFEE ORGANIZATION, COFFEE MARKET REPORT OCTOBER 2022, 9 (2021). See also Ishan Puranik, *Intellectual Property in the Coffee Industry*, 3 INT’L J. OF L. MGMT. AND HUMAN., 40, 41 (2020).

<sup>2</sup> Lisa Hamann, et al., *CSR in the Coffee Industry: Sustainability Issues at Nestlé-Nespresso and Starbucks*, 2 EUR. MGMT. AND PUB. AFF. STUD., 31, 31 (2014).

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

<sup>4</sup> Janina Grabs, *Assessing the Institutionalization of Private Sustainability Governance in a Changing Coffee Sector*, 14 REGUL. & GOVERNANCE, 362, 377 (2018).

<sup>5</sup> FOOD AND AGRICULTURE ORGANIZATION, FAO COFFEE POCKETBOOK, 10 (2015).

<sup>6</sup> INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, GLOBAL MARKET REPORT: COFFEE PRICES AND SUSTAINABILITY, 3 (2022). See also Daphne Zografos Johnson, *Using Intellectual Property Rights to Create Value in the Coffee Industry*, 16 MARQ. INTELL. PROP. L. REV., 283, 284-8 (2012).

<sup>7</sup> Grabs, *supra* note 4 at 377.

<sup>8</sup> *Id.*, at 363. See also Laura T. Reynolds, et al., *Regulating Sustainability in the Coffee Sector: A Comparative Analysis of Third-Party Environmental and Social Certification Initiatives*, 24 AGRIC. AND HUM. VALUES, 147, 148 (2007).

addressing sustainability issues within coffee's agricultural production and supply chains.<sup>9</sup> At a local level, intellectual property rights have emerged as tools to create differentiated markets, providing producers with alternative trading opportunities, and adding value to the product, a framework Colombia has been in the forefront of.<sup>10</sup> As the coffee industry continues to be plagued by the whims of an unstable global market, private governance has emerged as a potential tool to address the issues of our global era. This paper compares and analyzes the intra-national and trans-national approaches to regulation within the coffee industry. By focusing on the emergence of an international reputation system through the creation of independent certification schemes, this paper seeks to contextualize the degree to which norms on sustainability practices have been *reinstitutionalized* and applied within the coffee industry.<sup>11</sup>

## II. CLUB GOODS THEORY AND PRIVATE CERTIFICATION SCHEMES: A MOVE TOWARDS UNIFORMITY AND PRIVATE REGULATION IN THE INTERNATIONAL COFFEE INDUSTRY

Until 1989, the global coffee market was regulated by various international agreements known as the International Coffee Agreement ("ICA"), which sought to bring price stability to the market.<sup>12</sup> The ICA utilized macroeconomic policies (such as export quotas) to assure supply to consumers while creating equitable market prices.<sup>13</sup> However, while the ICA quotas limited coffee exports in exporter countries, the agreement did little to curtail production or prevent the subsequent oversupply of the good.<sup>14</sup> As a result, the flooded market led to the ultimate failure of the agreement and unprecedented price drops between the 1990s and

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<sup>9</sup> Grabs, *supra* note 4 at 362-363. See also Kaisa Sorsa & Juha Kettunen, *Transnational Private Regulation: Evidence from the Coffee Industry*, 6 ASIAN J. OF AGRIC. EXTENSION, ECON. AND SOCIO., 209, 210 (2015).

<sup>10</sup> Zografos Johnson, *supra* note 6 at 292-300. See also Grabs, *supra* note 5 at 370.

<sup>11</sup> *Reinstitutionalization* here refers to the degree to which a social norm is transformed into a legal norm, and subsequently, incorporated into and recognized by formal institutions and systems. THOMAS SCHULTZ, *TRANSNATIONAL LEGALITY: STATELESS LAW AND INTERNATIONAL ARBITRATION*, 1, 131-132 (1st ed. 2014).

<sup>12</sup> Lennart Schüßler, *Protecting 'Single Origin Coffee' Within the Global Coffee Market: The Role of Geographical Indicators and Trademarks*, 10 ESTEY CTR. J. OF INT'L. L. AND TRADE POL'Y. 149, 150-1 (2009). See also G.N. Pichop & F.M. Kemegue, *International Coffee Agreement: Incomplete Membership and Instability of the Cooperative Game*, 2006 SW. BUS. AND ECON. J., 25, 28 (2005).

<sup>13</sup> Schüßler, *supra* note 12 at 150-1. Pichop & Kemegue, *supra* note 13 at 28.

<sup>14</sup> Schüßler, *supra* note 12 at 150-1. Pichop & Kemegue, *supra* note 13 at 28.

2000s.<sup>15</sup> Today, the ICA is regarded as a symbol of good intentions in an industry that has been almost exclusively regulated by neoliberal theoretics and free-market behavior.<sup>16</sup>

While exporters have slowly recovered from the economic crises in the industry, coffee consumption has steadily increased due to strong marketing efforts, with ambiance and social positioning being sold alongside the product itself.<sup>17</sup> Growing interconnection of the world's food and agricultural supply chains, coupled with slow state catch up regarding social and environmental legislations and the emergence of consumer preoccupation with ethical corporate conduct, have prompted the emergence national and transnational governance mechanisms to set, monitor, and identify goods produced under dignified social, economic, and environmental conditions.<sup>18</sup>

Private certification systems have been adopted as symbols and reputational indicators of ethical business practices within the global production chain.<sup>19</sup> The following sections will focus on the emergence, adoption, and compliance with independent certifications as the *de facto* sustainability standards within the global coffee industry, utilizing the economic theory of club goods as an analytical tool to conceptualize multinational corporate compliance and obligations with such industry originated standards.<sup>20</sup>

### III. CLUB GOODS THEORY

Private transnational regulation has been compared to club goods; whereby voluntary memberships are created to take on certain costs. These costs are not necessarily required by law, but they allow members to jump ahead of the curve, receiving the positive externalities and social branding benefits from the creation of these differentiated market, as well as compliance with industry-created sustainable production standards.<sup>21</sup> As an economic theory, the club goods theory seeks to describe goods that adopt public and

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<sup>15</sup> Schüßler, *supra* note 12 at 150-1.

<sup>16</sup> Pichop & Kemegue, *supra* note 12 at 29.

<sup>17</sup> Schüßler, *supra* note 12 at 151.

<sup>18</sup> Reynolds, *et al.*, *supra* note 8 at 147.

<sup>19</sup> *Id.* See also Daniele Giovannuci & Stefano Ponte, *Standards as a New Form of Social Contract? Sustainability Initiatives in the Coffee Industry*, 30 FOOD POL'Y., 284, 285 (2005).

<sup>20</sup> Sorsa & Ketteunen, *supra* note 9 at 210-2.

<sup>21</sup> *Id.*

private goods characteristics, since they are generally excludable but non-rivalrous.<sup>22</sup> Club goods can function as private policy instruments to prompt companies to comply with desirable social goals and possibly exceed established labor, wage, and environmental minimum standards or address gaps within domestic or international law. In the coffee industry, certifications and labeling initiatives have become the *de facto* way in which goodwill standards and competitive positioning have been created.<sup>23</sup>

#### IV. THE BIG THREE: FAIRTRADE AND THE RAINFOREST ALLIANCE THIRD-PARTY CERTIFICATION INITIATIVES

Third-party certifications, whereby independent coordinating bodies set forth the required standards for compliance, create participatory structures, and monitor corporate adherence to said standards, are seen as having the most legitimacy and strongest consumer appeal due to their perceived separation from corporate interests.<sup>24</sup> This paper explores the emergence of the Fairtrade Label and the Rainforest Alliance as some of the most popular standard-setting initiatives.<sup>25</sup>

The Fairtrade label mainly focuses on improving economic conditions and welfare for small coffee producers by strengthening their access to markets, cutting out intermediaries and creating a fixed price floor for their products to provide them with fair wages.<sup>26</sup> The label was first launched by a Dutch organization in 1988, and by 1997, the Fairtrade Labelling Organizations International (“FLO”) was established as a global uniform standard setting and certifying body.<sup>27</sup> FLO has the authority to set the label’s standard, negotiate pricing, and formally provide support to producers, meanwhile a separate organism, FLOCERT, is tasked with conducting certifications and auditing producers to ensure compliance with FLO’s standards.<sup>28</sup> Since the

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<sup>22</sup> Douglas A. Schuler, *A Club Theory Approach to Voluntary Social Programs: Multinational Companies and the Extractive Industries Transparency Initiative*, 14 BUS. AND POL., 1, 7 (2012). See also SORSA & KETTEUNEN, *supra* note 9 at 211.

<sup>23</sup> Sorsa & Kettunen, *supra* note 9 at 211.

<sup>24</sup> Reynolds, *et al.*, *supra* note 8 at 147.

<sup>25</sup> Giovannucci & Ponte, *supra* note 19 at 287.

<sup>26</sup> Graeme Auld, *Assessing Certification as Governance: Effects and Broader Consequences for Coffee*, 19 J. OF ENV’T. AND DEV., 215, 219 (2010). See also Maria Fridell, *et al.*, *With Friends Like These: The Corporate Response to Fair Trade Coffee*, 40 REV. OF RADICAL POL. ECON., 8, 14–20 (2008).

<sup>27</sup> Iman Prihandono & Fajri Hayu Relig, *International Certification as a Mechanism for Protecting Human Rights of Indonesian Coffee Farmers*, 49 ENV’T. POL’Y. AND L., 49, 51 (2019).

<sup>28</sup> *Id.*



2000s, the Fairtrade label as a specialty market has grown dramatically within importer countries, capturing the attention of state governments and international organizations, and drawing a spotlight on unethical practices in the industry.<sup>29</sup> The rapid expansion and popularity of the Fairtrade label have caused major industry players, such as Nestlé and P&G, to adopt Fairtrade practices, values, and guidelines within their corporate structures.<sup>30</sup>

Meanwhile, the Rainforest Alliance is a certification initiative primarily concerned with the environmental impacts of coffee production.<sup>31</sup> Hitherto, its concern has been establishing environmental standards for coffee farming techniques, agricultural production, and biodiversity protection, among others.<sup>32</sup> The Rainforest Alliance has also incorporated social and economic sustainability into its paradigm, whereby alongside various other non-governmental organizations (“NGOs”), the Alliance has created the Sustainable Agricultural Network (“SAN”), an organizational network which has set forth standards and guidelines for over 90 criteria at individual producer and collective certification levels.<sup>33</sup> Although the Rainforest Alliance system lets producers choose how to implement said guidelines, they are required to demonstrate compliance with them.<sup>34</sup>

While broad critiques around private certification have questioned the mechanism’s efficiency and ability to effect real, systematic change within the industry — and not become a mere seal of approval co-opted by the corporations such initiatives were meant to challenge — praise has also been awarded because of their effect on consumer awareness, agenda mainstreaming in the industry, and a heightened collaboration between public and private governance structures.<sup>35</sup> Moreover, the rapid expansion and popularity of voluntary private certification mechanisms showcase how regulatory voids can be filled through market-drivers and become the basis for industry standards, incorporating traditional public policy concerns such as social welfare and environmental protection.<sup>36</sup> However, as the following sections explore, the adoption of

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<sup>29</sup> Fridell, *et al.*, *supra* note 26 at 14-15.

<sup>30</sup> *Id.*

<sup>31</sup> Giovannucci & Ponte, *supra* note 19 at 287. See also Juliane Reinecke, *et al.*, *The Emergence of a Standards Market: Multiplicity of Sustainability Standards in the Global Coffee Industry*, 33 ORG. STUD., 791, 799-800 (2012).

<sup>32</sup> Hamann, *et al.*, *supra* note 2 at 32.

<sup>33</sup> Prihandono & Hayu Relig, *supra* note 27 at 52.

<sup>34</sup> Fridell, *et al.*, *supra* note 26 at 21.

<sup>35</sup> Alud, *supra* note 26 at 216, 228.

<sup>36</sup> Raynolds, *et al.*, *supra* note 8 at 157-160.

third-party certifications has not precluded the use of intra-state legal tools to address industry concerns at a domestic level.

## V. THE ROLE OF THE STATE IN THE COFFEE INDUSTRY: INTELLECTUAL PROPERTY RIGHTS AND CAFÉ DE COLOMBIA

Recently, intellectual property rights, specifically trademarks and geographical indicators (GIs), have emerged as tools to combat low coffee prices in exporter countries by creating a higher-priced, sophisticated, and differentiated market for coffee moving away from the commodity goods market.<sup>37</sup> Since most certification strategies have originated in consumer countries, concerns over the high transaction costs for small-holder farmers and limited decision-making mechanisms at local levels have emerged among producers.<sup>38</sup> As such, GI's have represented a means through which producers at a local level can participate in the standard-setting market and gain regulatory protection at state levels.<sup>39</sup>

The idea behind the use of trademarks and GIs mimics that of certification schemes and the creation of clubs for sustainably sourced coffee, since through these mechanisms producers have sought to differentiate their products at a global scale which rely on marketing and reputational mechanics to be successful.<sup>40</sup> GIs, however, require the backing of a specific legal regime to be safeguarded, with protection outside the country of origin mostly depending on the Agreement on Trade-Related Aspects of Intellectual Property of 1995 ("TRIPS") or other bilateral agreements.<sup>41</sup>

In the coffee industry, GIs have emerged as the primary mode for promotion of single-origin coffee, a type of coffee blend characterized by its origin in a single country or region, and as a legal guarantee to protect coffee growers and marketers against unfair competition.<sup>42</sup> Many producer countries have opted to

<sup>37</sup> Schüssler, *supra* note 12 at 150. See also PURANIK, *supra* note 2 at 44-46.

<sup>38</sup> Xiomara F. Quiñones, *et al.*, *Can Origin Labels Re-Shape Relationships Along International Supply Chains? The Case of Café de Colombia*, 9 INT'L J. OF THE COMMONS, 416, 418 (2015).

<sup>39</sup> *Id.*

<sup>40</sup> Ramona Teuber, *Geographical Indicators of Origin as a Tool of Product Differentiation: The Case of Coffee*, 22 J. OF INT'L. FOOD AND AGRIC. MKTG., 277, 278 (2010).

<sup>41</sup> Dominique Barjolle, *et al.*, *The Role of the State of Geographical Indications of Coffee: Case Studies from Colombia and Kenya*, 98 WORLD DEV., 105, 106 (2016). See also QUIÑONES, *et al.*, *supra* note 38 at 422.

<sup>42</sup> Jennifer Barnette, *Geographic Indications as a Tool to Promote Sustainability? Café de Colombia and Tequila Compared*, 39 ECOLOGY L. CURRENTS, 102, 108 (2012).

protect and register their geographical indicators for coffee in the US and European Markets, some of the largest coffee importers.<sup>43</sup> Colombia has been regarded as one of the leading actors in this trend, with recent efforts focusing on the establishment of regional and estate coffees through GI's reputational system.<sup>44</sup>

The Café de Colombia GI was established in 2005 by the *Federación Nacional de Cafeteros de Colombia* ("FNC"), a private non-profit organization with state government participation which was established in 1927 and tasked with the management and governance of the country's coffee value chains.<sup>45</sup> The FNC's objective over the years has been to safeguard Colombian coffee and provide higher socioeconomic outputs for the country's growers by establishing private collaborations with different organizations such as *Almacafé* and *Cafecert* to provide quality control, certifications, marketing, and commercialization systems for the good.<sup>46</sup> Originally, the FNC had relied on the protection awarded by trademarks, whereby through the Juan Valdez logo, consumers could identify a coffee brand as consisting of 100 percent Colombian coffee.<sup>47</sup> However, the FNC's use of GIs has further distinguished Colombian coffee within the broader global coffee market, basing its distinguishing qualities on production and picking techniques, taste, aroma, and quality due to its Andean origins.<sup>48</sup> Locally, the Café de Colombia GI also establishes and enforces minimum legal standards for coffee producers regarding production processes and quality-assurance.<sup>49</sup> As the key governing institution within the country's industry, the FNC has developed, overseen, and enforced quality standards, farming techniques, price monitors, and traceability mechanisms which has overall institutionalized the industry through the protection and enforcement awarded by the GIs in the state's legislations.<sup>50</sup>

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<sup>43</sup> Teuber, *supra* note 40 at 278-80.

<sup>44</sup> *Id.* at 282. See also Barjolle, *et al.*, *supra* note 41 at 105.

<sup>45</sup> See Barjolle, *et al.*, *supra* note 41 at 107-8. See also Barnette, *supra* note 42 at 108.

<sup>46</sup> Barjolle, *et al.*, *supra* note 41 at 108-109.

<sup>47</sup> Schüßler, *supra* note 12 at 165.

<sup>48</sup> Barjolle, *et al.*, *supra* note 41 at 108-109.

<sup>49</sup> Protected Geographical Indication, CAFE DE COLOMBIA, <https://www.cafedecolombia.com/particulares/protected-geographical-indication/?lang=en> (last visited Nov. 16, 2022).

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

## VI. CONCLUSION

The coffee industry provides an interesting case study for the evolution of private regulatory mechanisms and development of transnational legal systems. As was discussed in this essay, the first attempts to regulate and establish minimum standards within the industry focused on the use of traditional policy mechanisms in international law and multilateral treaties, through the creation of the ICA.<sup>51</sup> However, by the end of the 20<sup>th</sup> century, the market failures and economic collapses that plagued coffee producers, as well as global political trends focusing on neoliberal economic theory, ultimately led to a wave of deregulation.<sup>52</sup> As such, institutionalization of norms and compliance standards in recent decades have largely come from private sustainability initiatives and civil society groups that have slowly achieved industry-wide recognition through the creation of a premium coffee market for consumers, which in turn has forced major industry players to respond to the ethical production demands of buyers.<sup>53</sup> The differentiated-market model produced by private regulation has trickled down and been adopted by state legal mechanisms, primarily GIs and trademarks, as a means to award producers economic protection.<sup>54</sup> Compliance with broad norms concerning agricultural production, price premiums and quality standards have become intrinsic within the private and public sectors, at both ends of the supply chain. Despite developments in private regulation within the coffee industry being relatively recent, they highlight the potential such mechanisms have to further develop strong governance structures and audits outside of international politics and failing state regulatory structures. This paper shows that as globalization increases and value chains become more interconnected, the development of industry generated 'coffee clubs' using certifications, trademarks, and GIs allow for real-time standards and enforcement mechanisms to emerge that correspond directly to industry needs, where otherwise public governance may be slow to catch up.

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<sup>51</sup> Pichop & Kemegue, *supra* note 12 at 25-26.

<sup>52</sup> Grabs, *supra* note 4 at 363.

<sup>53</sup> *Id.* at 381-2.

<sup>54</sup> Barnette, *supra* note 42 at 108.