INTERNATIONAL INTELLECTUAL PROPERTY SCHOLARS SERIES*

USING INTELLECTUAL PROPERTY RIGHTS TO CREATE VALUE IN THE COFFEE INDUSTRY[1]

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I. INTRODUCTION

Coffee is the single most important tropical commodity traded worldwide. It is produced in over 50 developing countries, and it is estimated that some 20 million rural families,[2] or 125 million people,[3] depend on growing coffee throughout the world for their livelihoods. Over the past decade, coffee producers have been facing considerable difficulties because of low and unstable coffee prices. In 2002, coffee prices collapsed to 100-year lows in real terms, leading to a world coffee crisis. Meanwhile, the coffee economy in high income countries has been moving in the opposite direction, and the crisis is hardly visible from Starbucks-type western coffee chains. This paper examines how coffee producers in developing countries can use intellectual property, or intellectual property-related rights, as differentiation tools to move from pure commodity exports to higher-price exports in niche markets and create value. It takes into account the influence of new consumption patterns in the coffee industry and analyzes the various differentiation techniques that have been proposed, such as single-origin, specialty and gourmet, and sustainable coffees. Finally, it examines the situation of

2. UNITED NATIONS DEVELOPMENT PROGRAM (UNDP), HUMAN DEVELOPMENT REPORT 2005: INTERNATIONAL COOPERATION AT A CROSSROADS. AID, TRADE AND SECURITY IN AN UNEQUAL WORLD 139 (Charlotte Denny ed., 2005) [hereinafter UNDP].

3. NESTOR OSORIO, INT'L COFFEE ORG., THE GLOBAL COFFEE CRISIS: A THREAT TO SUSTAINABLE DEVELOPMENT (2002).

the coffee industry in Vietnam and Indonesia, who are also two of the most important coffee producers worldwide in terms of volume, and where the coffee sector has experienced an explosive growth since the 1980s.

II. A SHORT HISTORY OF THE COFFEE BEAN

The history of the coffee bean starts in Northeast Africa, in the province of Kaffa in Ethiopia, where the coffee tree probably originated. Used traditionally by Ethiopian nomadic mountain warriors as an early type of energy bar,[4] "coffee was first eaten as a food sometime between 575 and 850[,] long before it was made into a hot beverage in 1000–1300[]."[5] Western accounts of the discovery of coffee include various fanciful tales told by local traders to the first European merchants who came to Yemen to buy coffee in the early seventeenth century.[6] According to one well-known legend, coffee was discovered by an Ethiopian goat herder, Kaldi, who noticed his goats would behave frenetically after eating red coffee berries.[7] Curious, Kaldi tried some and as his tiredness quickly faded, "he began dancing about excitedly with his goats."[8] Kaldi was noticed by a monk from a local monastery, who "tried the fruits himself, and, noticing the effect, came [up with] the idea of boiling the berries to make a drink [that would] help the monks stay awake during religious services."[9]

From the Ethiopian monks' experimental drink, to today's busy coffee shops, coffee has become increasingly popular over the years and has grown into a central part of day-to-day life. By the mid-sixteenth century, the drink had come to be considered "as important as bread and water," so that drinkers in Constantinople, Cairo, and Mecca formed special areas where to drink it, which became the world's first coffee houses.[10]

During the sixteenth century, most coffee beans were procured from

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4. "Originally, coffee beans were crushed into balls of animal fat and used for quick energy during long treks and warfare." Beans were also used as porridge or to make a fermented wine. NINA LUTTINGER & GREGORY DICUM, THE COFFEE BOOK, ANATOMY OF AN INDUSTRY FROM CROP TO THE LAST DROP 2–3 (2006).

5. *Id.* at 2.

6. ANTHONY WILD, COFFEE: A DARK HISTORY 42–43 (2004).

7. LUTTINGER & DICUM, *supra* note 4, at 3; WILD, *supra* note 6, at 43.

8. LUTTINGER & DICUM, *supra* note 4, at 3; WILD, *supra* note 6, at 43.

9. LUTTINGER & DICUM, *supra* note 4, at 3; WILD, *supra* note 6, 42–43.

10. The first English coffee house opened in Oxford in 1650, two years before the first London coffee house. LUTTINGER & DICUM, *supra* note 4, at 3, 6.

southern Yemen where the Arabs had been cultivating coffee since about 1500.[11] The two main ports for coffee were Mocha, on the Red Sea in Yemen, and Jidda, the port of Mecca.[12] At the time, coffee was "a monopoly of the Arab world, and the secrets behind its cultivation were jealously guarded."[13] "Foreigners were strictly forbidden from visiting coffee farms, and the beans could"[14] only be exported after boiling or half-roasting to prevent them from germinating. In addition, fines were imposed on traders who would try to smuggle them out.[15] Nonetheless, "by the early seventeenth century, monopolistic control . . . began to crumble"[16] "[a]s reports of the new beverage started to circulate through[out] Europe,"[17] and merchants started to take notice of this new opportunity. The expansion of European trade and colonization led to a rapid spread of coffee cultivation from Ethiopia and Yemen to other parts of the world, and to the decline in importance of the port of Mocha.[18]

III. GEOGRAPHICAL EXPANSION OF COFFEE PRODUCTION

From the early eighteenth century, as most of the major colonial powers became players in the production of coffee,[19] coffee cultivation increased dramatically throughout the tropics. At the beginning of the nineteenth century, coffee was cultivated exclusively on islands. However, in the decades to follow, with the advent of the railway revolution, cultivation quickly spread to the Americas, including most of the newly independent Latin American countries.[20] Brazil became the

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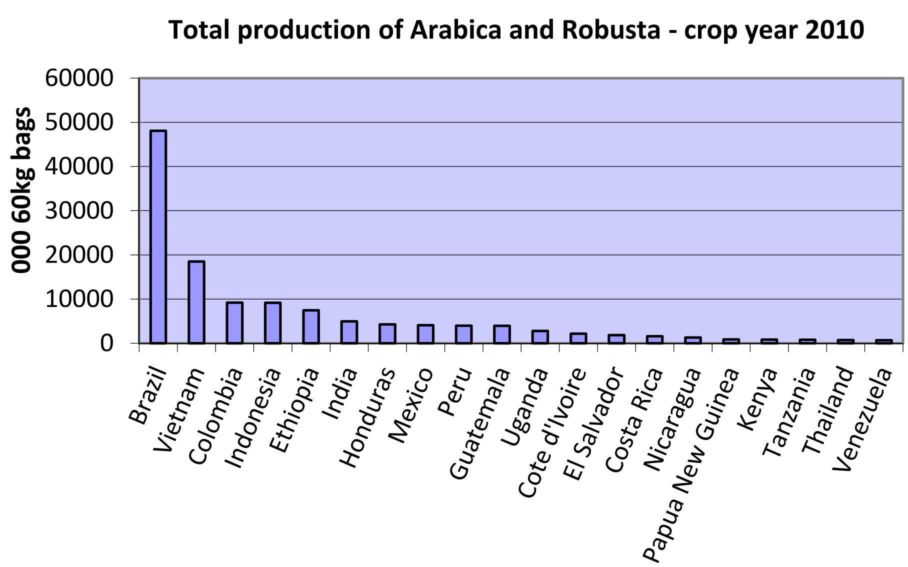
11. *Id.* at 5–6.
12. *Id.* at 6.
13. *Id.* at 7.
14. *Id.*
15. WILD, *supra* note 6, at 76.
16. LUTTINGER & DICUM, *supra* note 4, at 7–8.
17. WILD, *supra* note 6, at 76.
18. *Id.* at 76, 98.
19. "The Dutch cultivated coffee in Ceylon (now Sri Lanka), Java, Sumatra, Bali, Timor, and later, Celebes (Sulawesi) and Dutch Guiana (Suriname); the English grew coffee in the Caribbean and, later, in Ceylon and India; the French planted coffee in the Caribbean, South America, and later, in their colonies in Africa; and the Portuguese produced coffee in Brazil, parts of Indonesia, and later in Africa as well." LUTTINGER & DICUM, *supra* note 4, at 25.
20. "Réunion, Martinique, Santo Domingo, Cuba, Jamaica, Puerto Rico, Java and Sri Lanka were the main coffee-producing territories." BENOIT DAVIRON & STEFANO PONTE, THE COFFEE PARADOX, GLOBAL MARKETS, COMMODITY TRADE AND THE ELUSIVE PROMISE OF DEVELOPMENT, 57 (2005).

first exporting country in that region.[21] In the 1920s, Colombia emerged as Brazil's main competitor in Latin America, and Africa progressively developed as a new coffee-exporting continent.[22] Eventually, in the 1980s and 90s, cultivation spread to Asia, with rapid development in Indonesia and, subsequently, an even faster development in Vietnam.[23] In the 1980s Vietnam was in the middle of the pack of coffee producers. By 1999, with production of over 11 million bags, it beat out Colombia as the second largest coffee producer in the world, a position it has held ever since.[24]



Rank	Area	Type	000 60 kg bags
1	**Brazil**	A/R	48095
2	**Viet Nam**	R	18500
3	**Colombia**	A	9200
4	**Indonesia**	R/A	9169
5	**Ethiopia**	A	7450

21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 57–58.

6	**India**	A/R	4983
7	**Honduras**	A	4290
8	**Mexico**	A	4100
9	**Peru**	A	3976
10	**Guatemala**	A/R	3950
11	**Uganda**	R/A	2800
12	**Cote d'Ivoire**	R	2200
13	**El Salvador**	A	1840
14	**Costa Rica**	A	1589
15	**Nicaragua**	A	1300
16	**Papua New Guinea**	A/R	867
17	**Kenya**	A	833
18	**Tanzania**	A/R	800
19	**Thailand**	R	752
20	**Venezuela**	A	700

Source: International Coffee Organization
Figure 1: Top coffee producers

In 2007, the total value of coffee exports worldwide was estimated at US $12.7 billion, up 17% since 2006.[25] Of these, exports of Robusta coffee accounted for US $3.32 billion, as opposed to US $9.38 billion for Arabica coffee.[26] In terms of imports, in 2008, the European Union was the largest importer of coffee, accounting for 66% of worldwide imports, followed by the United States with 24%, and Japan with 7%.[27]

IV. The Coffee Crisis

Following a series of short-term agreements between producing countries, a coffee study group was formed to negotiate an agreement to include both exporting and importing countries. In 1962 the International Coffee Agreement (ICA) was successfully negotiated in the United Nations New York headquarters. The ICA, which was administered by the International Coffee Organization (ICO), was to be

25. Food and Agriculture Organization, The Market for Organic and Fair Trade Coffee 4 (2009) [hereinafter FAO].
26. *Id.*
27. *Id.*

renegotiated every five years.[28]

Under the ICA, a target price was set, and export quotas were allocated to each producer "whereby supplies of coffee in excess of consumer requirements were withheld from the market."[29] In order to comply with the ICA, "[p]roducing countries met quota obligations by stockpiling coffee to keep it off the market, destroying it, or selling it at low prices" to countries that were not part of the agreement, such as the Soviet Block and other developing countries.[30] Although the system was not perfect, coffee prices remained relatively stable and high during that time and "came to be seen as a viable means of development for . . . countries that had not produced it before or had done so only in limited quantities." Indonesia for example, along with some Central American and African nations, were some of the countries to undertake massive expansions of their coffee industries.[31]

In the 1980s, the ICA system was showing strains due to changes in coffee production creating a global surplus concentrated in countries who had not previously been coffee powers, such as Vietnam and Indonesia.[32] As the quota system prevented new producers from accessing lucrative ICA markets, much of this production could only be sold at low prices to countries outside the ICA.[33] At the same time, in addition to problems of free riding and disputes over quotas, changes in consumer preferences for ground over soluble coffee "were not met by changes in supply due to the political rather than market [allocation] of quotas."[34] This rigidity worried roasters "who feared that competitors [w]ould get access to cheaper" and better quality coffee from new producing countries, that was available in non-member countries, and undermined their cooperation within the ICA system.[35] The combination of these elements led to a failure to renegotiate the ICA in 1989.[36]

With the end of the ICA, producing country coffee agencies lost almost all influence on the international market. Coffee prices

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28. *See History*, INT'L COFFEE ORG., http://www.ico.org/ history.asp (last visited Feb. 1, 2012).
29. *Id.*
30. LUTTINGER & DICUM, *supra* note 4, at 91.
31. *Id.*
32. *Id*. at 93.
33. *Id.*
34. *Id.*
35. DAVIRON & PONTE, *supra* note 20, at 87.
36. *Id.* at 88.

plummeted immediately, and in 2002 they collapsed to their lowest price in 100 years, causing hardship in countries where coffee is a key source of earnings and of farmers' incomes. While "[a]t the end of the 1980s coffee exporters received about $12 million for their exports[, i]n 2003 they exported more coffee, but received less than half as much income. Meanwhile, the coffee economy in high-income countries has been moving in the opposite direction. Since 1990 retail sales have increased from about $30 billion to $80 billion" in 2002.[37] As set out by Daviron and Ponte:

> The global value chain for coffee is currently characterised by a 'coffee paradox': a "coffee boom" in consuming countries and a 'coffee crisis' in producing countries. A paradox within this paradox is that the international coffee market is awash in coffee of 'low quality', while there is a dire shortage of 'high quality' coffee – and it is the latter that is generating sales growth.[38]

As a result of the coffee crisis, small producers in developing countries have absorbed huge economic shocks.[39] Falling prices have had a direct impact on their ability to generate income and to access basic services such as health and education.[40] In addition, small producers have been faced with increased debt as a result of their inability to pay back loans. While it is difficult to estimate the financial losses suffered by coffee producing households,[41] the United Nations Development Programme (UNDP) estimated that in Ethiopia, the lower price of $0.30 per kilo in 2003 reduced incomes of coffee-producing households by $200. This was calculated by taking as a reference point the 1998 price of $1 per kilo, which represented the 1990–2005 average, and using household-level data. This represented a great loss for a country where over one-third of the population survives on less than $1 a day.[42] At the national level, this loss translated into $400 million, which "mean[t] that for every $2 in aid received by

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37. UNDP, *supra* note 2, at 140.
38. DAVIRON & PONTE, *supra* note 20, at xvi.
39. UNDP, *supra* note 2, at 140.
40. *Id.*
41. The difficulty arises from the facts that "[i]nformation about production at household level is [often] incomplete." In addition, "in a market with wildly fluctuating prices the choice of reference years will have a major bearing on estimated losses." *Id.* at 140–41.
42. *Id.* at 141.

Ethiopia . . . $1 was lost through lower coffee prices."[43]

Since 2005, prices have started to recover, reflecting a greater balance between supply and demand. In 2008, coffee prices reached their highest level in more than a decade, and since then, they have flattened out, but remain well above the average prices recorded over the course of the past two decades.[44] While conditions for producers have improved, this does not signal the end of their problems. Further, it is argued that price recovery is likely to be only temporary, given the cyclical nature of the coffee market.[45]

V. CHANGES IN CONSUMER CONSUMPTION PATTERNS – THE DECOMODIFICATION OF COFFEE

For a long time coffee was seen as a commodity, priced according to the New York or London exchanges,[46] with coffee producing countries being the suppliers of the raw material. Much of the discussion around the coffee crisis has revolved around the themes of oversupply and increased production efficiency, and while coffee producing countries are actively trading, they are not making much profit from trade, and they are stuck in a commodity problem.

Over the past two decades, "the act and symbolic associations of coffee drinking" have evolved and "[n]ew consumption patterns have emerged with the growing importance of" differentiated coffees, usually either by geographic origin, quality, or cultivation processes.[47] In addition, the ways in which coffee is drunk have changed dramatically and the coffee market has gone through a "latte revolution"[48] with the emergence of coffee bars and café chains at every street corner. Coffee lovers can now custom-order their drink, with choices at every level of the formulation, including bean origin, brewing and grinding methods, concentration, flavouring, packaging, social content, and ambiance.[49]

With the advent of differentiated coffee sectors and an increased interest on the part of consumers in coffee's symbolic attributes,

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43. *Id.*

44. *See* FAO, *supra* note 25, at 6.

45. *See* BRYAN LEWIN, DANIELE GIOVANNUCCI, AND PANOS VARANGIS, WORLD BANK DEPT. OF AGRIC. & RURAL DEV., COFFEE MARKETS: NEW PARADIGMS IN GLOBAL SUPPLY AND DEMAND 3, xiv (2004).

46. Coffee is a traded commodity on major futures and commodity exchanges, most importantly London for Robusta coffee and New York for Arabica coffee.

47. DAVIRON & PONTE, *supra* note 20, at xvi.

48. *Id*.

49. *Id.*

consumers have also started to become more conscious about the social and ecological dimensions of coffee consumption. These emerging trade paradigms may offer producers opportunities to pursue strategies independent of commodity pricing at the exchanges, and capture value by asking for higher prices for better quality coffee and more sustainable cultivation and trade practices.

VI. DIFFERENTIATED COFFEES

Differentiated coffees are types of coffees "that can be clearly distinguished because of distinct [geographical] origin, defined processes, or exceptional characteristics such as superior taste or zero defects."[50] They are often characterized "by a closer and sometimes direct relationship [between a producer and] a roaster or buyer rather than being traded in bulk or via the commodity market."[51] In contrast, mainstream coffees are usually pre-ground blends of unidentified origin, and are normally distributed through mainstream channels, such as supermarkets.[52]

There is a growing interest in the economic, social, and environmental benefits of differentiated coffees, as they can provide producers with alternative trading opportunities and help them move from pure commodity exports to higher-price exports in niche markets, such as single-origin, specialty, gourmet, and sustainable coffees such as organic, fair trade, or shade, bird, or eco-friendly coffees. Over the past few years, differentiated markets have been growing steadily. This is due to consumer interest, and an increasing demand from gourmet and/or ethical consumers, but also from the industry's interest in their high growth rate, their contribution to producer stability, and their ability to command higher prices.

A. Specialty and Gourmet Coffees

The term **specialty** is very difficult to define as it is used in different ways by different people and can refer to a very large set of coffees.[53] "Nowadays, the term covers. . . all coffees that are not. . . industrial blends, either because of their high quality and/or limited availability at the producing level, or because of flavoring, packaging, and/or ambiance

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50. LEWIN ET AL., *supra* note 45, at 99.
51. *Id.*
52. *Id.*
53. DAVIRON & PONTE, *supra* note 20, at 77.

[at] the consumption [level]."[54] The term specialty coffee has often been used interchangeably with **gourmet** coffee, although the latter refers strictly to higher-quality and exceptional coffees.

The use of the term specialty can be traced back to the United States where it was used by small roasters and retailers to differentiate their offerings from those of larger commercial roasters. It is also associated with the advent of café chains, such as Starbucks, which introduced a new way of looking at coffee and spread awareness of fine arabicas and darker roasts. These chains also associated the term specialty with ambiance consumption and the possibility for consumers to custom-order their drink. Over the past two decades, the consumption of specialty coffee has been growing steadily.[55] However, it is very difficult to measure the added value of the specialty industry for small-scale coffee producers, as the definition of what should be understood as "specialty" is very vague. In addition, where consumers pay a premium for some of the features of specialty coffee, such as atmosphere and in-person services, this will not reach coffee producers.

The specialty industry is currently looking for a clearer definition of "specialty," as they fear that the term may lose most of its meaning and value because of overuse and misuse. Although no definition of specialty coffee can be found on the website of the Specialty Coffee Association of America (SCAA), specialty coffee was defined by the Specialty Coffee Association of Europe (SCAE) in the following terms:

> Specialty coffee is defined as a crafted quality coffee-based beverage, which is judged by the consumer (in a limited marketplace at a given time) to have a unique quality, a distinct taste and personality different from, and superior to, the common coffee beverages offered. The beverage is based on beans that have been grown in an accurately defined area, and which meet the highest standards for green coffee and for its roasting, storage, and brewing.[56]

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54. *Id*.

55. Between 1994 and 2004, the specialty coffee industry grew by an average of 20% each year. It is estimated that the number of Americans drinking specialty coffees on a daily basis grew from 9% of the adult population in 1999 to 12% in 2003 and 16% in 2006. LUTTINGER & DICUM, *supra* note 4, at 172.

56. *What is Specialty Coffee?*, SCAE.COM, http://www.scae.com/about-us/what-is-specialty-coffee.html (last visited Feb. 1, 2012).

B. Single-Origin Coffees

Single-origin coffees are coffee varieties with a single known geographical origin, which can be a country, a region, or even a single farm or plantation. Single-origin coffees are viewed by consumers as synonymous with quality or special characteristics associated with the climate or soil composition of their geographical origin. Protection of single-origin coffees with intellectual property tools can take the form of geographical indications, trade marks, or certification and collective marks.

1. Geographical Indications

"Geographical indications," as defined in Article 22(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), are indications[57] which identify a good[58] as originating[59] in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic[60] of

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57. Under the TRIPS Agreement, a geographical indication is any "indication" pointing to a given country, region or locality. This differs from the definition of appellations of origin under the Lisbon Agreement, which provides that appellations of origin are necessarily "geographical names" of a country, region, or locality. Although Article 22(1) does not provide what form indications can take, it is accepted that an indication is not expressly limited to the name of a place. A word or a phrase, for example, may serve as a geographical indication without necessarily being the name of a territory and so may "evoke" the territory. For example, "Basmati" is known as an indication for rice coming from the Indian sub-continent, although it is not a place name as such. In addition, while a word may be an indication, other types of symbols, such as pictoral images, icons, or emblems (for example the symbol of the Eiffel Tower to designate French products) may also serve as identifiers. UNCTAD – ICTSD, RESOURCE BOOK ON TRIPS AND DEVELOPMENT 289 (2005).

58. Whereas appellations of origin designate a product, the name of which is usually the same as the appellation of origin, it is well established that geographical indications, for the purpose of TRIPS, apply to any "good," be it natural, agricultural, agri-industrial, or manufactured, in respect of which an appropriate geographical link is made. JACQUES AUDIER, TRIPS AGREEMENT GEOGRAPHICAL INDICATIONS 16 (2000).

59. Geographical indications identify a good "originating" in the territory of a Member, or a region or locality in that territory. This should be understood as referring to goods that must be mined, grown, or manufactured in that territory.

60. Under TRIPS, "quality, reputation, or other characteristics" of a good can each be a sufficient basis for eligibility as a geographical indication, where they are "essentially attributable" to the geographical origin of the good in question. The word "attributable" seems to suggest an objective criterion. However, while this might be possible for a quality or characteristic, reputation suggests a subjective element. Indeed, the reference to quality refers to physical characteristics of the good. On the other hand, the reference to reputation makes clear that the identification of a particular objective attribute of the good is not a prerequisite to conferring protection. It is enough that the public associates a good with a territory because the public believes the good to have desirable characteristics. Indeed,

the good is essentially attributable to its geographical origin.[61] In other words, under the TRIPS definition, geographical indications communicate important information on: (i) the name of the product; (ii) the area of geographical origin of the product; and (iii) its given quality, reputation, or other characteristics, which are essentially attributable to that geographical origin.

Article 22(2) of the TRIPS Agreement establishes the general standard of protection that must be available for all geographical indications. It provides that "legal means" must be provided to interested parties to prevent the use of geographical indications which mislead the public as to the geographical origin of the goods. It also requires that legal means must be provided to prevent use which constitutes an "act of unfair competition" within the meaning of Article 10*bis* of the Paris Convention.[62] However, while it is mandatory for Member States to provide protection to geographical indications, they are free to determine the appropriate method of protection, when implementing the provisions of the Agreement within their own legal system and practice. Over the past decade, a variety of different legal concepts have been used to protect geographical indications at the national and regional levels. These include, in particular, laws of unfair competition and passing off, protected appellations of origin and registered geographical indications, collective and certification marks,

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geographical indications, like trademarks, may be built up through investment in advertising. The drawback is that the public may be deceived as to the quality of goods and their territorial link through false or misleading advertisement. UNCTAD – ICTSD, *supra* note 57, at 290.

61. The words "essentially attributable" to the geographical territory are intended to establish the link between the product and the relevant territory. While a literal reading of "territory" would suggest that the link must be physical, that is, that the product must embody certain characteristics because of the soil conditions, weather, or other physical elements in a place, the terms "reputation" and "essentially attributable" allow flexibility. Therefore, "essentially attributable" can be understood to also refer to human labour in the place, or to goodwill created by advertisement in respect to the place. UNCTAD – ICTSD, *supra* note 57, at 290–91. This also seems to be confirmed by the drafting history of TRIPS. In the 1990 draft (Draft of 23 July 1990 (W/76) para 2), the quality, reputation or other characteristic of the product had to be attributable to its geographical origin, including natural and human factors. The qualification "natural and human factors" did not, however, reappear in the final text of TRIPS, which uses the broader term of "geographical origin." DANIEL GERVAIS, THE TRIPS AGREEMENT, DRAFTING HISTORY AND ANALYSIS 188–89 (2d ed. 2003).

62. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994), *available at* http://www.wto.org/english/docs_e/legal_e/legal_e.htm#agreements.

and administrative schemes of protection.[63] The choice of a protection mechanism, or a combination of systems of protection, will usually depend on the legal tradition and historical and economic conditions of the jurisdiction concerned. However, the differences between these systems will have a bearing on important questions, such as conditions of protection, entitlement to use, and scope of protection.

There are many examples where geographical indications have been chosen as a tool to differentiate single-origin coffees, such as Hawaiian Kona and Guatemalan Antigua coffee. But perhaps one of the most publicised examples is the registration and marketing of the indication Café de Colombia.

Colombia has a long history of developing strategies to protect and promote its coffee. This is mainly due to the marketing strategies developed by the National Federation of Coffee Growers of Colombia (FNC)[64] to differentiate and market Colombian single-origin coffee. Initially, the FNC's marketing strategy relied on trademark protection. In the early 1980s, with the help of a New York advertising agency, it developed and registered the Juan Valdez logo featuring the typical *cafetero* Juan Valdez, his mule, and the Colombian mountains in the background. The purpose of the logo is to identify and serve as a seal of guarantee to the brands that consist of 100% Colombian coffee as approved by the FNC. In order to obtain the right to use the logo, the product must meet certain minimum standards. A trademark license will only be granted for use on whole bean or ground roast coffee, whether caffeinated or decaffeinated, and without flavour enhancers. These coffee brands are subsequently subject to quarterly quality control tests by the FNC. Failure to pass these tests can lead to the revocation of the trademark license.

In addition to its trademark strategy, the FNC took steps to register the words Café de Colombia as a geographical indication. In December 2004, the FNC presented the Colombian government with an application to recognize Café de Colombia as a national geographical indication, which was granted in February 2005. In addition, Café de Colombia was registered as a certification mark in the United States and Canada, as a Denomination of Origin in Ecuador and Peru, and as a Protected Geographical Indication (PGI) under the European Union

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63. UNCTAD – ICTSD, *supra* note 57, at 291.

64. The FNC is a non-profit and non-political cooperative that tries to stabilize the market for Colombian coffee, and undertakes research, social assistance, and promotion programs on behalf of the small, independent *cafeteros*.

system. The latter, which was granted in 2007, was the first non-EU, agri-food product to be granted a PGI.

More recently, at the domestic level, regional efforts have been underway in Colombia to identify regions that present unique local characteristics and are sufficiently distinct to be individually marketed as geographical indications. One of these regions is the mountainous region of Nariňo in southern Colombia where approximately 40,000 farmers use very traditional methods of coffee production and primary processing. Their production has a widely recognized and unique flavor, and provides a premium-priced product for one of the country's less developed rural regions. Nariňo's increased commercial popularity and discussions about its protection grew slowly since the 1990s and in 2006 the FNC began the process of helping it define and demarcate its origin and apply for a geographical indication.[65]

Image 1: Juan Valdez logo

Another example of differentiation through geographical indications comes from **Indonesia**. Arabica coffee was first introduced in Indonesia by the Dutch at the end of the 17th century. The Dutch Colonial government initially planted coffee around western Java, and later coffee plantations were also established in central and eastern Java, and in parts of Sumatra and Sulawesi. Coffee was also grown in eastern Indonesia and in Flores, which at the time were under Portuguese control. In the 1880s, most plantations were wiped out by coffee rust disease. This led to the widespread introduction of the more disease-resistant Robusta type of coffee around 1900.[66] Today, coffee is one of

65. Daniele Giovannucci & Luis Fernando Samper, *The Case of Café Nari o, Colombia, in* GUIDE TO GEOGRAPHICAL INDICATIONS, LINKING PRODUCTS AND THEIR ORIGIN 197, 199 (2009).

66. JON THORN & MICHAEL SEGAL, THE CONNOISSEUR'S GUIDE TO COFFEE 147

the most important agricultural commodities for Indonesia, and Indonesia has become one of the world's top producers of Robusta, with only less than 10% of total coffee production being of Arabica beans. Most of the coffee is produced on small plantations, which account for about 96% of the total production.[67] Today, Indonesia is the fourth biggest coffee exporter in the world, and coffee is a source of income for millions of households.[68]

The best growing areas throughout the archipelago are on the islands of Java, Sumatra, Sulawesi, and Flores. Sumatra is the major producing region for Robusta coffee, which "competes in the global market with producers such as Vietnam as a cheap, bulk coffee for processing into instant coffee," or for use in commercial blends.[69] In relation to Arabica, there are a number of well-known producing regions that have reputation in the international specialty coffee market for their high quality.[70] In Indonesia, Northern Sumatra is the most important Arabica-producing region, and customarily the Arabica coffee grown in that region is exported under the name "Mandailing" or "Mandheling."[71] The next most important Arabica origin in terms of value is Southern Sulawesi, followed by the highly regarded estates of East Java.[72]

In 2002, the Indonesian Coffee and Cocoa Research Institute (ICCRI), in cooperation with CIRAD, a French agricultural research organization, initiated a pilot project on the geographical indication protection of Kintamani Bali Arabica coffee. The Kintamani pilot was to be a model on the use of geographical indication as a tool to promote other types of coffees, and other products in Indonesia, and to take advantage of its rich indigenous culture. Kintamani coffee was chosen for the pilot project after careful consideration of several of its features: (i) its reputation: Bali coffee is well-known worldwide for its quality and distinctive taste; (ii) the use of uniform planting materials; (iii) the farmers' organization: most coffee farmers in Kintamani are organized

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(2009).

67. SURIP MAWARDI, ESTABLISHMENT OF GEOGRAPHICAL INDICATION PROTECTION SYSTEM IN INDONESIA, CASE IN COFFEE 4 (2009) [hereinafter WIPO DOCUMENT].

68. *Id.*

69. Jeff Neilson, *Global Private Regulation and Value-Chain Restructuration in Indonesian Smallholder Coffee Systems*, 36 World Development 9, 1612 (2008).

70. *Id.*

71. *Id.*

72. *Id.*

in traditional structures of farmers' organizations founded on Hindu philosophy, called Subak Abian, and this kind of structure can easily be established into a rural cooperative; (iv) the use of uniform application of farming techniques: the coffee farming techniques in Kintamani include organic farming, single stem pruning, the use of shade trees on 30–50% of the land, as well as diversification with tangerine trees which all contribute to the unique taste of that coffee; (v) strong efforts on quality improvement over the past five years; and, finally, (vi) an optimal altitude: Kintamani coffee is grown at an altitude of 1000–1500 meters, and this high altitude also contributes to the formation of a better aroma and taste.[73]

In Indonesia, geographical indications are protected under Law No. 15/2001 regarding Marks. This law was further supplemented by Government Regulation No. 51/2007 on Geographical Indications. According to Article 56(1) of Law No. 15, a "[g]eographical indication shall be protected as a sign which indicates the place of origin of goods, which due to its geographical environmental factors, including the factor of the nature, the people or the combination of the two factors, gives a specific characteristics and quality on the goods produced therein."[74] The Regulation in turn describes in detail the procedure that has to be followed for the registration of a geographical indication.[75] An application should be made to the Directorate General of Intellectual Property Rights (DGIPR), and shall contain the details of the applicant, a filing date, a recommendation from relevant government institutions, a book of requirements, and a receipt for payment of the application fee. The key document is the book of requirements. It provides information on the name of the geographical indication that is being applied for, the types of goods covered by the geographical indication, the description of the specific characteristics and the quality which allow the objective differentiation of the product, the boundaries of the area that is protected by the geographical indication, a map illustrating these boundaries; a description of the history and tradition in relation to the use of the geographical indication, a description of the production

73. *See* S. MAWARDI, ET AL., DEVELOPING GEOGRAPHICAL INDICATION PROTECTION IN INDONESIA: BALI KINTAMANI ARABICA COFFEE AS A PRELIMINARY CASE, 1–4 (2005).

74. The registration of geographical indications is handled by the Directorate General of Intellectual Property Rights (DGIPR). The DGIPR is supported by a Geographical Indications Expert Team that consists of seven members from the Ministry of Agricultures, the Ministry of Law and Human Rights, the Ministry of Industry and the Ministry of Sea and Fisheries.

75. *Id*.

process explained in such a way as to allow other producers in the area to produce the given product, a description of the method used to control the goods and of the measure taken to ensure the traceability of the goods, and an illustration of the label to be used in relation to the geographical indication.[76] Following receipt of the completed application form, the DGIPR will forward the application to a Geographical Indications Expert Team, who will have two years to conduct a substantial examination of the application. If the application complies with the registration requirements, the Expert Team will advise the DGIPR that it shall be registered.[77]

On 5 December 2008, Kintamani Bali Arabica coffee was the first geographical indication to be registered in Indonesia. Since then, a number of domestic and foreign applications have been received by the DGIPR, including applications for Flores Bajawa Arabica coffee from the island of Flores, and Gayo Arabica coffee from the area of Aceh in northern Sumatra.[78] At the start of the geographical indication pilot project, the price of Arabica coffee, including that of the Kintamani Bali variety, was on average, US $0.70 per kilo of unsorted green coffee, which was less than the price of Indonesian Robusta coffee. By 2006 Kintamani Bali Arabica coffee was one of the most expensive in Indonesia, and in 2008, its average price reached US $3.10 per kilo of unsorted green coffee.[79]

76. *See* Yasmon, *Gov't Regulation of the Republic of Indonesia Number 51 Year 2007 Regarding Geographical Indication*, art. 6(3), (2007).

77. *Id.* at art. 8.

78. Other domestic applications include Jepara carving furniture, Jepara sea roasted peanut, Ngemplak dried fish, and Jepara king fish cracker from Jepara in central Java, Kali Gesing goat milk from Purworejo in central Java and Muntok white pepper from Muntok in Bangka island. Foreign applications included Champagne sparkling wine from France and Pisco wine from Peru. *See* Mawardi, *supra* note 73, at 16.

79. WIPO DOCUMENT, *supra* note 67, at 3.

Image 2: Kintamani Bali label

2. Trademarks

Trademarks are signs which distinguish goods or services of one undertaking from those of other undertakings, and convey information about the source or trade origin of the goods or services in respect to which they are used. In addition to their distinguishing function, trademarks also have an advertising function. They play a pivotal role in the branding and marketing strategies of a company, contributing to the definition of the image and reputation of the company's products in the eyes of consumers. The image and reputation of a company create trust which is the basis for establishing a loyal clientele and enhancing a company's goodwill. Finally, trademarks provide information about, amongst other things, the quality of the goods and services which consumers need to make informed purchasing decisions. Trademarks provide an incentive for a company to invest in maintaining or improving the quality of its products in order to ensure that products bearing its trademark have a positive reputation. Consumers who are satisfied with a product are likely to buy or use that product again in the future.

Trademark registration, combined with an appropriate marketing strategy, can increase consumer recognition of single-origin coffees and, in turn, increase commercial benefits for coffee producers as the addition of a trademark on a good adds to its value. There are many examples of trademarks being used to market single-origin coffees. One of the most significant is the Ethiopian fine coffee trademarking and licensing initiative.

Ethiopia is one of the poorest countries in the world. In 2007, it ranked 171st out of 182 countries in the Human Development Index.[80]

80. The Human Development Index looks beyond GDP and provides a composite measure of three dimensions of human development: life expectancy, adult literacy, and

Causes for poverty include recurrent droughts, low levels of agricultural technology and rural infrastructure, and an unstable political environment. In 2008, agriculture accounted for 43% of GDP and employed 85% of the active population, while industry and services respectively represented 13% and 45% of GDP.[81] Agricultural production consists mainly of export products such as coffee, tea, spices, and other crops such as cereals, pulses, oil seeds, fruits, and vegetables.[82] Over the past decade, Ethiopia's economy has shown important fluctuations largely due to the variability in performance in the agricultural sector, with a negative GDP growth rate of 3.8% in 2003 as a result of drought, followed by an unprecedented average growth of 11% between 2005 and 2008.[83]

With coffee being its single most important export product, Ethiopia is one of the countries that has been most affected by the coffee crisis.[84] Coffee "provid[es] more than 60% of foreign exchange earnings and 10% of government revenue. About one quarter of the population is involved directly or indirectly in producing and marketing coffee."[85] While exports have increased by two thirds between 1998 and 2003, export earnings have fallen dramatically as a result of the coffee crisis, and the price shocks absorbed by coffee producers have been enormous.[86]

Solutions proposed to maximize Ethiopia's export earnings and the price received by coffee farmers include "increasing the quantity of national production through extensification (new plantings) and/or intensification (higher productivity), improving quality, increasing the proportion of coffees selling at significant premiums," such as differentiated coffees, and conducting promotions to raise demand for Ethiopian coffee.[87] With regards to product differentiation, Ethiopia

standard of living. *Human Development Reports*, UNDP.ORG, http://hdr.undp.org/en/statistics/hdi/ (last visited Feb. 13, 2012).

81. *Key Development Data & Statistics for Ethiopia*, WORLDBANK.ORG, http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/ETHIOPIAEXTN/0,,menuPK:295955~pagePK:141132~piPK:141109~theSitePK:295930,00.html (last visited Feb. 13, 2012) [hereinafter WORLD BANK].

82. *See African Economic Outlook 2007*, KEEPEEK.COM, http://www.keepeek.com/Digital-Asset-Management/oecd/development/african-economic-outlook-2007_aeo-2007-en, 254 (last visited Feb. 13, 2012).

83. *See* WORLD BANK, *supra* note 81.

84. UNDP, *supra* note 2, at 140.

85. *Id*.

86. *Id.* at 140–41.

87. Nicolas Petit, *Ethiopia's Coffee Sector: A Bitter or Better Future?*, 7 JOURNAL OF AGRARIAN CHANGE 225, 252 (2007).

already benefits from an impressive selection of distinctive coffees such as Harrar, Sidamo, Yirgacheffe, Limu, and Wollega. However, due to the country's wealth of genetic resources and large areas with optimal growing conditions, there is potential to increase the proportion of specialty coffee exports if quality and consistency are guaranteed.[88] In addition, in the field of sustainable coffees, Ethiopia could benefit from the market for organic coffee as over 95% of exported coffee is organic.[89]

In 2004, the Ethiopian Intellectual Property Office (EIPO) started working with partners to identify mechanisms to capture the intangible value of selected single-origin coffees, with the aim to attract a greater share for Ethiopia's coffee growers of the high retail prices fetched by their coffee. Following extensive studies and consultations, a consortium of stakeholders, including representatives of farmers' cooperatives, coffee exporters, and government bodies agreed that their objective was to achieve wider recognition of the distinctive qualities of these specific types of Ethiopian coffees as brands, and to position them strategically in the expanding coffee market, while at the same time protecting Ethiopia's ownership of its coffee names so as to prevent their misappropriation.

While the large majority of coffee producing regions tend to seek protection for single-origin coffees with geographical indications (see Café de Colombia case study), the stakeholders opted for a trademark-based solution and identified a selection of three coffee designations: Harrar/Harar, Sidamo and Yirgacheffe. The EIPO then began filing applications to register the names in key market countries. This move was combined with the offer of royalty-free licenses to foreign coffee companies to create a network of licensed distributors, who in return, would actively promote Harrar/Harar, Sidamo and Yirgacheffe to consumers in the specialty coffee market. This would eventually allow producers to ask for a higher price for their coffee, once demand for Ethiopian coffee grew.

From 2005 to 2007, the EIPO filed trademark applications for Harrar/Harar, Sidamo, and Yirgacheffe in 34 countries and was granted 27 titles by mid-2007, including in Canada, the European Union, and Japan. However, in the United States, while the U.S. Patent and

88. *Id.* at 253.

89. Ethiopian organic coffee is the product of subsistence farmers who do not use chemicals, fertilisers, or persticides in the production process. TADESSE MEKURIA ET AL., ETHIOPIAN ORGANIC COFFEE: HOME OF THE BIODIVERSITY OF *COFFEA ARABICA L.*, THE FIRST AND FINEST COFFEE OF THE WORLD (2004).

Trademark Office (USPTO) had approved the application to register Yirgacheffe, the National Coffee Association (NCA) strongly opposed the EIPO's applications to register Harrar/Harar and Sidamo. Both applications were refused by the USPTO on the ground that the proposed marks had become too generic a description for coffee. The EIPO filed rebuttals against the USPTO decisions with supporting evidence to demonstrate that the terms Harrar/Hara and Sidamo had acquired distinctiveness, and they were both registered as trademarks by the USPTO in June of 2008 and February of 2008 respectively.

According to the website of the Ethiopian Coffee Network, the Ethiopia Trademarking and Licensing Initiative is already producing an important impact both within Ethiopia and in the world coffee market. Several different stakeholders in the coffee sector have united, within Ethiopia, in a new grouping to support these trademarks and to prepare to invest in production for, and promotion of, these coffee brands. It is expected that better brand and supply management in Ethiopia, combined with strategic promotion, will help achieve higher returns for everyone in the coffee chain, and in particular increase the income of coffee farmers in Ethiopia.

3. Certification and Collective Marks

Certification and collective marks are special types of marks. They inform the public about certain characteristics of the products or services marketed under the mark. Article 7*bis* of the Paris Convention provides for mutual obligation of registration and protection of collective marks in the countries of the Union.[90] However, it leaves each

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90. As originally established in Paris in 1883, the Paris Convention made no provision for the protection of collective marks. However, at the Washington Conference of 1911, Article 7*bis* was introduced in the Convention. It was later amended at the London Conference of 1934. Article 7*bis* of the Paris Convention provides that:

> The countries of the Union undertake to accept for filing and to protect collective marks belonging to associations the existence of which is not contrary to the law of the country of origin, even if such associations do not possess an industrial or commercial establishment.
>
> Each country shall be the judge of the particular conditions under which a collective mark shall be protected and may refuse protection if the mark is contrary to the public interest.
>
> Nevertheless, the protection of these marks shall not be refused to any association the existence of which is not contrary to the law of the country of origin, on the ground that such association is not established in the country where protection is sought or is not constituted according to the law of the latter country.

Paris Convention for the Protection of Industrial Property, art. 7*bis*, Mar. 20, 1883, 21 U.S.T. 1583; 6 I.L.M. 806 (amended Sept. 28, 1979).

country to be the judge of the particular conditions under which a collective mark shall be protected, and provides that it may refuse protection if the mark is contrary to the public interest. Even though the Paris Convention only refers to collective marks, it is generally understood that the term also includes certification marks.[91] Certification and collective marks can be indications of geographical origin. As such, they can be protected under the TRIPS Agreement. The TRIPS Agreement incorporates a number of articles of the Paris Convention, including Article 7*bis*. As a consequence, collective marks which belong to associations and are serving as geographical indications are protected under TRIPS.[92]

The Community Trade Mark Regulation[93] allows for registration of Community collective marks, but not certification marks. It provides that a Community collective mark shall be a Community Trade Mark (CTM) if it is "capable of distinguishing the goods or services of the members of the association which is the proprietor of the mark from those of other undertakings."[94] Under the Community regime, "[a]ssociations of manufacturers, producers, suppliers of services, or traders which, under the terms of the law governing them, have the capacity in their own name to have rights and obligations of all kinds, to make contracts or accomplish other legal acts and to sue and be sued, as well as legal persons governed by public law, may apply for Community collective marks."[95] Such an association can include an association of coffee producers.

A certification mark is a mark which indicates that the goods or services in connection with which it is used are certified by the proprietor of the mark with respect to geographical origin, material, mode of manufacture of goods or performance of services, quality, accuracy, or other characteristics. In other words, they are indicia of conformity of goods or services to particular standards, stipulated by the proprietor of the mark.

Any person or entity that authorizes traders to use a certification in relation to certain products or services may apply for a certification

91. *See* NORMA DAWSON, CERTIFICATION TRADE MARKS, LAW AND PRACTICE 13 (1988).

92. *See* JEFFREY BELSON, CERTIFICATION MARKS 23 (2002). For a discussion of the protection of TCEs with geographical indications, see Chapter 6.

93. *See* Council Regulation (EC) No. 40/94, 1994 O.J. (L11) 1 (on the Community Trade Mark).

94. Id. at 26, art. 64(1).

95. *Id.*

mark. However, the applicant must be considered competent to certify the products concerned. The owner of the certification mark is ultimately responsible for controlling its use and for ensuring that the mark is not used on non-compliant goods. The applicant must also supply a copy of the regulations governing the use of the certification mark, which must indicate who is authorized to use the mark, the characteristics to be certified by the mark, how the certifying body is to test those characteristics and supervise the use of the mark, the fees to be paid in connection with the administration of the certification scheme, and the procedures for resolving disputes. Unlike collective marks, certification marks are not confined to any membership. They can be used by anybody who complies with the standards defined by the owner of the certification mark.

A collective mark is a mark which distinguishes the goods or services of members of an association which is the proprietor of the mark from those of other undertakings, without any requirement for certification of the goods or services. In most jurisdictions, applicants are required to supply a copy of the regulations governing use of the collective mark. These generally indicate who is authorized to use the mark, the conditions of membership of the association, any conditions for use of the mark, as well as sanctions against misuse. The cost, duration, and scope of protection applicable to collective marks are similar to those of ordinary trademarks. However, since the cost of registering a collective mark is divided between the members of the association, it becomes much cheaper for an individual member. This can be an attractive argument for small coffee producers for whom the cost of registering an ordinary trade mark to market their products or services could be dissuasive.

An association of coffee producers can register a collective mark and authorize its members to use it in relation to their products or services. In that way, a collective mark can be used as a tool to help them obtain consumer recognition and customer loyalty, and to develop a joint marketing campaign for their products. Collective marks are often used to show membership in a union, association, or other organization. Membership as such may be an incentive to some customers to buy a product bearing the collective mark. In addition, a collective mark can also have the function of informing the public about certain features of a product associated with the mark. Unlike certification marks, the proprietor association of a collective mark does not have to set standards to be met by its members in order to be able to use the mark. However, it may do so if it wishes. Consequently, collective marks may also perform a certification function.[96] This is particularly relevant in countries that do not provide for registration of certification marks.[97]

An example of use of a certification mark to differentiate single-origin coffee is the **Jamaica Blue Mountain Coffee** certification mark. Blue Mountain coffee is cultivated in three specific parishes of Jamaica: Portland, Saint Andrews, and Saint Thomas.[98] More than 7700 farmers work in these areas to produce this famous coffee.[99] In 1982, the Jamaican Government decided to adopt an export-oriented agriculture strategy, and as a result, the Coffee Industry Board of Jamaica (CIB) commenced a series of development programmes.[100] A definition and delimitation of the Blue Mountain Area was included in the Coffee Industry Regulation Act, however, the development of the Blue Mountain brand was a long process that took several decades. It began with an effort to achieve a consistent production of high quality coffee, followed by the development of a target market,[101] and later only organized legal protection efforts.

The Blue Mountain indication is now protected under Jamaican law by a certification mark, and the CIB was designated the sole entity with the authority to grant use of the Blue Mountain designation.[102] The CIB

96. Note that there is a certain level of confusion between certification and collective marks. As Jeffrey Belson pointed out, during the first century of the registration system, there was confusion over the respective roles of certification and collective marks and this situation has not improved due to a proliferation and growing divergence of policy and law on certification and collective marks. For example, a mark may become a CTM collective mark and a national domestically-registered certification mark. Also, as there can be varying degrees of conflation, the usefulness and specificity of the information conveyed by a collective mark may, at times, be close to that of a traditional certification mark, and at other times, less so. *See* BELSON, *supra* note 92, at 42–43.

97. As regards certification and collective marks, national laws for the registration of trade marks can be classified into three categories: (i) those which permit registration of certification marks only, in which case use of the marks is open to all who meet the standards; (ii) those which permit registration of collective marks only, in which case collective marks may also perform a certification function. However, because they are registered as collective marks, their use is only permitted to members of the proprietor association, and (iii) those which permit registration of both certification and collective marks. In this category also, collective marks may perform a certification function. *See* DAWSON, *supra* note 91, at 85.

98. Kira Schroeder, *The Case of Blue Mountain Coffee, Jamaica, in* GUIDE TO GEOGRAPHICAL INDICATIONS, LINKING PRODUCTS AND THEIR ORIGIN 170, 170 (2009).

99. *Id.*

100. *Id.*

101. Most of Blue Mountain coffee is sold to Japan and exports of green coffee from Jamaica to Japan have grown steadily since the 1970s. However, even though the crop is quite limited, Jamaican exporters are keen to develop new markets, and the CIB has been working towards legal protetction in various other markets. *Id.* at 170–72.

102. *Id.* at 172.

certifies not only the geographical origin of the coffee, but also its quality and characteristics.[103] In addition, the CIB has since registered the mark in other markets. Today, Blue Mountain is registered in approximately fifty one countries, either as a certification mark where the law offers that option or, if not, as a trademark.[104]

Image 3: Jamaica Blue Mountain Coffee certification mark

C. Sustainable Coffees

Sustainable development was defined in the Brundtland report on Environment and Development[105] as being a development that meets the needs of the present without compromising the ability of future generations to meet their own needs.[106] In turn, sustainability in the coffee world means that "a sustainable producer shall meet long term environmental and social goals while being able to compete effectively with other market participants and achieve prices that cover his production costs and allow him to earn an acceptable business margin."[107]

Some sustainable coffees are sold as certified coffees, such as organic, shade, bird or eco-friendly, or fair trade, while others are sold under sustainability initiatives that are designed by private companies,

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103. *Id.*

104. Schroeder, *supra* note 98.

105. The Brundtland Report is also known as the Report of the World Commission on Environment and Development: Our Common Future. The report is available at http://www.un-documents.net/wced-ocf.htm.

106. *See* NGO Committee on Education, *Report of the World Commission on Environment and Development: Our Common Future*, UN DOCUMENTS: GATHERING A BODY OF GLOBAL AGREEMENTS, http://www.un-documents.net/ocf-01.htm (last visited Apr. 10, 2012).

107. DANIELE GIOVANNUCCI & FREEK JAN KOEKOEK, THE STATE OF SUSTAINABLE COFFEE: A STUDY OF TWELVE MAJOR MARKETS 15 (2003).

but do not necessarily involve third party monitoring.[108] So far organic, shade, bird or eco-friendly, and fair trade coffees have been the best attempts towards sustainable production practices that meet the environmental, social, and economic needs of coffee producers. Very importantly, they all allow for reasonable verification of their claims. Indeed, as more firms adopt their own "sustainable" criteria, it is critical that they clarify their standards or certification and use third-party verification so as to ensure compliance with claims and reduce the risk of losing public confidence, which would be damaging for all market participants.[109]

Although sustainable coffee is still a small niche, it is growing rapidly and the industry is generally optimistic about its future. The estimated size of certified sustainable coffees in 2001 was approximately 600,000 60 kg bags, which represents, on average, 1-2% of the trade in the leading consuming countries.[110] Of these, organic and fair trade were the largest markets by volume.

1. Ethical Consumerism

Sustainability should be linked with changing consumer preferences and the notion of ethical consumerism. Ethical consumerism is not new. From a historical and sociological perspective, researchers have identified four waves of consumerism culminating in ethical awareness. The first wave was the cooperative movement, which took off in England in 1844. It began as a working-class reaction to excessive prices and poor quality goods.[111] The second wave, which emerged in the 1930s, focused on "value-for-money, basic product information, and reliable labelling."[112] Its aims were to make the marketplace more efficient and inform and educate consumers. The third wave

108. These include the "Green Mountain Coffee Roasters' Stewardship Programme, Thanksgiving Coffee Company's Song Bird and Bat Magic Coffees, Starbucks' CAFE programme, and Rapunzel Pure Organics' E-Blend and E-Espresso." DAVIRON & PONTE, *supra* note 20, at 164.

109. GIOVANNUCCI & KOEKOEK, *supra* note 107, at 22.

110. By adding estimates of non-certified coffees that were sold with claims of sustainable production practices, the global total of "sustainable" coffee sold in the leading consuming countries could reach 1.1 million 60 kg bags. *See* LEWIN ET AL., *supra* note 45, at 119.

111. *See* Tim Lang and Yiannis Gabriel, *A Brief History of Consumer Activism*, *in* THE ETHICAL CONSUMER 33, 35 (2005).

112. ALEX NICHOLLS & CHARLOTTE OPAL, FAIR TRADE: MARKET-DRIVEN ETHICAL CONSUMPTION 181 (2005).

concentrated on "consumer safety and manufacturer accountability."[113] Finally, the fourth and most recent wave introduced "environmental and ethical issues linked to notions of corporate citizenship and social responsibility."[114] There are several factors that influence the growth of ethical consumer behavior. They include (i) the globalization of markets and the rise of transnational corporations and brands, (ii) a growing awareness of the social and environmental effects of technological advances because of campaigning pressure groups, and (iii) a shift in market power towards consumers.[115]

There are five main types of ethical purchasing, which can be either product-oriented or company-oriented. These are boycott; positive buying; full screening, which compares ethical ratings across a product area; relationship purchasing, where consumers seek to educate sellers about their ethical needs; and anti-consumerism or sustainable consumerism.[116] In relation to coffee, ethical consumerism can manifest itself in a variety of ways. Consumers may, for example, want to boycott a company as a sign of protest because of unfair working conditions of coffee farmers; they might choose a fair trade label due to concerns for developing countries or an organic label because of concerns for their own health or the effect of the use of pesticides on wildlife and the environment; or choose a shade, bird, or eco-friendly label due to concerns for the environment. Ethical consumers do not ignore price and quality as they will probably not choose these products if they are prohibitively expensive, or if they do not have a good taste, but they are applying some additional criteria in the decision making process.

2. Organic Coffee

According to the International Federation of Organic Agriculture Movements (IFOAM), an umbrella organization for the organic agriculture movement that unites more than 750 member organizations in over 100 countries:

> Organic agriculture is a production system that sustains the health of soils, ecosystems and people. It relies on ecological processes, biodiversity and cycles adapted to local conditions, rather than the use of inputs with adverse effects. Organic

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113. *Id.*

114. *Id.*

115. Rob Harrison, Terry Newholm, and Deirdre Shaw, *Introduction*, *in* THE ETHICAL CONSUMER 1, 5 (2005).

116. *Id.* at 3.

> agriculture combines tradition, innovation and science to benefit the shared environment and promote fair relationships and a good quality of life for all involved.[117]

Although many producers grow coffee without the use of synthetic agrochemicals, this alone is not enough for coffee to be considered organic. Organic certification requires active cultivation practices on the part of producers which add to their costs of production. However, producers will usually receive price premiums for certified organic coffee, which will compensate for the extra production costs.

Organic standards are set up by government authorities, international organizations,[118] and the International Federation of Organic Agriculture Movement (IFOAM). Organic certification on the other hand, is carried out by a number of accredited certification agencies, who monitor organic standards of production, processing, and handling. IFOAM unifies organic standards and verification practices, and accredits certifiers, so that organic certification is assessed in the same way throughout the world.[119]

In the European Union, organic production is regulated by Council Regulation (EC) No. 834/2007 on organic production and labelling of organic products.[120] The regulation establishes the legal framework for all levels of production, distribution, control, and labelling of organic products that may be offered and traded in the EU. It determines the continued development of organic production through the provision of clearly defined goals and principles. In addition, two further Regulations have been adopted, most notably Commission Regulation (EC) No.1235/2008[121] with detailed rules concerning the import of organic products from third countries. This regulation provides for a system of bilateral recognition of third countries. In addition, in

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117. *Definition of Organic Agriculture*, IFOAM, http://www.ifoam.org/growing_organic/ definitions/doa/index.html (last visited Feb. 2, 2012).

118. *See, e.g.,* Codex Alimentarius Commission, *The Guidelines for the Production, Processing, Labelling and Marketing of Organically Produced Foods,* Food & Agriculture Org. of the United Nations (1999), http://www.codexalimentarius.net/web/more_info.jsp?id_sta=360.

119. *See id.*

120. *See* Council Regulation (EC) No. 834/2007, 2007 O.J. (L 189) 1. The regulation repealed Regulation (EEC) No. 2092/91 on organic farming and the corresponding labelling of agricultural products and food. This regulation created minimum standards and strengthened consumer confidence in relation to organic products.

121. 889/2008, 2008 O.J. (L 250) 1. The other is Commission Regulation (EC) No. 889/2008 with detailed rules on production, labelling, and control, including its first amendment on production rules for organic yeast.

relation to organic products imported from third countries which have not yet attained bilateral recognition, the new import regulations provide that products that are controlled in the same manner as in the EU should also have free access in the common market. The bodies that undertake these controls must apply to the EU Commission and be authorized by the Commission and the Member States for this purpose. It is expected that the new import regulations will facilitate organic imports in the EU and allow better monitoring.[122]

In the United States, organic production is regulated by the Organic Foods Production Act (OFPA) of 1990. OFPA establishes minimum national standards for the production and handling of foods labelled as organic, but allows for state standards that are more restrictive. OFPA authorized the formation of a National Organic Program (NOP) by the United States Department of Agriculture (USDA) to develop, implement, and administer national production, handling, and labelling standards, as well as to require and oversee mandatory certification of organic production. The USDA has set requirements for the importing and exporting of organic products.[123]

Over the past decade, organic coffee has been used as a marketing tool to attract new consumers, and the organic coffee market has experienced a substantial growth. Recent statistics of the ICO indicate that the growth is ongoing. They show that the value of organic coffee exported in 2008/9 amounted to US $38.44 million compared to US $31.96 in 2007/8. This represents an increase of 20.3% in revenue, whereas the increase in the corresponding volume was 22.4%.[124]

Depending on the source, average price premium values vary between 10–40% for the period of 2002–2008. This is due to the fact that premiums are difficult to estimate because they depend on the quality and origin of the coffee, the situation of the market at a given moment, the reputation of the producer, and the existence of additional certification, such as fair trade.[125] Although price premium values for organic coffee seem to have fallen in recent years, there may be further opportunities for producers of organic coffee carrying multiple

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122. *See generally* LEGISLATION – ORGANIC FARMING - EUROPA, http://ec.europa.eu/agriculture/organic/eu-policy/legislation_en (last visited Feb. 5, 2012).

123. *See generally* AGRICULTURAL MARKETING SERVICE – HOME, http://www.ams.usda.gov/ (last visited Feb. 5, 2012).

124. *See* INT'L COFFEE ORG., WP STATISTICS 140/09 (2009), *available at* http://www.ico.org/show_doc_category.asp?id=16.

125. *See* FAO, *supra* note 25, at 9.

certifications, or for organic coffee of exceptional quality.[126]

3. Shade, Bird, and Eco-Friendly Coffees

Shade, bird, and eco-friendly are coffee production systems that maintain and enhance wildlife habitat and biological diversity through effective management of the forest canopy on the farm, and protection and restoration of surrounding natural environments.[127] In the mid-1990s, biologists discovered a marked decline in populations of tropical migratory songbirds linked to the trend in coffee technification, which uses modernized varieties that prefer sun, thus requiring the removal of traditional shade trees and the use of additional chemicals.[128]

Currently there are two certification systems for these types of coffees, the Smithsonian Migratory Bird Center (SMBC) for "bird-friendly" coffee, and the Rainforest Alliance for "Rainforest Alliance-certified" coffee.

The SMBC's bird-friendly certification is only granted to producers of organic coffee. This certification requires, amongst other things, that coffee be grown under multi-story shaded forest settings that maintain and support ecosystem biodiversity. Coffee farms should include a minimum of ten native tree species, and the shade should cover a minimum of 40% of the land at solar noon, which is measured with a solar densitometer.[129]

Image 4: SMBC Bird-Friendly seal

The Rainforest Alliance Certified seal combines environmental and

126. *Id.*

127. *See* LEWIN ET AL., *supra* note 45, at 102.

128. LUTTINGER & DICUM, *supra* note 4, at 54–55.

129. *See* SHADE GROWN COFFEE – SMITHSONIAN MIGRATORY BIRD CENTER – NATIONAL ZOO, http://nationalzoo.si.edu/SCBI/MigratoryBirds/Coffee/ (last visited Feb. 5, 2012).

social criteria. On the one hand it guarantees that coffee is grown on farms where forest is protected and rivers, soils, and wildlife are conserved. On the other, it certifies that farmers are treated with respect, paid decent wages, are properly equipped, and given access to education and medical care. However, it does not require coffee to be organic to be certified, and the shade criteria are not as strict as those of the SMBC.[130]

Image 5: Rainforest Alliance Certified seal

The growth of shade, bird, and eco-friendly coffee in the late 1990s represented a significant development in coffee-related activism.[131] Whereas the primary market driver for organic coffee was the drinker's personal health concerns about agrochemicals, the motivation to buy shade, bird, or eco-friendly coffees is fuelled by environmental concerns.[132] In that way, rather than boycotting a company, consumers can show support by buying an alternative product.[133] Although the production and export volumes are much smaller than those of the organic and fair trade sustainable coffees, future market growth assessments for shade, bird, and eco-friendly coffees are 10–20% per year.[134] These coffees have achieved quick success, especially in North America, Taiwan, and Japan, and it is anticipated that they could have the greatest potential for mainstream distribution as these certification systems are not limited to smallholders.

130. The Rainforest Alliance is a New York-based environmental group. *See* COFFEE RAINFOREST ALLIANCE, http://www.rainforest-alliance.org/agriculture.cfm?id=coffee (last visited Feb. 5, 2012).

131. LUTTINGER & DICUM, *supra* note 4, at 193.

132. *Id.* at 193, 95.

133. *Id*.

134. DAVIRON & PONTE, *supra* note 20, at 180.

4. Fair Trade

a. Definition and Historical Development of Fair Trade

Fair trade is an alternative approach to conventional international trade. Over the past forty years, there have been various definitions of fair trade. However, in 2001, four of the main fair trade networks agreed a common definition as part of a broader cooperation strategy. According to this definition:

> Fair Trade is a trading partnership, based on dialogue, transparency and respect, which seeks greater equity in international trade. It contributes to sustainable development by offering better trading conditions to, and securing the rights of, marginalised producers and workers – especially in the South. Fair Trade organisations (backed by consumers) are engaged actively in supporting producers, awareness raising and in campaigning for changes in the rules and practice of conventional international trade.[135]

The concept of fair trade began to take shape in Europe after World War II, when Western European–based charities such as Oxfam began importing handicrafts from Eastern European producers to support their economic recovery.[136] At the same time, the U.S. development NGO Mennonite Central Committee started importing embroidery and other popular crafts from Puerto Rico as a way of improving the livelihoods of the artists, and it set up the SELFHELP Crafts of the World Organization, which would later be known as Ten Thousand Villages.[137] These initiatives relied on the common assumption that traditional business models were fundamentally flawed and that the only way to make them fairer was to set up a parallel or alternative trading model.

In the 1970s, alternative trade organisations (ATOs) were established with the aim of offering producer organizations in the South the opportunity to trade with importers in the developed world through

135. Definition of the FINE alliance. FINE brings together the Fair Trade Labelling Organisation International (FLO), the International Federation for Alternative Trade (IFAT), the Network of European World Shops (NEWS) and the European Fair Trade Association (EFTA).

136. NICHOLLS & OPAL, *supra* note 112, at 19–20.

137. *Id.* at 20.

a shortened supply chain, without the intervention of middlemen.[138] Products would thus be purchased directly from the producers in developing countries, and be sold through networks, or "Third World shops" or catalogues, mainly in Europe and North America. During the 1980s, agricultural products began to be added to the product range of the ATOs, and sold through sympathetic or socially-oriented retail businesses such as the Co-operative Group in the UK, in that way promoting fair trade to a larger consumer base.[139] At the same time, the development of fair trade certification marks allowed the concept of fair trade to get more recognition, as well as mainstream market access.[140] In the 1990s, sales of fair trade products grew significantly in the mainstream markets with the participation of big players such as Costa Coffee, Starbucks, and Sainsbury's.[141] Over the past few years, the fair trade volume has been growing steadily because supermarket chains in Europe and the United States have started handling fair trade products, and some have even launched their own fair trade labelled products.[142]

b. The Fair Trade Philosophy, Economics, and Principles

As a philosophy, fair trade attempts to correct market failures by promoting empowerment and improved quality of life for producers. This is done "through an integrated and sustained system of trade partnerships amongst producers" and retailers.[143] Minimum wages and the payment of a social premium are the primary mechanisms for achieving this goal.[144] Fair trade relies on the assumption that consumers are willing to pay a premium price for fair trade products because of the moral satisfaction they derive from the assurance that the fair trade label provides. It contends that a "survival of the fittest model," on an international scale, is neither moral nor defensible in modern society, and argues that producers should be paid "as much as possible" rather than "as little as possible". This can be contrasted with mainstream business models, which focus on meeting consumer demand

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138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. For more information on the historical development of fair trade, *see generally* Andy Redfern and Paul Snedker, *Creating Market Opportunities for Small Enterprises: Experiences of the Fair Trade Movement*, (SEED Working Paper No. 30, 2002); NICHOLLS & OPAL, *supra* note 112, at 19–20.

143. MARY ANN LITTRELL & MARSHA DICKSON, SOCIAL RESPONSIBILITY IN THE GLOBAL MARKET: FAIR TRADE OF CULTURAL PRODUCTS 5 (1999).

144. NICHOLLS & OPAL, *supra* note 112, at 53.

and expanding shareholder profits.[145]

Fair trade is seen as a political reaction to the rise of free trade, capitalism, and the power of trans-national corporations. It has been characterized in the economics literature as being a third way "between free trade on the one hand, and protectionism on the other."[146] Under classical free trade theory,[147] "countries [should] export what they are relatively good at producing and they [should] import what they cannot produce sufficiently."[148] Supporters of free trade argue "that the unfettered movement of goods, services and finance between countries offers the most efficient model of transactional business," thus making it a win-win situation in which everyone benefits.[149] "Attempts to liberalize world trade and to bring the benefits of free trade to all countries began after the Second World War" when the General Agreement on Tariffs and Trade (GATT) attempted to "arbitrate between international trade disputes via a series of 'rounds' of negotiations to promote free trade and international deregulation."[150] However, while the volume of international trade significantly increased over the past thirty years, global inequity has also grown, implying that the benefits of free trade have not been evenly spread.[151] This was partly due to market imperfections within developing countries that compromised "the ability of trade to lift them out of poverty."[152] These include a lack of market access, imperfect information, the lack of access to financial markets, the lack of access to credit, the inability to switch to other sources of income generation, corruption, and weak legal systems and enforcement of laws.[153] Fair trade supporters argue that because of these market imperfections, the global trade system cannot

145. LITTRELL & DICKSON, *supra* note 143, at 5; Redfern & Snedker *supra* note 142, at 4.

146. *See* Geoff Moore, *The Fair Trade Movement: Parameters, Issues and Future Research,* 53 JOURNAL OF BUSINESS ETHICS 73, 76 (2004).

147. "Classical free trade theory has its origins in Adam Smith's and David Ricardo's theories of comparative advantage." NICHOLLS & OPAL, *supra* note 112, at 17. According to Black's Law Dictionary, free trade is defined as "the open and unrestricted import and export of goods without barriers, such as quotas or tariffs, other than those charged only as a revenue source, as opposed to those designed to protect domestic businesses." *Black's Law Dictionary* 691 (9th ed. 2009).

148. NICHOLLS & OPAL, *supra* note 112, at 17.

149. *Id.*

150. *Id.*

151. *Id.* at 18.

152. *Id.*

153. *Id.* at 18–19.

work for everyone.[154] Instead, by providing a profitable relationship to all parties in the supply chain, fair trade offers a sustainable market-based solution to global trade failures.[155] In addition, it must be highlighted that fair trade does not involve government intervention.[156] It "is a consumer choice trading model that operates entirely within the free market system."[157] In that way, fair trade is a subset of free trade and functions within the broader free market trading system.[158] In particular, fair trade philosophy is reflected into a series of fair trade principles on which fair trade stakeholders operate.

c. Fair Trade Principles

i. Direct Trade with Producers

The first requirement of the fair trade model is that importers must, wherever possible, buy directly from producers.[159] While estates, plantations, and large-scale producers "have historically enjoyed access to export markets, small-scale producers are typically isolated from direct export access unless organized into cooperatives or similar group-selling structures."[160] Coffee "farmers in developing countries often live in isolated rural areas with few or no roads and" often do not have the possibility to take their product to the market.[161] Therefore, they must rely on middlemen to come to their farms and buy their product and have a very limited bargaining power as competition by buyers is rarely achieved. Middlemen will often agree not to compete with each other on price, so that farmers receive only one price offer.[162] In order to develop an alternative approach to these trading practices, ATOs established a practice whereby they would buy directly from, and build relationships with, producers in developing countries.[163] They set up business and supply chain structures that allowed them to ship the coffee from producer to customer via their own warehousing, and often through their own shops, relying on mainstream services, such as

154. NICHOLLS & OPAL, *supra* note 112, at 19.
155. *Id.*
156. *Id.* at 53.
157. *Id.*
158. *Id.* at 53–54.
159. *Id.* at 33.
160. *Id.*
161. NICHOLLS & OPAL, *supra* note 112, at 33.
162. *Id.* at 33–34.
163. Redfern & Snedker, *supra* note 142, at 21.

shipping and packaging, only when they had no other choice.[164]

ii. Long-term Trading Relationships

The aims behind the long-term trading relationship principle are to allow for long-term planning and sustainable production practices.[165] Long-term trading relationships allow farmers to benefit from a predictable income flow and to correct market information failures by allowing information exchange to take place between producers and importers regarding supply and quality requirements. This principle, however, is difficult to enforce in practice because there are no clear rules as to how long the "long-term relationship" must be, with most purchase contracts being initially set up for a duration of six months to one year only, and with importers having the possibility to switch suppliers once their contract expires.

iii. The Minimum Price and the Social Premium

The fair trade minimum price is calculated to cover the costs of sustainable production,[166] the cost of sustainable livelihood, and the cost of complying with fair trade standards.[167] The application of a minimum price to the fair trade model was inspired by the Keynesian model of economics where price should be more closely linked to the cost of production. According to Keynes, one should not pay less for a product than the cost of its production, plus the cost of a decent standard of living for the producer.[168] The additional social premium on the other hand is intended for investment in social, commercial, or environmental development projects. It guarantees that producers earn a little extra to invest in improving their social condition or the quality of their natural environment. In other words, the social premium represents the "development agenda" of fair trade.[169] The Fairtrade Labelling

164. *Id.*

165. *See* FAIRTRADE INTERNATIONAL (FLO) / STANDARDS / AIMS OF FAIRTRADE STANDARDS, http://www.fairtrade.net/aims_of_fairtrade_standards.html (last visited Feb. 5, 2012).

166. The costs of production include land, labour, and capital costs of sustainable production. They are calculated based on surveys of producers. NICHOLLS & OPAL, *supra* note 112, at 40.

167. The costs of complying with fair trade standards include, for example, those of belonging in a cooperative, organising a worker's assembly, paperwork associated with inspections, and reporting to FLO. NICHOLLS & OPAL, *supra* note 112, at 40.

168. *See* Redfern & Snedker, *supra* note 142, at 4; NICHOLLS & OPAL, *supra* note 112, at 41–42.

169. NICHOLLS & OPAL, *supra* note 112, at 47.

Organisation's (FLO) inspections check that the social premium is spent on social development projects chosen by the community through a democratic process, and monitors the progress of these projects and the way they benefit the community. FLO does not, however, make judgements as to the value of the chosen use of the social premium.

d. Fair Trade Labelling

The concept of fair trade, as such, has existed for over 40 years. Fair trade labelling on the other hand, emerged in 1988 at the initiative of Mexican coffee farmers together with a Dutch development agency named Solidaridad.[170] Coffee imported to the Netherlands under fair trade principles was labelled by Solidaridad under the name Max Havelaar.[171] After this first initiative, fair trade retailers realised that by sharing a mark that identified their fair trade business practices, they could benefit from joint marketing and education around the fair trade label, and grow more quickly. Other national fair trade labellers such as TransFair and the Fairtrade Foundation soon followed in Solidaridad's steps, covering a growing range of products.

The formalization of the fair trade process into a label relied on one important principle: independent third party standard-setting and certification. Indeed, not-for-profit organizations "who licensed the use of a label had to guarantee that producer groups were democratically organised and transparent and that the importer paid [them] the fair trade price."[172] All the National Initiatives[173] started individually, and each defined for their own market the fair trade consumer label they wanted on their products. In 1997, seventeen National Initiatives founded an umbrella organization, the FLO,[174] recognising the need for

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170. Solidaridad is a Dutch development organisation for Latin America, Asia and Africa. It was founded in 1969. Its two main objectives are sustainable economy and fair trade, and human rights and society building. For more information see http://www.solidaridad.nl.

171. The label was called "Max Havelaar" after an 1860 novel by Multatuli called Max Havelaar, or the Coffee Auctions of the Dutch Trading Company, which played a key role in Dutch colonial policy in the Dutch East Indies in the nineteenth and early twentieth century.

172. NICHOLLS & OPAL, *supra* note 112, at 128.

173. The National Initiatives are labelling organisations that issue fair trade labels to importers and verify that fair trade standards for specific products are met. National Initiatives are not involved in trading products. They certify products, select, verify, and monitor fair trade producers, and promote fair trade products to retailers and consumers.

174. FLO is the coordinator of the fair trade labelling system. It is a standard setting and certification agency for fair trade importers and producers. It gives credibility to the fair trade label by providing an independent, transparent, and competent certification of social and economic development. Its mission is: (i) to improve the position of the poor and

a single logo. They believed that a single logo would increase clarity for consumers and facilitate cross-border trade. The logo was not introduced straight away because of the financial cost of such an operation, the difficulty in finding a mark that would be accepted in all countries, and the risks involved in losing trust and awareness vested in the former logos. However, over the past few years, following an increasing interest in fair trade labelling and facilitated cross-border trade from international companies, FLO has started the process of harmonizing the different labels into one international certification mark by proposing the use of this newly developed certification mark to countries that wish to move forward to a common approach. The new mark, which is now available, will be replacing the existing labels at different speeds in different countries.[175]

Fair trade labelling works as a certification system. It provides an independent guarantee to consumers that producers and traders have abided by all fair trade conditions, that fair trade products have been produced and traded according to pre-defined social, contractual, and sometimes environmental standards, and that fair trade workers and artisans benefit from a higher price, stable income, fairer trading relations, and decent production conditions.

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disadvantaged producers in the developing world by setting up fair trade standards, and by creating a framework that enables trade to take place at conditions respecting their interests; (ii) to guarantee the integrity of the fair trade mark and certification process; (iii) to facilitate the business of fair trade by helping to match supply and demand; and (iv) to offer producers support and consultancy to improve their business strategies. At the producers level: FLO sets out the criteria that have to be met by producers to be listed in the fair trade producers register which is distributed to traders. FLO inspects producer groups to certify them for compliance with fair trade standards, including democratic organisation, financial transparency, adequate working conditions, and progress regarding social and community development goals. Furthermore, FLO offers support to producers through the Producer Business Unit. At the traders level: traders sign a contract with FLO to determine the way fair trade works and to give FLO the right of inspection to ensure that the rules have been respected. Traders act as a link between producers and licensees. At the licensees' level: licensees sell the final product to consumers. They are the only stakeholders, in the fair trade chain, who are authorised to use the fair trade label. In return for that right, licensees pay a fee to the National Initiatives. The licensees can be retailers, wholesalers, or ATOs. Finally, at the National Initiatives level: the National Initiatives encourage industry and consumers to support a fairer trade—and to purchase the products that carry a fair trade label—as an independent consumer guarantee that producers in the developing world get a better deal. *See* http://www.fairtrade.net/sites.aboutflo/why.html.

175. *See* FAIRTRADE INTERNATIONAL (FLO) / ABOUT FAIRTRADE / THE FAIRTRADE MARK, http://www.fairtrade.net/the_fairtrade_mark.html (last visited Feb. 5, 2012).

Image 6: Fairtrade logo

e. Certification

In order to become certified and participate in the fair trade system, producer groups must be inspected by a third party, the certifier,[176] for compliance with the International Fairtrade Standards. Producers must contact FLO and fill in a questionnaire. After evaluation of the questionnaire, an inspection visit is performed by a FLO-trained inspector,[177] who spends one or two weeks on site, depending on the size and type of the producer organization. Producer groups that are already in the system are re-inspected annually, and any certified group may also receive surprise visits from FLO inspectors at any time. After visiting the producers, the inspector writes a report assessing the compliance with FLO standards for a specific product. The report is then discussed by an independent certification committee which takes on the decision to certify or not. Once approved for certification, a contract is signed between the producer organization and FLO.[178]

f. Fair Trade Coffee Facts

In 2003, worldwide sales of all fair trade products amounted to approximately $895 million, up from an estimated $600 million in 2002.[179] In 2009, consumers worldwide spent $3.4 billion on fair trade

176. The certification process is operated by FLO-Cert Ltd. on the basis of ISO standards for certification bodies (ISO 65). FLO-Cert Ltd. is a limited company that was established separately from FLO, to make fair trade certification and auditing operations more transparent. *See* FAIRTRADE INTERNATIONAL (FLO) / ABOUT FAIRTRADE / CERTIFYING FAIRTRADE, http://www.fairtrade.net/becoming_a_fairtrade_producer.html (last visited Feb. 5, 2012).

177. In order to ensure that producer groups comply with fairtrade standards, FLO works with a network of independent inspectors who regularly visit all producer organizations. In addition, it uses a specially developed trade auditing system to monitor traders' and retailers' compliance with fairtrade conditions and make sure that every fairtrade-labelled product sold to a consumer has indeed been produced by a certified producer organization which has been paid the fairtrade price. *See id*.

178. *See id.*

179. Press Release, Fairtrade Labelling Organisation International, 7 Million Farming

certified products. Despite these figures, fair trade still represents a tiny percentage of the volume of international trade. However, its social and economic impact should not be underestimated. Fair trade involves more than 827 certified producer organizations in 58 countries in Asia, Africa and Latin America, representing over 1.2 million farmers and workers and their families. In addition to other benefits, approximately 52 million euro was distributed to communities in 2009 for use in community development.[180]

Coffee is the fair trade product with the highest sales volume. Although the market share for fair trade coffee was estimated at only 1% of worldwide coffee sales in 2009, worldwide sales of fair trade coffee reached 14% between 2007 and 2008, for a total value of 1.2 billion euro. It is estimated that global fair trade coffee sales generated an additional income of US $30 million for nearly 400 producer organizations in 2008.[181]

For the June of 2008 to June of 2010 period, the FLO system guarantees a Fairtrade Minimum Price, or floor price, of US$ 1.01 to 1.45 per pound, depending on the type of coffee, and a further US$ 0.10 Fairtrade Premium that goes into communal funds for farmers to improve social, economic, and environmental conditions. In addition, when the coffee is also certified organic, an extra minimum US$ 0.20 higher per pound is applied to the Fairtrade Minimum Price.[182]

Figures 2 and 3 compare the Faitrade and New York price for Arabica, and the Fairtrade and London LIFFE price for Robusta respectively during the period 1989–2008. They show that the Fairtrade Minimum Price proved highly effective when world market prices fell below a sustainable level like, for example, during the coffee crisis of the late 1990s – early 2000s. While in recent years the difference between the Fairtrade Minimum Price and the New York or London LIFFE prices have been more modest, the fair trade system still provides a safety net, and the certainty of receiving a guaranteed price in a typically highly-volatile commodity market.[183]

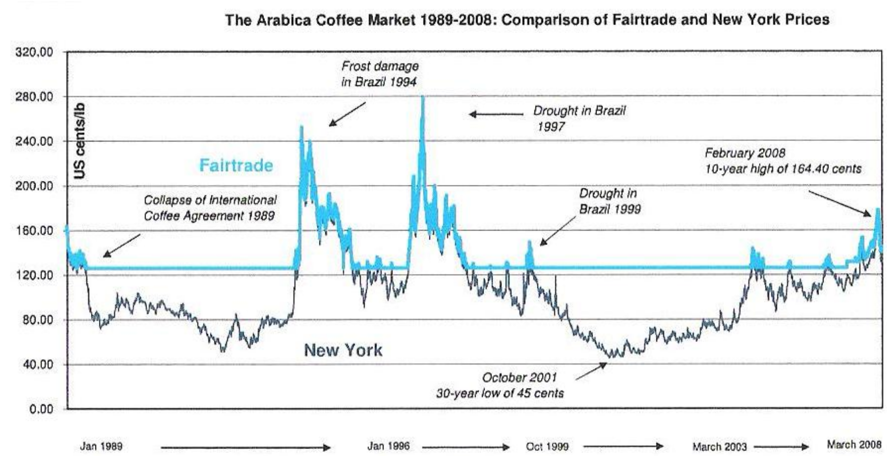
Families Worldwide Benefit as Global Fairtrade Sales Increase By 40% and UK Awareness Of The Fairtrade Mark Rises To 57% (Aug. 10, 2007), *available at* http://www.fairtrade.org.uk/press_office/press_releases_and_statements/archive_2007/aug_2007/global_fairtrade_sales_increase_by_40_benefiting_14_million_farmers_worldwide.aspx.

180. *See* FAIRTRADE INTERNATIONAL (FLO)/ ABOUT FAIRTRADE/ FACTS AND FIGURES, http://www.fairtrade.net/ facts_and_figures.o.html.

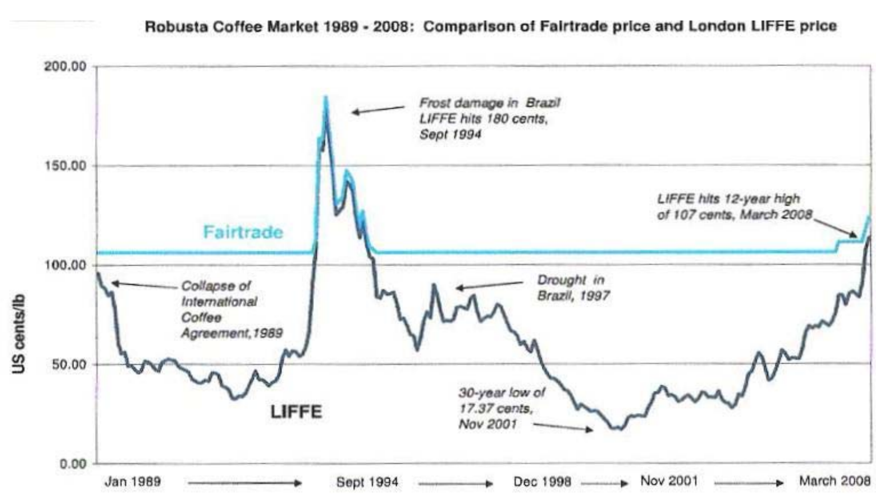
181. *See* FAO, *supra* note 25, at 10.

182. *Coffee*, FAIRTRADE INT'L, http://www.fairtrade.net/coffee.html (last visited Feb. 5, 2012).

183. *See* FAO, *supra* note 25, at 11.



Source: Fairtrade Foundation 2009
Figure 2: Comparison of New York and fair trade prices for Arabica coffee, 1989–2008



Source: Fairtrade Foundation 2009
Figure 3: Comparison of London and fair trade prices for Robusta coffee, 1989–2008

5. Industry-Driven Certification Initiatives

Following the success of some sustainable coffee initiatives in the late 1990s, some large roasters, retailers, and food service providers recognised the potential of certification schemes and codes of practices and began their own internal "sustainability programs." Key coffee industry initiatives now include the Global Partnership for Good Agricultural Practice protocols (Global-GAP); the Utz Kapeh certification, now called Utz certified; the Common Code for the Coffee Community (4C); and Starbucks' CAFE Practices (Coffee and Farmer Equity) Program. For the most part, these schemes comprise a diversity of partnership models between NGOs or some independent schemes, like the Rainforest Alliance, and the corporate coffee sector. Some other companies have shown a commitment to sustainable coffee, agreeing to purchase third-party certified coffees.[184]

While these initiatives have the potential to include very large volumes of coffee in a short amount of time, raise awareness in the marketplace, and positively impact more of the world's coffee growers,[185] they raise some serious concerns. First, producers increasingly find that being enrolled within corporate-driven sustainability programs and traceability systems can be a requirement to market access. Yet it remains unclear whether producers actually receive financial benefits from their participation in these schemes. Second, many of these corporate-driven certification schemes offer lower social standards than fair trade, and lower environmental criteria than organic, certification.[186] Finally, it is feared that the proliferation of these parallel systems will confuse consumers, erode their confidence, and reduce their willingness to pay for these coffees, which will ultimately weaken the entire field.

VII. CONCLUDING COMMENTS

Over the past decade, the act and symbolic association of coffee drinking have evolved, and new consumption patterns have emerged.

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184. For example, in 2006 Nespresso announced an intention to source 50% of its coffee from the AAA Sustainability Program, and by 2010 McDonalds UK announced that all coffee served in its stores would be from Rainforest-certified farms. *See* Jeff Neilson, et al., *Challenges of Global Environment Governance by Non-State Actors in the Coffee Industry: Insights from India, Indonesia and Vietnam*, *in* AGRICULTURE, BIODIVERSITY AND MARKETS: LIVELIHOODS AND AGROECHOLOGY IN COMPARATIVE PERSPECTIVE 178 (Stewart Lockie & David Carpenter eds., 2010).

185. *See* GIOVANNUCCI & KOEKOEK, *supra* note 107, at 56.

186. *See* Neilson et al., *supra* note 184, at 179.

There has been an increasing demand on the part of consumers for quality coffee with identifiable characteristics, such as geographical origin. At the same time, ethical considerations are increasingly involved in consumers' purchasing decisions, whether these are linked with concerns about health and food safety or the environmental and social implications of coffee production. These emerging tendencies offer producers opportunities to pursue strategies independent of commodity pricing at the exchanges, and to capture value by asking for higher prices for better quality coffee, and more sustainable cultivation and trade practices.

The choice of a differentiation strategy should be reached on a case-by-case basis, considering several factors. These include: (i) the existence of goodwill and reputation in a product; (ii) the existence of an appropriate legal system within the country of origin, or the country where protection is sought. This can be a decisive factor behind the choice of using a geographical indication, a trademark, or a certification mark for the protection of single-origin coffees; (iii) the manner in which coffee is produced, such as small-scale production or plantation systems. Whereas fair trade will only be granted to small-scale producers, the organic, shade, bird or eco-friendly coffees are not limited to smallholders; (iv) the trends in market demand for specialty or sustainable coffees, and (v) the costs and time needed to reach the legal or certification requirements. For example, where a country has heavily invested in a low-cost/high-volume model of exploitation, it may be prohibitively expensive and time-consuming to move into niche markets.

In recent years, the market share for differentiated coffees has grown considerably, and in 2008, it was estimated that differentiated coffees accounted for 6% of worldwide coffee production. With sales of conventional coffee stagnating both in Europe and the United States, differentiated coffees are one of the few segments of the coffee market registering sales growth.[187] As such, it is starting to attract the attention of large roasters, retailers, and food service providers who seek to meet consumers' demand for ethical products, and project an image of being socially responsible.[188]

With the existence of multiple certification schemes and labels, and a recent increase in private voluntary ethical certification schemes, there are concerns that consumers may be confused as to what they stand

187. *See* FAO, *supra* note 25, at 15.
188. *Id.* at 16.

for.[189] Also, some of these schemes, such as the SMBC's Bird-Friendly certification, and the Rainforest Alliance certification marks, seem to overlap to some extent, and cause uncertainty. This may erode consumer confidence and reduce their willingness to pay for these coffees. Ultimately, it is up to the industry and regulatory bodies to educate consumers and ensure that the coffees using these labels are certified by an independent third party according to clearly defined standards.

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189. *See* LEWIN ET AL., *supra* note 45, at 101; GIOVANNUCCI & KOEKOEK, *supra* note 107, at 21.